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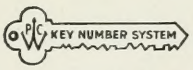

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REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT

OF

SOUTH CAROLINA

VOLUME XX

CONTAINING CASES OF APRIL AND NOVEMBER TERMS, 1883.

BY ROBERT W. SHAND

STATE REPORTER

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LAW

JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.

HON. WILLIAM D. SIMPSON.

ASSOCIATE JUSTICES.

HON. HENRY McIVER. HON. SAMUEL McGOWAN.

CIRCUIT JUDGES.

FIRST	CIRCUIT,	HON.	BENJAMIN C. PRESSLEY.
SECOND	"	"	ALFRED P. ALDRICH.
THIRD	"	"	THOMAS B. FRASER.
FOURTH	"	"	JOSHUA H. HUDSON.
FIFTH	"	"	JOSEPH B. KERSHAW.
SIXTH	"	"	ISAAC D. WITHERSPOON.
SEVENTH	"	"	WILLIAM H. WALLACE.
EIGHTH	"	"	JAMES S. COTHRAN.

ATTORNEY-GENERAL.

HON. CHAS. RICHARDSON MILES.

SOLICITORS.

1*st Circuit*—W. ST. J. JERVEY.
2*d Circuit*—F. H. GANTT.
3*d Circuit*—J. J. DARGAN.
4*th Circuit*—H. H. NEWTON.
5*th Circuit*—R. G. BONHAM.
6*th Circuit*—T. C. GASTON.
7*th Circuit*—D. R. DUNCAN.
8*th Circuit*—J. L. ORR.

CLERK OF THE SUPREME COURT.

A. M. BOOZER.

TRIBUTE OF RESPECT

TO

CHANCELLOR JAMES P. CARROLL AND ATTORNEY-GENERAL JAMES CONNER

In the Supreme Court of the State of South Carolina, on Tuesday, November 27th, 1883, the three Justices of the court being in their seats, and a number of lawyers, members of the General Assembly, and others, being present, the Honorable Charles Richardson Miles, Attorney-General of the State, arose and said:

May it please your Honors—It has seldom, I think, fallen to the lot of any one holding the position which I do, to be called upon, officially, to announce, at one time, the death of two men who have borne such relations to the bench and bar of South Carolina as did the two whose names I am about to mention. And not often has the highest court of South Carolina had announced to it the death of two citizens more distinguished, more honored and more loved, than the late James P. Carroll and James Conner.

The Honorable James P. Carroll was the last surviving Chancellor of South Carolina elected under the constitution of 1790, the only surviving ex-chancellors, Chancellor Lesesne and Chancellor Johnson, having been elected under the constitution of 1865, and the venerable and honored members of the judiciary elected under the constitution of 1790, Judges Glover and Munro, having been Law Judges. And a worthy representative he was of the bar and bench of "old South Carolina." With a mind vigorous and acute, well disciplined by study and furnished by reading, thoroughly trained by a large and successful practice, with genial nature and dignified and courteous manners, he illustrated some of the highest qualities of a lawyer. The gifts and acquirements which had earned for him reputation and success at the bar won for him distinction on the bench.

He was peculiarly fitted for the duties of a Chancellor of South Carolina. With intellect and learning which qualified him to deal with the profoundest and subtlest principles and the most difficult and intricate questions, his decrees as Chancellor and opinions in the Equity Court of Appeals and in the highest court of South Carolina, the Court of Errors, rank him high among the judges of a State which was always justly proud of her judiciary. And his diligence and accuracy, his patience and urbanity, made him most successful and acceptable in the discharge of the varied and exacting duties of a Chancellor. As a judge, he was easy to approach and singularly free from all official assumption; but his firmness and dignity effectually prevented any attempt to presume.

When, after the constitution of 1868, Chancellor Carroll was deprived of his commission as Chancellor, which he could never have forfeited, because he held it "dum bene se gesserit," we all remember the spirit, vigor and cheerfulness with which he returned to the bar, and again displayed the characteristics which had made him so successful as a lawyer and distinguished as a judge.

Very early in my professional life, I enjoyed the advantage of a somewhat intimate association with Chancellor Carroll, through his intimacy with my old preceptor, partner and friend, Hon. Isaac W. Hayne, whom Chancellor Carroll valued and loved for the qualities which made him what he was—one of the highest, truest, bravest of men, and one of the noblest types of a South Carolinian—and I was honored by many marks of his confidence and friendship to the end of his life. And I feel it a grateful, though sad, privilege to pay this imperfect, but heartfelt, tribute to his worth.

Around the memory of Chancellor Carroll cluster the associations of those earlier days when the life of the State flowed untroubled in peaceful channels—when judges, without fear and beyond reproach, wore the unsullied ermine on seats upon which "Shame was ashamed to sit."

But at mention of the name of James Conner come crowding the memories of those evil days, from which, "with slow steps, with slow, faint steps and much exceeding pain," we have but just passed—days in which even the seat of justice did not escape pollution; and our hearts swell with gratitude to him to whose self-sacrifice, wisdom and "matchless fortitude" are due, in large measure, the restoration to the safety and purity which we now enjoy, and where once again we have just laws impartially administered by pure and able judges. James Conner was distinguished in many fields of usefulness and duty: but he was pre-eminently a lawyer, and in this place, especially the scene of his labors and his triumphs, it is appropriate to

dwell upon his characteristics and career as a lawyer.

From his graduation from the South Carolina College, in 1849, to the day of his death, his life was devoted to the profession, the only interval in which he was not actively and exclusively engaged in it being the four years in which he served the State in the field. It was manifest, from the time he commenced the study of law, that it was not his purpose to use the profession, as many do, only as a means for the attainment of influence and position in other fields—it was the pursuit to which he devoted his life, and this was proved to the end.

With great physical and mental capacity for labor, and always practical, he, soon after his admission to the bar, prepared a Digest of all the law reports of the State from the year 1835 to 1854, which he published in 1855, with the apt motto, "Forsan hæcolim meminisse juvabit." This was followed, in 1857, by a Digest of all the equity reports of the State from the Revolution to 1856, prepared in conjunction with his classmate and life-long friend, Hon. C. H. Simonton; and this by the "History of a Suit at Law," a treatise which supplied a want which had been realized by him and all his contemporaries in the study of law. These constituted his contributions to the debt which it has been said every lawyer owes to his profession.

In 1856 he was appointed United States District Attorney, and in the discharge of the unusual and responsible duties devolved upon him he not only showed marked ability and force, but manifested a persistency and courage in withstanding all attempts to unduly control or influence his action in the prosecutions with which he was charged, which won for him the highest confidence and respect of the profession and the State. In December, 1860, under circumstances which will be ever memorable, he resigned the office of District Attorney of the United States, and became at once conspicuous and influential in the councils of his State. He was elected in 1861 a member of the convention which passed the ordinance of secession, to fill the vacancy occasioned by the death of his father, Henry W. Conner, Esq.

Upon the formation of the provisional government of the Confederate States, he was appointed District Attorney of the Confederate States, the Hon. A. G. Magrath, who had resigned the office of United States District Judge, being the District Judge of the Confederate States. He went, however, immediately into active service in the field; and I esteem it an honor to have performed the duties of the office by his appointment until 1864, when I was succeeded by Mr. Lord.

Of General Conner's qualities and career as a soldier I will not attempt to speak on this occasion. There are those before whom I speak who know far better than I what he did and what he suffered—who were his comrades, who shared his toils and dangers, and, like him, did their full duty to cause and country, and who have shared with him the just pride and deserved gratitude of their fellow-citizens.

The war over, General Conner returned to the State, maimed in body and weakened in constitution, but with faculties "sinewed with action" and courage unabated, to reknit the broken strands and weave anew the web of his professional life. I need not recall how the people of his City and State "took him into their arms and hearts." There was nothing in their gift which he could not have had for the asking. But, while never shrinking from any duty of citizenship, political or social, he would not be induced to accept any office, but devoted his entire energies to the practice of his profession. With his mind, naturally vigorous, improved by assiduous and conscientious study and steadily matured and developed, elevated and sustained by calm judgment, perfect courage, truthfulness and directness of purpose, and freedom from all pretensions, he quickly took his undisputed place in the foremost rank of the profession, and achieved marked professional success. It was impossible to have loftier aims or higher standards, personal and professional, than he had, and few have more consistently and thoroughly lived up to and realized them.

His nomination as Attorney-General, in 1876, by a convention in which he had been the leader in opposition to the course adopted by the majority, was a most striking evidence of the admiration, respect and confidence which were inspired by his ability, candor, courage and magnanimity. It is unnecessary to dwell upon the value of the services which he rendered the State in the canvass of 1876; yet it is but fitting that I should on this occasion, and in this presence, dwell with emphasis upon his labors in securing the fruits of the political victory won at the polls. None better understand than do your Honors how empty would have been the political success had not the legal title of the new government been established in the courts. And in accomplishing this, I say, without derogation from the value of the services rendered by others, Attorney-General Conner was more than the mere official—he was the real and acknowledged leader. The people of South Carolina realized that—second only to their and his chief, Governor Hampton—to Attorney-General Conner are they indebted for the permanent establishment of the liberties which were rewon in 1876. Surrounded by dangers and uncertainties, with a full sense of his responsibility, his courage never faltered, his calm judgment never failed; with much to make a devious course seem expedient and questionable methods excusable, he never swerved from "the direct forthright," never resorted to measures which he was not willing to avow. It may be said of him

as England's great laureate said of England's great hero—

"Whatever record leaps to light,
He never shall be shamed."

General Conner's popularity with the people of South Carolina, being based upon no arts, but on their admiration, respect and affection, unlike that of most leaders, never waned, but continued as strong and as real after his return from the war until he laid down the burden of life, which had become heavier than even he could bear. I think the one action of his life which disappointed some of the people of the State was his resignation of the office of Attorney-General in 1877, a rare exception where office is so eagerly sought and so reluctantly abandoned. One ambition our friend, I believe, had, a lofty and worthy one—to occupy a place where your Honors sit, a place which he would have most worthily and acceptably filled, with honor to himself and usefulness to the State, but which he would not seek to attain, because he felt it to be inconsistent with the duty he owed to those whom he valued more than life, and prized more than even the rewards of honorable ambition.

I have been carried away by feeling to speak more than I had purposed, and must leave unspoken much that I would gladly have said. In conclusion, I will say that there may have been citizens of South Carolina who have occupied positions of wider usefulness and more extended reputation, who have held higher official stations and who have received greater rewards, but South Carolina has had no son who has enjoyed higher respect, more perfect confidence and a warmer love than did James Conner.

In token of respect to the memory of ex-Chancellor James P. Carroll and ex-Attorney-General James Conner, I move that the court do now adjourn.

In seconding this motion, the Honorable Joseph Daniel Pope spoke as follows:

May it please the Court—The sad but grateful privilege has been accorded me to follow the announcement just made to the court by the Attorney-General, and to second his tribute of respect to the memory of the late Chancellor Carroll. It is altogether befitting that such a testimonial to the worth, the character, the learning, and the public services of the deceased, should be entered as of record in this court. In other days, he sat, not as your Honors now sit, in the Supreme Court, but as one of the judges of the separate Court of Appeals in Equity in South Carolina, when that court survived. And until an All-wise Providence permitted this Commonwealth to be stricken by an era of misrule—happily now no more—he occupied his place as a member of the high court for the correction of errors and for the final adjudication of all such questions of constitutional law as arose in *our* courts under the State and federal constitutions.

To others, upon other occasions, it has been permitted to speak of Chancellor Carroll as a man and as a citizen; as a learned counselor, as an eloquent advocate, and as a patriot, who was ever true to the State, not only in the bright days of her prosperity, but in the darkest hours of her adversity and humiliation. Here and in this presence we are now to speak of him as a judge.

And in so doing let us ask, what is a judge? Clad in the judicial robe, a judge occupies at once the most exalted position that any man can occupy, both in his relations to his fellow-men and to the government of which he is a part. In his hands are often the issues of life and of death; by his word often the captive is set free or is held within the bars of the prison; upon his judgment often goes forth the fiat by which the estates of the litigant are to be saved or lost to himself or his family. Life, liberty and property are at once in his judicial keeping!

What an office! What a power! What a responsibility! What a delicate trust! How subtle, how nice, how complex, how perplexing are the questions that often address themselves to the understanding or appeal to the conscience of the judge! There are those who speak lightly of these grave responsibilities, and would even lightly assume them; who seem to forget the delicate touch that is required to follow the gossamer thread by which the judge is often called upon to seek out the covert hiding-place of fraud, or bring up truth from the bottom of deep waters where it is said to dwell.

How often to the nicely adjusted, highly sensitive mind of an equity judge, trained to pursue truth, do straws tell which way the wind blows; to such a mind, how often do trifles light as air, when cast into the scales, slowly but surely drag down the beam! And if there be a spectacle of the moral sublime on earth, it is to see such a judge rise to the height of the occasion and ask, not what the letter of the law might say, not what the learning of the schools might say, not what stern logic might say, but what does enlightened conscience say?

Such was the exalted sphere of usefulness, of responsibility, and of honor, to which our deceased friend was called, a quarter of a century ago, by the voice of the representatives of the State. And how did he perform his part? Across the hall, in the library of this court, he has left his record; and those who come after us may judge of him, as we now judge of the great names and the distinguished services of the illustrious men who have gone before us. As illustrative of his powers, need I refer to the case of Myers v. O'Hanlan, as an example of his judicial style, or to the case of Manning v. Richardson, as an instance of his judicial learning. In our reports he has built up a monument

to himself which will stand for all time, side by side with those erected by his distinguished compeers.

In the same pages we may read after Harper, a judge illustrious for his talents, revered for his learning, and beloved for the sweetness of that human nature which possessed him. There we may follow the early teachings of De Saussure, who, like Nottingham, in England, has been called the father of equity in South Carolina. There we may trace the heroic courage, the sublime energy, and the masterful authority and common sense of O'Neall; the massive and almost unerring judgment of David Johnson; the subtle and critical learning, the marvelous power of statement and monumental industry of Job Johnston; the masterly decrees and profound legal opinions of the Wardlaws, of whom it may be said that they were among the jewels of the Commonwealth; the exquisite genius of Withers, which, like the finely-tempered Damascus blade, could penetrate to the marrow, or cleave asunder falsehood and error. There we may recall the noble presence of Earle, the exalted and benignant nature of Evans, the strong practical sagacity of Dunkin, the able and admirable adjudications of Dargan; all of whom have passed away, leaving still among the living two octogenarian patriarchs—Glover and Munro—venerable for their great age and their profound learning; and venerated for their unimpeached integrity and for the great services that they in their day rendered to the State. All venerable men!

These were the friends, and many of these the compeers of the late Chancellor Carroll. This was the great company into which he was introduced when he assumed the ermine, which he wore without reproach and returned to the State as spotless as he received it. This was the council board at which he took his seat. Among these and such as these he held his own in all those great qualities that go to make up the grand character of an enlightened judge.

Were I called upon to say what beautiful traits of character peculiarly marked the private and public life of Chancellor Carroll, I should at once answer—modesty and courtesy. Never distrustful of his powers or of his opinions, he yet ever bore himself and avowed his sentiments without vanity, and with a gentle urbanity that was as charming to others as it was graceful in him. Under all circumstances he held in respect the honest convictions of those from whom he differed. In private intercourse he was careful never to contradict the dogmatic assertions of others even when he knew them to be ill-founded and as he abhorred so he avoided colloquial argument as one of the pests of society. On all such occasions he would courteously turn the conversation with a pleasantry, and adroitly lead it into other channels.

As an illustration of the generous and kindly nature of the man, permit me to state here a personal incident. He and I were members of the legislature at the same time. When it was proposed by his friends that judicial honors should be conferred upon him, it was naturally supposed that he would receive, as he certainly deserved, my support. But at the time, there was another proposed for the same honor from my own district, who had, by reason of a long and intimate friendship, a claim upon me which I could not easily forego. I immediately sought out Mr. Carroll at his seat in the Senate, and explained to him the delicacy of my position. His face lighted up with a frank smile and he said: "By all means stick to your friend, and when you can do no better come to me." On the second ballot I did go over to him, along with others, and his election was thus rendered almost unanimous. It is pleasing to recall the frank, cheerful, unselfish feeling that under such circumstances actuated a generous mind.

But the noblest nature and the highest qualities of head and heart cannot long withstand the noiseless tread of the inevitable hour. Sooner or later death comes to all. It came to our friend in the fullness of years and of honors. He has gone! The places that knew him once shall know him no more forever. And in bidding him our last farewell, it can truthfully be said, that we shall never again be called upon in this court to add our tribute of respect to a higher manhood, a purer nature, a more refined mind, a sweeter courtesy, or a more becoming modesty; for these in the highest degree adorned and graced the public and private career of James Parsons Carroll.

In further seconding the motion of the Attorney-General, in so far as it related to the memory of Gen. Conner, the Hon. Leroy F. Youmans rose and said:

May it please the Court—In the heated political canvass of 1876, at the request of the Democratic party, I had the honor to address an immense audience in the city of Charleston, the home of the lamented dead, in memoriam of whom this motion has been made by the official head of the bar of the State, before the most exalted of the judicial tribunals of South Carolina. I have been reminded by some of that audience, that in the course of that address I took occasion to say that "the Democratic candidate for the high office of Attorney-General of South Carolina was eminent in all the departments of his profession, renowned in the arts alike of war and of peace, brave without rashness, prudent without timidity, the soul of honor, and the perfection of common sense, Charleston's favorite son, General James Conner."

This estimate of his character, abilities and position, expressed at a time when the

principles, feelings, interests and passions of our people were stirred to their profoundest depths, I, to-day, in the midst of the calm, peace and prosperity which pervade and permeate all this Commonwealth, in the full blaze of the light with which the last seven eventful years, marked by his priceless services, have illumined his career, and in this august presence, deliberately re-affirm. This is due to truth, to history, to the State, to the city of Charleston, and to him.

If in the course of my personal experience I ever met with a man who acted in the full spirit of the principle which Sallust expressed in the commanding language of Rome, "Nam et prius quam incipias consulto, et ubi consulueris, mature facto opus est;" the principle which the greatest of the English poets, the greatest of all poets, expressed, in words known wherever the English language is read or spoken, "If it were done, when 'tis done, then 'twere well it were done quickly;" the principle which the great American pioneer, who fell at the Alamo, expressed with the nervous pith of the West, in words known wherever American point and American directness are known, "Be sure you are right, then go ahead;" that man was James Conner. And this principle is the heroic sentiment of manhood through all the ages of humanity.

My first acquaintance with General Conner was in 1856, on the occasion of my application for admission to the bar, he being one of the examining committee. That acquaintance, at its beginning, was marked by the greatest kindness and confidence on his part, a kindness and confidence which continued unbroken, without interruption or diminution, and ceased only with his mortal existence, when, amid the soul-felt laments of the people of the city of Charleston and the people of the State of South Carolina, "gently and reverently he was laid in the bosom of the State he loved," in the sacred burial-place of the city of his birth, the city of his home, the city whose peace his valor had protected, the city whose prosperity his wisdom had assured.

As early as 1856 his high character and standing in his profession secured him, on the accession of Mr. Buchanan to the presidency, appointment to the position of District Attorney of the United States for the District of South Carolina. How zealously, how ably, how faithfully, with what vigor and skill for the honor and interests of this great Republic, with what just consideration for the rights of the accused, with what entire absence of oppression, persecution, bias, or insolence of office, the duties of that most responsible federal position were performed by him has already been told by better-informed critics, by more competent eulogists—"His praise been hymned by loftier harps than mine." For immediately upon the receipt of the sad intelligence of his death, his distinguished survivors of the accomplished and famed bar of Charleston, in the State Circuit Court then in session there, put upon record in words which have been scattered broadcast by the telegraph and press, the highest testimonials upon each and every of these points. These testimonials "hodie manent longeque manebunt."

Nay, more, the eminent jurist who, at the time of General Conner's being District Attorney, adorned the position of District Judge of the United States Court, and "nil tetigit, quod non ornavit," than whom none knew better, appreciated more highly, or loved more tenderly, the lamented dead, in language reflecting as much honor on the distinguished living by whom it was uttered, as on the distinguished dead of whom it was uttered, in the presence of the bar of Charleston and the court, spoke of General Conner's discharge of the duties of the office of District Attorney, in terms such as Cicero may have spoken of Sulpicius or Hortensius. With the verity of history it may be said that in the entire roll of the United States District Attorneys of South Carolina, commencing with John Julius Pringle, and running down to the present time—a roll embracing judges, statesmen and ambassadors, Edward McCrady, Sr., the Nestor of the Charleston bar, and James L. Petigru, for forty years the acknowledged leader of the bar of South Carolina—there never was one who more fully filled that office than James Conner.

But unexceptionable and praiseworthy as was his conduct in the discharge of the duties of that office, certainly nothing could have been more unexceptionable, praiseworthy and patriotic than the manner of his leaving it. For when, in 1860, it became evident that the great question before the people of South Carolina was, whether the State should attempt the exercise of what she had always regarded her sovereign rights, the District Judge and the District Attorney both resigned the positions they held under the federal government, and cast in their fortunes with their State. And when in 1861 the State having, by the ordinance of her convention, sundered the bonds which bound her to the federal Union, "called upon her sons to redeem the pledges she had made," James Conner responded to that call from Sumter and Manassas 'till the Confederate flag was left

> "Without a man to wave it;
> Without a sword to save it."

Posterity will never ask how he responded to that call. The muse of history has long since taken possession of, and will forever preserve that response, as among the most precious and priceless memories of those disastrous days. Go ask the battle-scarred fields of Virginia, and listen to the whis-

pers of the Genius Loci, as they come from the now placid fields of waving grain, where erst

> "Death rode upon the sulphury siroc,
> Red battle stamped his foot, and
> Nations felt the shock."

Go ask the battle-scarred veterans of the Army of Northern Virginia, the survivors of his company, his battalion, his regiment, his brigade, the division, the corps, the army in which he served. Go read Caldwell's History of McGowan's Brigade. Go to

> "Fame's eternal camping ground,
> Where silent tents are spread,
> And glory guards with solemn round
> The bivouac of the dead."

Unfurl the funeral banners, under which the noble dead of his brigade lie sleeping, and ask the shades of those departed heroes! Go ask the shot and shell that maimed and mutilated his body, blasted his health, and finally, after twenty-one years of physical suffering, consigned him to that most glorious of tombs—the tomb of the patriot and the hero. He lived the life of a patriot and a hero, the most glorious of lives to live; he died the death of a patriot and a hero, the most glorious of deaths to die.

During the dark eight years of South Carolina's history which immediately followed the passage of the reconstruction acts, "the millennium of the minnows," the golden age of the foreign foe and the native traitor, General Conner was among the recognized leaders of those who "never bowed the knee to Baal," or "crooked its pregnant hinges where thrift might follow fawning."

But, distinguished as were his services in the office of United States District Attorney, patriotic and devoted as was his action in resigning that position when South Carolina's honor and his own required it, entwined with the glory of South Carolina as are and forever will be his gallantry, his proficiency in the art of war, and his heroic services throughout the whole of the four years' struggle, as if some still greater act were necessary to complete the drama of his career, and by adding a crowning grace, make it totus, teres atque rotundus, Providence and the good fortune of South Carolina had reserved for him the performance of a still more heroic, a still more patriotic service, which at her command he was to render her, the last and noblest of his public life.

For when in 1876 it was determined by the oppressed people of the State, worn out with the despicable rule of the creatures who since 1868 had lorded it over South Carolina, that, under the lead of Wade Hampton,

> "The man, who though his storied fame
> On stormy fields was won,
> Still boasts no sweeter, nobler name,
> Than Carolina's son,"

and relying upon whatever remained of the past honor, courage and energy of the State, determined that these people should be taught that no more harrying would be tolerated, that "the chase was o'er, the hunt was up, the quarry stood at bay," it was at the same time determined that call should be made upon James Conner for the performance of services which involved as much skill and prudence in their conception and mode of execution, as much nerve and ability in their execution, as he had ever been called upon to display on the blood-stained fields of Virginia.

How that call was responded to, let his conduct in the political campaign in South Carolina in 1876, and the history of the rifle clubs of Charleston, of which he was President-in-Chief, let the history of the dual government in South Carolina and the long-continued, the most exciting litigation ever waged before the courts of this State, let his whole career as Attorney-General of South Carolina, answer.

That history is too recent, that history is too deeply stamped upon the memory of all living Carolinians, to require, if even to permit, recital here. Suffice it to say that in the long roll of Attorneys-General of South Carolina, commencing in 1762 with Adam Graeme, and running down to the able and distinguished gentleman who now so worthily fills that high office—a roll including the names of Rutledge, Pringle, Cheves, Richardson, Petigru, Legaré, Rhett, Bailey and the Haynes, while there have been men whose patriotism, ability and fame are unsurpassed, who acted on a wider theater and a less restricted stage, yet the sons of South Carolina who have lived through these late exciting scenes, the ground swell of which has scarcely yet subsided, who have seen, acted, lived that history, can never be made to believe that there ever was a time in the history of the State whose exigencies called upon any of these giants of the past for services in the office of Attorney-General requiring greater promptness, greater firmness, greater courage, greater prudence, greater ability, than the exigencies of these times demanded from Attorney-General Conner; that those demands were ever more fully and fairly met than they were met by him, or that among them all there beat a truer heart, or braver pulse.

He had, from the time of his election as Attorney-General, given his undivided attention and most anxious solicitude to the discharge of his official duties, and had been subjected to continuous and unremitting excitement which would have tried nerves of iron, and which had wasted his delicate frame. The long-continued contest in which he had been so prominent an actor, having come to a successful close, and "novus ordo

saeclorum nascitur" having become an accomplished fact in South Carolina, on December 1st, 1877, he sent in his resignation of his high office, to the great regret of the Governor, the legislature, the bench, and the people of the State.

That regret was fitly voiced in Governor Hampton's letter transmitting his resignation, and the action of the General Assembly thereon. "I perform this duty," says the Governor, "with infinite regret. The arduous duties of the office of Attorney-General have been discharged with a zeal, energy and patriotism which could not have been surpassed, while his counsel has been of incalculable importance to me during the past year. He has won the esteem, respect and affection of our people, and he will carry to his retirement the confidence of all with whom he has been associated, as well as the consciousness of having done his whole duty." "Responsibility," said Edward Bulwer (Lord Lytton), "that heaviest word in all our language." "Duty," said Robert E. Lee, in still higher strain, "that noblest word in all our language."

The General Assembly, on the reception of his letter of resignation, in a preamble and resolution spread upon the journal of the Senate and the House of Representatives, Resolved, "that in the conduct of the arduous and delicate duties entrusted to him as Attorney-General, he had deserved the gratitude of the State, and tendered to him their thanks in the name of the people of South Carolina."

In the composition of three most admirable law books, relative to South Carolina decisions and practice, he paid fairly and fully that debt which, Lord Bacon says, every lawyer owes to his profession. He was a most earnest man. Whatever his hands found to do, that he did "totis viribus, maximo conatu." No difficulty, no danger, deterred him. He quailed before no antagonist. He shrank from no labor. He dared do all that may become a man. He was a man, aye, every inch a man. In civil and military life, he believed, and acted to the full on the belief, in that thrilling and soul-sustaining Scripture "Tu ne cede malis, sed contra audentiorito."

He read much, he conversed much, he wrote much. He was a full man, a ready man, an exact man. All who met him, allied with him or opposed to him, knew and felt in him a reasoner, a lawyer, a man of affairs. He fully appreciated and acted, both in writing and in speaking, on what the greatest English writer of this century regarded the first rule of all writing and speaking—that rule to which every other is subordinate—that the words used shall be such as most fully and precisely convey the meaning. His extensive range of reading enabled him to have, in a most remarkable degree, at his command, general observations, maxims, illustrations, the sayings of the wise, sententiæ, γνῶμαι, and these he wielded with consummate dexterity, always with force, often with crushing effect, in conversation, in writing, in debate.

Ordinarily, at the bar, his manner was calm, collected and deliberate, but when aroused to the full exertion of his powers by the "gaudia certaminis," or some great moral sentiment, his voice, mien, gesture, made him seem the incarnation of fiery thought. He had all the power of plain things. He summoned no lightning from the heaven of invention, he evoked no fury from the shades below, but the torch in his hand burned with withering power, and he wielded it without fear of man. Like Chatham's, his crutch was a weapon of oratory.

His sympathies were with duty and its performance, never with unscrupulous, remorseless power; not with the heroes whose victorious chariot wheels, stained with the blood of vanquished nations, conducted them to power and renown; they were rather with the captain who, in pursuance of duty, went down with the "ill-fated barque launched in the dim eclipse, and rigged with curses dark;" with Troy's champion at his last stand beneath its walls; with Leonidas in the Grecian Pass; with the dissenting consul at Cannæ; with Maxcy Gregg's last message, when the death damp was on his brow, "Tell Governor Pickens if I am to die now, I die cheerfully for South Carolina."

Acting throughout life on the maxim, that in mortals it is more to deserve than to command success, he has left to the bride whom he so knightly wooed and so knightly won, to his orphan children, to the city and State of his birth and home and love, a legacy more precious than the great successes he achieved in civil and military arenas—the legacy of the lesson of his life: "noble ends by noble means pursued;" "the acquisition of great renown by great public services;" the recollection that he spent and was spent in the service of South Carolina; that he lived for her and died for her; that "His public passion and his ideal dream, his soul's twin Arcady and Academe," was South Carolina; that he loved her as the "Athenian loved the city of the violet crown, as the Roman loved the maxima rerum Roma;" as the Pitts, father and son, loved "the inviolate isle of the sage, and free;" that he was conspicuously prominent among those sons of South Carolina who, under the magic rallying cry of Carolinians for Carolina, raised her from the condition of the prostrate State, and placed her again on her former pedestal of the Palmetto State; and a State is the grandest of the works of man, "grander than the Iliads, or the Pyramids, or the Systems of the Stars."

In granting the motion, and in response to what had been so beautifully spoken of the distinguished dead, Mr. Chief Justice Simpson said:

It is quite proper, Mr. Attorney-General, that this court should pause in its labors under the weight of the sad events which you have just announced, and in honor of the two distinguished deceased whose recent demise has so bereaved the profession.

Of course, it will not be possible for me, under the present circumstances, to review the lives of these two gentlemen, or to pronounce that eulogium upon their worth and virtues which they so eminently deserve. I will say, however, that I fully concur in all that has been said in the beautiful tributes that have just been paid them at the bar, and I will only add a few remarks in reference to them as lawyers.

In the judicial history of our State, and in that bright galaxy of distinguished lawyers and judges whose memories are embalmed in our hearts and whose names we delight to recount when the jewels of our profession are called for, no one, except, perhaps, the lamented Petigru, belonged more exclusively to that profession, or more fully adorned it during their day and generation, than did Chancellor Carroll and General Conner. It is meet, therefore, that we, their survivors, should cherish and, as far as may be, perpetuate their memory.

Chancellor Carroll was admitted to the bar in 1830, I believe, and from that day until his death, a period of more than a half century (except for a short time while he was State Senator from Edgefield county), he devoted himself exclusively and entirely to the pursuit of the law, either as a practicing attorney or as a distinguished judicial magistrate. And recognizing early that the law was indeed a jealous mistress, he gave to it all of his energies, all of his splendid talents, and all of his high character, not only during his early manhood, but also in his middle life and his maturer years. No wonder then that he reaped its rewards and gained its highest honors.

As a lawyer he was distinguished for his courtesy to his brethren, for his firm adherence to the interests of his clients, for his exhaustive investigation of their cases, and for his able and powerful presentation of them to the courts. By universal consent no one stood higher in all these respects than he. As a judicial magistrate, his name and memory are embalmed in the records of chancery, and will last as long as equity has a place in the administration of justice by the courts. In his death, the profession has indeed sustained a great loss. But as to himself we are consoled with the thought that his harvest-time had nearly come. He had already reaped much that he had sown. His life was behind him; his record was made up.

And when considered as a whole, what a record it was! Courtly manners, winning courtesy, indomitable energy, ardent zeal, high ability, profound learning, unwavering fidelity and exalted honor—all beautifully blended and interwoven, made it up, in its grand completeness. Thus standing, it might be studied as a model by which to form professional character; and, as such, I commend it to the bar and to the bench. Sometimes we have seen the great orb of day go down on a cloudless eve, leaving a bright effulgence gilding the tree-tops which marked the horizon beneath which it had just sunk. Thus our friend went down at the close of a most worthy, honorable and useful life, with no spot upon his escutcheon, and with a bright halo overhanging and pointing to his tomb.

It may be said, too, of General Conner, that his whole heart was in his profession. Next to his family and his State, nothing was dearer to him. Save these, he suffered nothing to intervene between himself and its duties, and esteeming it a profession, as it is, in the pursuit of which the best and noblest aspirations and powers of man might be indulged, expanded and enlarged, he loved it for itself, and he embraced it with an unusual devotion. Although he was cut down in mid-life, yet he had deservedly achieved a high and wide reputation as a lawyer, and at his death a most noble future was spread out before him, illumined by a brilliant past.

In addition to his distinguished position at the bar, founded upon those eminent qualities which he displayed in his private practice, it will be remembered that he had been of immense service to his State in his official capacity. Because if South Carolina gained anything by its rescue from the grasp of that band of vandals which plundered it so long, this was due in great degree to the calm wisdom and indomitable firmness of General Conner, guiding the State as Attorney-General, in that hour of her greatest peril, when she was standing upon the very brink of ruin, and which none will forget. Services like these, among the ancient Greeks, would have been the foundation of a marble statute in the market-place, erected by public demand. The people of this State should see to it that the memory of General Conner should never pass away.

Though he died comparatively young, yet he had already scaled all the mountains in his legal pathway, and at his death he was standing on the margin of a grand and beautiful plateau, full of the richest fruits, all of which seemed to be within his grasp. To us, with our finite minds, looking upon what he had already achieved and seeing his commanding position for the future, it does seem that he might have been spared a little longer, so that he could have taken possession of that which he had already earned, and which appeared

rightfully to be his; so that he might have finished that beautiful monument, the foundations of which he had already laid so deep and broad, and upon which he was so carefully piling a lofty column. But the ways of Providence are not our ways. They are inscrutable to us, and we are taught that what He doeth is done for the best. In cases like these, then, there is nothing left for us but to submit, deploring our loss and paying what honor we can to the memory of our deceased brethren.

Let this proceeding be entered upon the minutes of the court by the clerk, and let the court stand adjourned until to-morrow at eleven o'clock.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED IN THIS VOLUME.

Hon. W. D. SIMPSON, Chief Justice.
Hon. HENRY McIVER, Associate Justice.
Hon. SAMUEL McGOWAN, " "

*CARPENTER v. STRICKLAND.

(April Term, 1883.)

[1. *Agriculture* ⊂⊃11.]

A warrant to seize crop, under an agricultural lien, cannot be issued against a party unless the agreement for a lien was in writing and signed by the party charged.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. § 27; Dec. Dig. ⊂⊃11.]

[2. *Agriculture* ⊂⊃11.]

An employé upon a farm, who is to receive for his services an amount equal to one-half of the crop made, and is to work under the direction, supervision and control of the employer, has no interest in the crop, and, therefore, no right to bind it by a lien.

[Ed. Note.—Cited in Richey & Miller v. DuPre, 20 S. C. 10; Whaley v. Jacobson & Son, 21 S. C. 53; McCutchen v. Crenshaw, 40 S. C. 515, 516, 19 S. E. 140.

For other cases, see Agriculture, Cent. Dig. §§ 15–30; Dec. Dig. ⊂⊃11.]

[3. *Agriculture* ⊂⊃11.]

The statute authorizes a lien to be given only by an owner of the crop as land owner or tenant, and, as such, a cultivator of the soil on his own account.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. § 20; Dec. Dig. ⊂⊃11.]

[4. *Agriculture* ⊂⊃11.]

The word "employed," as used in this statute, is synonymous with the word "engaged," and does not authorize a lien to be given by a mere employé.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 15–30; Dec. Dig. ⊂⊃11.]

[5. *Agriculture* ⊂⊃11.]

The lien given to an agricultural laborer by another statute does not give him such an interest in the crop as would permit him to bind his interest by a lien for advances.

[Ed. Note.—Cited in Creech v. Long, 72 S. C. 31, 51 S. E. 614.

For other cases, see Agriculture, Cent. Dig. §§ 15–30; Dec. Dig. ⊂⊃11.]

*Before Wallace, J., Anderson, March, 1883.

The opinion states the case.

Mr. J. L. Tribble, for appellant.
Messrs. Moore & Wardlaw, contra.

September 24th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. In 1882, B. F. Strickland leased from A. A. Carpenter about fifty acres of land; and on January 12th, of that year, he entered into a written agreement with one G. W. Wilson, by which he hired Wilson, and his wife and children, to cultivate "about twenty acres of the land, to work the crop at the proper time, and to gather the same when mature, under the direction, supervision and control of the said Strickland. The lands to be cultivated—seventeen acres in upland cotton, and about three acres in bottom corn; the said Strickland to furnish, in addition to the land, tools and stock, and one-half of all fertilizers. In consideration of the services above contracted for, the said Strickland to pay the said Wilson, his executors, administrators, heirs or assigns, an amount equal to one-half of all crops, cotton, corn, &c.; the amount of said portion of the crops to be paid as soon as the crop shall have been gathered and prepared for market; the services herein contracted for shall begin on January 1st, 1882, and continue as long as may be necessary; and, during such time, Wilson to have the use and occupation of a house on or near said lands," &c.

On January 11th, 1882, in order to secure supplies, Wilson executed to A. A. Carpenter

what was called an agricultural lien "on his crops of cotton, corn, wheat and all other products of the said farm or farms, wherever grown, to be delivered over to him as soon as they are gathered and can be prepared for market," &c. Strickland also gave Carpenter an agricultural lien and mortgage; but they have both been paid, and do not enter into the case. Under the alleged lien, Wilson received supplies from Carpenter to the

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extent of about $82.28 up to *April 10th, 1882, when, with the consent of both Carpenter and Strickland, he abandoned his crop and left the place; and, as Carpenter alleges, Strickland verbally agreed to complete the working of the crop, and out of the proceeds of its sale, to pay the advances due, or to become due, to Carpenter. Strickland did take possession of the half-made crop, and gathered and disposed of it; but, denying the alleged agreement, refused to pay Wilson's lien to Carpenter, who thereupon procured an agricultural warrant on Wilson's lien against Strickland, and seized several bales of his cotton to satisfy it.

Strickland denied that he ever agreed to assume Wilson's lien, or that he could verbally adopt it so as to make it enforceable by law against him as a lien; and also insisted, as matter of law, that the demand of Carpenter never was a good and legal lien upon the crop, either as against Wilson or himself, for that he never signed it, and Wilson was a mere hired laborer to work the crop, in which he had no interest, and upon which he could not give a lien in advance. An issue to try the question was framed, and Judge Wallace held with the defendant Strickland, and dismissed the proceedings.

From this order Carpenter appeals to this court upon the following grounds: "1. Because his Honor erred in holding that G. W. Wilson had no such interest in his crops on which he could give a lien to A. A. Carpenter, the land owner. 2. Because his Honor erred in not holding that, upon Strickland taking by agreement the crop of Wilson, the said crop was liable to pay for all advances made to Wilson up to the time of that agreement, and thereafter to Strickland himself. 3. That Strickland, after taking Wilson's crop and procuring advances upon his lien, was thereby estopped from denying the validity of said lien." From the view which the court takes it will not be necessary to consider whether any, and, if so, what verbal agreement was made by Carpenter and Strickland at the time Wilson was discharged and left his crop. Strickland was not sued upon any such contract; but the proceeding was a warrant against Strickland, issued by the clerk under the statute, upon the undertaking of Wilson, which, as alleged, had been verbally assumed by Strickland. The only question

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is, whether that warrant, as *against Strickland, was authorized by law. He certainly never signed it; and we think the clerk exceeded his authority, under the statute, when he issued it against Strickland upon his alleged verbal agreement to take the place of Wilson. The proceeding was under the act which gives the stringent remedy of a lien in advance under which the crop may be seized and sold only where "an agreement in writing shall be entered into before such advance is made," &c.

Besides, we agree with the Circuit judge that Wilson, under his contract with Strickland, was nothing more than a laborer employed for wages, and had no interest, present or prospective, in the crop itself. He was "hired" to work "under the direction, supervision and control" of Strickland, and, in consideration of "the services contracted for," was to "be paid an amount (of money) equal to one-half of all crops, cotton, corn, &c., as soon as the crop should be gathered; the services contracted for to continue as long as may be necessary;" and during such time special provision is made that Wilson "may have the use and occupation of a house on or near the land," &c., &c. All this is inconsistent with the idea that Wilson was lessee and proprietor of the premises for the year. The terms of the contract in this case are much more explicit than they were in that of Huff v. Watkins, 15 S. C. 82 [40 Am. Rep. 680], in which this court held that "under a contract by which the services of an agricultural laborer are to be compensated by a share of the crop made, but he is to work under the exclusive direction of the employer, who is to have the entire control of the laborers' time and services, the relation of master and servant exists."

Wilson being a mere laborer for stipulated wages, we think it follows that he had no right to give a lien upon the crop to be made. The act upon the subject (Gen. Stat., § 2397), provides that "if any person or persons shall make any advances, either in money or supplies, to any person or persons who are employed or about to engage in the cultivation of the soil, the person or persons so making such advance or advances shall be entitled to a lien upon the crop which may be made during the year upon the land, in the cultivation of which the advances so made have been expended," &c., &c. As we understand

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it, this means a *cultivator of the soil upon his own account; that is to say, a proprietor, either as land owner or tenant, and as such owner of the crop to be made. It could not have been the intention of the law to include a mere laborer for wages, although he might be engaged as a farm hand in the cultivation of the soil. In such case the laborer has no interest in the crop as such, and to authorize him to encumber the crop of his employer would be to give him rights in the property of another, to introduce great con-

fusion, and, indeed, to destroy the important business of farming with hired labor.

An argument in favor of this right claimed for the mere laborer was drawn from the use of the word "employed." It was said that the word "employed," as used in the act, necessarily implies that there was an employer and an employé, and, therefore, it was the express intention to include him as one employed. We do not think that such was the intention of the law makers, but rather that they used the word "employed" as synonymous with "engaged"—as engaged in a particular business, simply to include those who were already engaged (or employed), as well as those who were about to engage in the cultivation of the soil. This construction is supported by the fact that the original agricultural lien law of 1866, and all amendments thereto down to the act of 1878, used in the same connection the words "engaged, or about to engage," &c. Gen. Stat., 1872, ch. CXX., § 55. This is shown to be the correct construction also by the succeeding section of the act itself, which gives the right to seize the crop in case the person to whom the advances have been made "is about to sell or dispose of his crop." How could a mere laborer, for hire, without having any interest in the crop, sell or dispose of his crop?

It is further urged that, under another provision of the law, an agricultural laborer, whether working for a share of the crop or for wages in money, has the first lien upon the crop in whose hands soever it may be; and, at least, to the extent of this right, the lien of Wilson to Carpenter authorized an agricultural warrant and seizure of the crop made upon the place. The act does go very far to favor the agriculture of the country in allowing a bona fide farmer to

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give in advance a first lien on his *crop not yet in existence; but it certainly does not go to the extent of allowing a mere laborer on a farm to give a lien for supplies upon his possible lien for wages as a laborer—a lien in advance upon another claim which may exist at the end of the year. The words of the alleged lien itself, drawn in exact conformity with the act, furnish the answer to this view. They do not pretend to give a lien on claims and mere choses in action of the lienor, but a first lien on his crops of cotton, corn, wheat and all other products of the farm, &c. This court has held that the agricultural lien act being a new law must be enforced according to its terms, and that the courts cannot go beyond the remedy provided by it, or supplement it by amendment under the forms of construction. Kennedy v. Reames, 15 S. C. 548.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

20 S. C. 6

RICHEY & MILLER v. DuPRE.

(April Term, 1883.)

[1. *Replevin* ⇐89.]

In action for claim and delivery of personal property, a non-suit should not be granted, the plaintiff having proved possession.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 349–351; Dec. Dig. ⇐89.]

[2. *Replevin* ⇐97.]

In action against a sheriff for the recovery of a bale of cotton, which he had previously sold, or for the value thereof, and for damages, a verdict for a stated amount in money is not invalid, the form of the verdict not being objected to at the time.

[Ed. Note.—Cited in Whaley v. Jacobson & Son, 21 S. C. 53.

For other cases, see Replevin, Cent. Dig. §§ 386, 387; Dec. Dig. ⇐97.]

[3. *Agriculture* ⇐11.]

A mere laborer for hire, although employed in the crop, is not a cultivator of the soil in the sense of the statute, and is not entitled to give an agricultural lien upon any part of the crop before settlement with his employer.

[Ed. Note.—Cited in McCutchen v. Crenshaw, 40 S. C. 516, 19 S. E. 140.

For other cases, see Agriculture, Cent. Dig. § 28; Dec. Dig. ⇐11.]

[4. *Agriculture* ⇐11.]

An employé, who is to receive a part of the crop as compensation for his services, is a laborer for hire.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 15–30; Dec. Dig. ⇐11.]

[5. *Judgment* ⇐243.]

In action at law by the purchaser of a bale of cotton, against the sheriff, for claim and delivery, the court cannot adjust the accounts between the producers of the cotton, they not being parties, one of whom had made the sale, and the other being the debtor under the lien levied.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 428; Dec. Dig. ⇐243.]

[6. *Replevin* ⇐100.]

[Cited in Reynolds v. Philips, 72 S. C. 34, 51 S. E. 523, to the point that Code, § 299, relating to claim and delivery, has not changed the law allowing the plaintiff to elect between damages for the value, as in trover, or a return of the property, with damages.]

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 396; Dec. Dig. ⇐100.]

Before Cothran, J., Abbeville, September, 1882.

The opinion states the case.

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*Messrs. E. B. Gary, and E. G. Graydon, for appellants.

Mr. L. W. Perrin, contra.

September 24th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. Basil Davis engaged Lewis Sanders to work his land in the year 1881, upon the following terms: "Davis was to furnish the stock and feed it, and after the guano was paid, Lewis was to get one-half." Richard, the father of Lewis, was

in no way known in the contract, but it seems that he assisted in making the crop. Whether there was any arrangement between Lewis and Richard, and, if so, what it was, did not clearly appear. Lewis denied that there was any agreement for compensation, but it was claimed on behalf of Richard, that for his services Lewis promised to give him half that should be made on the place; that they "were halvers in the crop."

During the year Richard got supplies from T. J. Ellis & Bros., and to secure the same, gave them an agricultural lien upon his crop. Towards the end of the year, Davis, the landlord, had a settlement with Lewis, and, in paying him, turned over to him a bale of cotton, which he (Lewis) sold and delivered to the plaintiffs, Miller & Richey. Whereupon the defendants, T. J. Ellis & Bros., claiming that the said bale of cotton in justice and equity should have gone to Richard in payment of his services in making the crop, procured an agricultural warrant on Richard's lien to them, and through the sheriff, DuPre, seized and sold the bale of cotton as part of Richard's crop. At the sale it brought $41.83, now in the sheriff's hands, and Miller & Richey brought this action "for the recovery of the said bale of cotton, or for the value thereof, in case delivery cannot be had, together with $100 damages," &c.

The case came on for trial before Judge Cothran, and under his charge the jury found for the plaintiffs $27, about half the amount for which the cotton was sold. The defendants now appeal to this court upon the following exceptions:

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*1. "Because his Honor refused a motion for a non-suit made by the defendants after the close of the plaintiffs' case.

2. "Because his Honor refused to charge the jury, that if Lewis Sanders was not subject to the control or authority of Basil Davis in making the crop on the land of Basil Davis in 1881, then the relation of master and servant did not exist between them, and the said Basil Davis was not the sole owner of said crop, if there was a contract between Basil Davis and Lewis Sanders, whereby the said Lewis Sanders was to receive a half or any portion of said crop for making and cultivating the same.

3. "Because his Honor refused to charge the jury when requested by defendants, 'That if Lewis Sanders and Basil Davis were joint owners of said crop, each had the right to dispose of his portion thereof, and the said Lewis Sanders had the right to make a contract with Richard Sanders, whereby he became joint owner of the share of said Lewis Sanders in said crop.' His Honor indorsed upon said request 'refused for the reason that the landlord and tenant were not joint owners; the landlord's rights were paramount till division made.'

4. "Because his Honor charged the jury that if Lewis Sanders and Richard Sanders were owners of equal shares of the crop produced, and Lewis Sanders had sold more than his share of the whole crop produced, the plaintiffs would still be entitled to recover one-half of any part of said crop purchased by them from Lewis Sanders, and seized by the sheriff, by virtue of a warrant issued to enforce payment of a lien given by said Richard Sanders on said crop.

5. "Because his Honor charged the jury that this is an action at law, and the jury should take no notice of any excess Lewis Sanders may have received over and above his share of said crop in this proceeding, although Lewis Sanders might be made to account in equity for said excess.

5. "Because his Honor charged the jury that a joint owner of personal property can, without the consent of the other joint owner, sell not only his interest, but the interest of the other joint owner of the property, and, therefore, where the sheriff levies on the interest of one joint owner of personal property, and sells the property levied

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upon, his sale disposes of the *interest of both joint owners and makes him liable to the other joint owner or those claiming through him for his share of said property.

7. "Because his Honor charged the jury that each joint owner of personal property is seized in and through the entire property, and that where one joint owner has disposed of more than his share of said property, the other joint owner is not allowed to retain the balance of said property, so as to make up the deficiency; that any remaining property after one joint owner has disposed of more than his share of said property, shall be divided according to the proportion which each had in the property before any part thereof was disposed of.

8. "Because his Honor erred in charging the jury that they might find a general verdict for the plaintiffs, instead of charging them that they should find specially upon the facts put in issue by defendants' answer.

9. "Because his Honor's charge utterly ignored the equitable defense set up in defendant's answer, and the equitable defense set up in the answer, not having been passed upon by the presiding judge, the judgment is null and void.

10. "Because the judgment is in all respects contrary to law and evidence."

The first exception as to the non-suit was properly withdrawn for the reason that the mere possession of the plaintiffs may have been enough to put the defendants to their proof.

Under the last general exception that "the judgment is in all respects contrary to law," it is claimed that the defendants may make the objection that the verdict was a nullity, for the reason that the action being for "claim and delivery of personal property,"

it should have been in the alternative, for the property, or in case a delivery cannot be had, for its value and damages for the detention. Bardin v. Drafts, 10 S. C. 496, and the second judgment in the case of Eason v. Miller & Kelly, 18 S. C. 381. But we do not regard this as necessarily an action pure and simple for the delivery of the cotton. At the time the action was brought, the cotton had already been sold, leaving only in the hands of the sheriff the proceeds of the sale. The prayer was for "the recovery of the said bale

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of cotton, or for *the value thereof, in case delivery cannot be had, together with $100 damages," &c. The jury rendered a verdict in favor of the plaintiffs for $27. At the time it was rendered, the defendants made no objection to the form of the verdict. As was said by the court in the case of Joplin v. Carrier, 11 S. C. 327, cited and followed in the case of Williams v. Irby, 16 S. C. 374, "the plaintiffs had a right to demand either damages for the taking and detention, as in trover for conversion, or the return of the property with damages. The code has not changed the rights of the parties in this respect. The provisions of section 301 (now 299) of the code, apply to a judgment awarding possession of personal property, not to a case where the plaintiff is entitled to general damages. It is for the plaintiff to elect which form of remedy he will pursue. We see no reason why the plaintiff could not elect to treat the case as an action for damages merely, notwithstanding the form of relief demanded by the complaint."

It is not necessary to consider the distinctions made in the other exceptions as to the relative rights of joint tenants, joint owners and partners. In the view taken by the court there is a question lying further back, which is conclusive of the case. Without considering whether Lewis was a tenant or mere employé of Davis, the landlord, there can be little doubt that Richard was a mere employé of Lewis. There was no privity between him and the landlord. He was not known in the contract with Davis. He was neither landlord, tenant nor subtenant of any part of the land. His only contract was with Lewis, who became his employer, and bound to pay him, and, therefore, he was a laborer for hire. This court has lately held, in the case of Carpenter v. Strickland, ante p. 1, that a mere laborer for hire, although employed in the crop, is not a cultivator of the soil in the sense of the act, and is not entitled to give a lien upon any part of the crop, before settlement with his employer.

This case would be perfectly plain if Richard's compensation had been in dollars instead of part of the crop. But in the view that he was to receive for his services part of the crop, it is claimed that he was some-

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thing more than a mere laborer for *hire—that he was co-tenant, joint-owner or partner of Lewis, with a vested interest in the part of the crop indicated. The fact that he was to be paid in a part of the crop could not change his status. The part of the crop mentioned had reference only to the manner and measure of payment, while the crop, as such, remained the exclusive property of Lewis until settlement between them, which settlement alone could determine whether anything was due on the contract. As was said in the case of Huff v. Watkins, 15 S. C. 85 [40 Am. Rep. 680], "The fact that as an incentive perhaps, to diligent and faithful work, the compensation of the laborer is not a fixed and definite sum of money, but is made to depend upon the amount of the proceeds of his labor, cannot change the relation in which the employé has voluntarily placed himself towards his employer. It certainly cannot, as has been argued, convert the relation into that of partners or joint-owners of the crop. Until the crop is divided, it belongs to the employer, and all that the laborer is entitled to is in the nature of a chose in action, a right to demand compensation for his labor, which by the agreement, is to be measured by the amount of the crop raised. Rogers v. Collier, 2 Bailey 581 [23 Am. Dec. 153]," and other authorities.

We think that Richard had not the right to make the alleged lien to J. T. Ellis & Bros., before settlement with Lewis, and that all the proceedings under it were void.

Besides this was a law case in which only the title to the property was involved. In deciding it, the court could not, for several reasons, stop to state the account between Lewis and Richard, in order to ascertain their respective shares, especially as the contest was between strangers, and neither Lewis nor Richard were parties before the court. In our view the legal title was in Lewis and passed to his alienees. If Richard has not received his full share, his remedy is against Lewis as upon a chose in action.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

NOTE.—In connection with the foregoing case, was heard the case of Lewis Sanders

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against J. F. C. DuPre. DuPre, as *sheriff, under the same lien of Ellis & Bros., against Richard Sanders, levied upon some seed cotton and the ungathered crop of Lewis Sanders, and sold them for $41.83. Lewis Sanders then brought action against the sheriff and Ellis Bros., demanding the same judgment as in the principal case. The verdict was for plaintiff for about one-half of the amount claimed. From the charges and refusals to charge of Judge Cothran, the defendants appealed upon the same grounds, so far as applicable, as were raised in the appeal of Richey & Miller v. DuPre.

December 12th, 1883. The following order was passed by

The CHIEF JUSTICE. The above-stated case having been heard, by consent of counsel, in connection with the case of Richey & Miller v. DuPre, as sheriff, and J. T. Ellis & Bros., the judgment in that case is conclusive of this case. The judgment of this court is that the judgment of the Circuit Court be affirmed.

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20 S. C. 12

STATE v. WILLIAMS.

(April Term, 1883.)

[1. *States* ⇐51.]

Under an act authorizing the governor to appoint a supervisor of registration, by and with the advice and consent of the senate, if in session, and, if not in session, subject to its approval at its next session, and which act declared that the term of office of such supervisor should be two years, the term of office of a supervisor appointed during vacation was not for the term of two years, but was merely provisional, and terminated when the senate, at its next session, adjourned without approval of the appointment.

[Ed. Note.—For other cases, see States, Cent. Dig. § 56; Dec. Dig. ⇐51.]

[2. *States* ⇐46.]

The "next session," within the meaning of this statute, meant the next session, in fact, whether special or regular.

[Ed. Note.—For other cases, see States, Cent. Dig. § 51; Dec. Dig. ⇐46.]

[3. *Officers* ⇐30.]

A supervisor appointed by the governor in vacation, and nominated to the senate at its next session, which was a special session, but not confirmed, and seven months afterwards elected clerk of court, was not elected clerk during the term for which he was appointed supervisor.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 37-43; Dec. Dig. ⇐30.]

[4. *Officers* ⇐30.]

As the constitution declares that every qualified voter shall be eligible to every office elective by the people, unless laboring under some one of the disabilities mentioned in the constitution, a statute which declares a supervisor of registration to be ineligible to any other office during the term for which he is appointed is unconstitutional and void.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 38; Dec. Dig. ⇐30.]

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*This was a proceeding in the original jurisdiction of this court, it being an information in the nature of quo warranto, filed on January 23d, 1883, in the name of the State of South Carolina, by C. Richardson Miles, attorney-general, against Joseph J. Williams, praying for a rule to show cause, and for judgment of ouster. The opinion states the case.

Mr. W. St. J. Jervey, for plaintiff.

Messrs. Simonton & Barker, contra.

September 24th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This was a proceeding in the original jurisdiction of this court to oust the defendant from the office of clerk of the Court of Common Pleas for Berkeley county, upon the ground that he was not eligible to said office by reason of his having been elected thereto during the term for which he had been appointed supervisor of registration for said county.

There was no controversy as to the facts, which are as follows: On March 1st, 1882, Williams was appointed by the governor supervisor of registration for Berkeley county, was commissioned on the thirteenth of that month, and entered upon the discharge of the duties of the office. The general assembly met in extra session on June 27th, 1882, and was adjourned sine die on July 5th, 1882. On the last-mentioned day the governor informed the senate of Williams' appointment, and that body failed or refused to approve the same. On July 24th, 1882, the governor sent to the secretary of State the following notice: "Removed J. J. Williams, supervisor of registration, and appointed P. J. Couturier, of St. Stephens, as supervisor of registration for Berkeley county in his stead." Couturier was commissioned for the unexpired term July 31st, 1882, and on November 28th, 1882, the governor informed the senate, which was then in session, of Couturier's appointment, which was approved by that body. Williams was elected clerk on November 7th, 1882.

The third section of the act of 1882 (17

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Stat. 1111) incorporated *in the general statutes of 1882 as section 91, providing for the appointment of supervisors of registration, reads as follows: "On or before the first day of March next, and on or before the same day in every second year thereafter, the governor shall appoint, by and with the advice and consent of the senate, if in session, and, if not in session, subject to the approval of the senate at its next session, and subject to removal by the governor, by and with the advice and consent of the senate, one competent and discreet person in each county, who shall be a qualified voter thereof, and who shall hold his office at the county seat, who shall be known as the supervisor of registration of such county. * * * The term of his office shall be for two years from the date of his appointment; he shall continue in office until his successor shall be appointed, and shall qualify; and he shall not be eligible to any other office during the term for which he is appointed."

The case of the plaintiff rests upon the proposition that Williams was appointed supervisor for the term of two years from March 1st, 1882, and that by the express terms of the act above quoted he was not eligible to any other office during said term;

and, hence, that his election as clerk was a nullity.

The terms of the act are somewhat peculiar—different from the language usually employed in such cases. The act does not, as is usually the case, declare that the appointee to the office of supervisor of registration shall be ineligible to any other whilst he holds the office of supervisor; but its terms are, "shall not be eligible to any other office during the term for which he is appointed." Hence, the mere fact that the defendant was out of office as supervisor, either by removal, resignation or otherwise, at the time he was elected clerk, would not affect the question. The real inquiry is, whether Williams was elected clerk during the term for which he was appointed supervisor. If he was, then, under the express terms of the act, he would be ineligible to the office of clerk, and, the election being a nullity, the plaintiff would be entitled to judgment of ouster.

What, then, was the term for which Williams was appointed supervisor? Was it for two years from March 1st, 1882, or did it expire upon the failure or refusal of the sen-

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ate, at its next *session, to approve the appointment made by the governor? It will be observed that the act does not give to the governor the unqualified power of appointment; but its language is, "the governor shall appoint, by and with the advice and consent of the senate, if in session, and, if not in session, subject to the approval of the senate at its next session." It is clear, therefore, that if the senate is in session at the time, the governor cannot make any valid appointment without the approval of that body. If, however, the senate is not in session, he may make an appointment "subject to the approval of the senate at its next session." That is, the appointment made by the governor is provisional merely, and, unless approved by the senate at its next session, terminates with such session.

The court is bound to take judicial notice of the fact, that the senate was not in session on March 1st, 1882, when the governor made the appointment of Williams as supervisor of registration, and therefore such appointment was provisional merely, and expired with the next session of the senate, at which, it is conceded, there was no approval of said appointment. The governor, without the approval of the senate, had no power to appoint a supervisor of registration for the term of two years. He could only appoint for a term ending with the next session of the senate, unless that body approved his appointment, and as there was no such approval, the term for which Williams was appointed expired on July 5th, 1882, when the next session of the senate terminated without approving the appointment made by the governor. The subsequent act of the governor, on July 24th, 1882, in removing Williams from office was a work of supererogation, and cannot affect the question. The term for which Williams had been appointed had then expired, and, being out of office, no removal was necessary.

It may be said that the words "next session" in the act above quoted should, under the authority of Arnold v. McKellar, 9 S. C. 335, be construed to mean next regular annual meeting, and, if so, then the term for which Williams had been appointed supervisor of registration had not expired when the election for clerk was held, inasmuch as the next regular session of the senate had not terminated, and indeed had not commenced,

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on Novem*ber 7th, 1882, when the election for clerk was held, and hence that Williams was then ineligible to that office. The construction given to the words in question, or rather very similar words, in Arnold v. McKellar, is fully vindicated by the reasons stated in that case; but no such reasons apply here, and therefore we are bound to give the words in question their usual and ordinary signification. It seems to us, therefore, that Williams was not elected clerk during the term for which he had been appointed supervisor of registration, and therefore he was not ineligible to the said office of clerk.

But even if it should be conceded that Williams was appointed supervisor of registration for the full term of two years from March 1st, 1882, it would be far from clear that the plaintiff would be entitled to judgment of ouster, for it may well be doubted whether that provision of the act quoted which declares a person appointed to the office of supervisor of registration ineligible to any other office during the term for which he has been appointed, is constitutional. Section 31 of Article I, is as follows: "All elections shall be free and open, and every inhabitant of this commonwealth, possessing the qualifications provided for in this constitution, shall have an equal right to elect officers, and be elected to fill public office." Section 7, of Article VIII, is in the following language: "Every person entitled to vote at an election shall be eligible to any office which now is, or hereafter shall be, elective by the people in the county where he shall have resided sixty days previous to such election, except as otherwise provided in this constitution, or the constitution and laws of the United States."

From the clauses of the constitution above quoted it would seem to follow that every qualified voter is eligible "to any office which now is, or hereafter shall be, elective by the people in the county where he shall have resided sixty days previous to such election," unless he labors under some one of the disabilities mentioned in the constitution. This being a right guaranteed to every voter by the organic law, cannot certainly be taken

away or abridged by any mere legislative provision. It is not pretended that the defendant labored under any one of the disabilities mentioned in the constitution, and it follows

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necessarily *that any act of the general assembly designed to impose upon him any other disability would be unconstitutional and void.

The office of clerk of the Court of Common Pleas is an office "elective by the people," and the fact that the election at which Williams was elected took place during the term for which he had been appointed supervisor of registration, could not render him ineligible to such office, as that is not one of the causes of ineligibility provided for in the constitution, and it is beyond the competency of the legislature to add another cause of ineligibility to those provided for in that instrument. The language of the constitution is affirmative, not negative merely. It in effect declares that every qualified voter shall be eligible to any elective office, unless he labors under some one of the disabilities mentioned in the constitution; and hence any attempt on the part of the legislature to add any other disability, would be in direct conflict with the positive mandate of the constitution, and, therefore, void.

The judgment of this court is that the rule be discharged and that the information be dismissed.

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20 S. C. 17

REESE v. LYON.

(April Term, 1883.)

[1. *Chattel Mortgages* ⟸162, 239.]

After default, the mortgagees of a chattel seized it; on the next day they refused to surrender possession to the mortgagor upon demand made and a tender by him of the debt and costs, unless they were also paid an unsecured claim held by them against him. Subsequently, they sold the chattel; and, afterwards, this action was instituted by the mortgagor against the mortgagees to recover the possession and for damages. *Held*, that the action could not be sustained as an action for claim and delivery, as the plaintiff had no title nor right to possession after seizure on condition broken.

[Ed. Note.—Cited in McClendon v. Wells, 20 S. C. 520, 521; Dilling, Baker & Co. v. Foster, 21 S. C. 338; Williams v. Dobson, 26 S. C. 112, 1 S. E. 421; Ex parte Knobeloch, 26 S. C. 336, 2 S. E. 612; Salinas & Son v. Ellis, 26 S. C. 347, 2 S. E. 121.

For other cases, see Chattel Mortgages, Cent. Dig. §§ 286, 502; Dec. Dig. ⟸162, 239.]

[2. *Chattel Mortgages* ⟸267, 296.]

Nor as an action to redeem, because not commenced until after seizure and sale.

[Ed. Note.—Cited in Jackson v. Merchants' Hotel Ass'n., 37 S. C. 571, 16 S. E. 713.

For other cases, see Chattel Mortgages, Cent. Dig. §§ 551, 583; Dec. Dig. ⟸267, 296.]

[3. *Chattel Mortgages* ⟸176.]

Nor as one for damages, no wrongful act having been committed.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 335, 337–339; Dec. Dig. ⟸176.]

[4. *Chattel Mortgages* ⟸297, 300.]

The only right of the mortgagor was to require an account from the mortgagees of the proceeds of sale, and in such action the mortgagees would be entitled to credit for the mortgage debt and expenses, and also for any unsecured claim held by them against the mortgagor.

[Ed. Note.—Cited in McClendon v. Wells, 20 S. C. 514, 521; Ex parte Lorenz, 32 S. C. 368, 11 S. E. 206, 17 Am. St. Rep. 862; Jackson v. Merchants' Hotel Ass'n, 37 S. C. 568, 16 S. E. 713; Baum v. Trantham, 42 S. C. 110, 19 S. E. 973, 46 Am. St. Rep. 697; Martin v. Jenkins, 51 S. C. 43, 27 S. E. 947.

For other cases, see Chattel Mortgages, Cent. Dig. §§ 584, 586; Dec. Dig. ⟸297, 300.]

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*Before Mackey, J., Sumter, October, 1881.

The opinion states the case.

Mr. Jos. H. Earle, for appellant.

Messrs. J. J. Dargan and Marion Moise, contra.

September 24th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This action was commenced, as to the appellant, James W. Lyon, on February 12th, 1878; the other copartner, Samuel H. Lyon, not having been served with the summons, never became a party to the action. The case, as made by the testimony for the plaintiff, was, substantially, as follows: On February 5th, 1877, the plaintiff executed a mortgage to Lyon Bros. & Co. on certain personal property to secure the payment of a debt of $90 on or before October 15th, 1877. After default in payment of the mortgage debt, to wit, on January 10th, 1878, the mortgagees seized the mortgaged property and took it into their possession, and on the next day plaintiff tendered to them the amount of the mortgage debt, together with the expenses of seizure, and demanded a return of the property. With this demand the mortgagees refused to comply, unless the plaintiff would also pay an additional amount, in which it was alleged the plaintiff had become indebted to the mortgagees after the execution of the mortgage, which additional indebtedness was, however, denied by the plaintiff. The plaintiff having refused to pay this additional sum, the property was sold at public sale under the mortgage, whereupon this action was brought, which, in form, appears to be an action to recover the possession of the mortgaged property, together with damages for its detention.

At the close of plaintiff's testimony, a motion for non-suit was made upon the ground that, under the showing made, the action

could not be maintained, "whether the same be considered an action of claim and delivery of personal property, or an action in the nature of a bill to redeem." The Circuit judge refused the motion, "and ruled that the

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plaintiff could not *recover in an action of claim and delivery of personal property, or under a bill to redeem; but that the plaintiff would be entitled, under his complaint upon the case as proved by him, to a verdict for damages, because of the detention and sale of the mortgaged property by the defendants after tender to them of the amount due under the mortgage, together with the costs of seizure, although such seizure of the mortgaged property was made by the defendants after condition broken." To this the defendant duly excepted.

The testimony for defendants, in addition to what had been shown by the plaintiff, was to the effect that after the execution of the mortgage the plaintiff became further indebted to them in the sum of $160; and that the mortgaged property brought, at the sale, the sum of $135.

The appellant requested the Circuit judge to charge the jury: "That it was the duty of the plaintiff to have tendered to the defendants the whole amount of the mortgage debt, and also the amount of his subsequent indebtedness to them." This his Honor refused to do; and, on the contrary, charged the jury: "That the amount of the mortgage debt being tendered the mortgagees, together with the costs of seizure, the mortgagor was entitled to the possession of the mortgaged property, notwithstanding any subsequent indebtedness of the mortgagor to the mortgagees, and without tendering such indebtedness, this not being a bill to redeem." And he also charged: "That the plaintiff being entitled to the possession of the mortgaged property from the time that he tendered to the defendants the amount of the mortgage debt, together with the costs of the seizure; that if such amounts were tendered as alleged, and if the defendants, refusing such tender, detained and sold the property, that the plaintiff was entitled to damages in this action;" to all of which the appellant duly excepted. The jury found a verdict in favor of the plaintiff for the sum of $105, and from the judgment entered on such verdict, the defendant, James W. Lyon, appeals, relying upon the points made by his exceptions as above stated.

Without stopping to remark upon the apparent inconsistency between the ruling of the Circuit judge, upon the motion for a

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*non-suit and his charge to the jury, we will proceed to consider and determine the real questions which we understand to be raised by this appeal. The fundamental inquiry is as to the effect of the tender of the mortgage debt made after breach of the condition of the mortgage, and after the mortgaged property had been taken into possession by the mortgagees under the mortgage. There can be no doubt that upon breach of the condition of a mortgage of personal property the legal title to the property mortgaged becomes vested in the mortgagee. Wolf v. O'Farrel, 1 Tr. Con. Rep. 151, more fully reported under the title of Wolff v. Farrell, 3 Brev. 68; Trescott v. Smith, 1 McCord Ch. 486. The question then is, Does a tender, not accepted after condition broken, revest the title in the mortgagor? If it did, then, as Chancellor Harper says, in Walling v. Aiken, McMull. Eq. 15, there would be no necessity for the mortgagor to invoke the aid of a court of equity by a bill to redeem, as he would have a complete remedy at law. Accordingly, it is laid down in books of established authority that a tender after condition broken of the mortgage debt, which is not accepted, will not revest the title in the mortgagor. Jones Chat. M. 633; 2 Hilliard Mort. 536; 2 Jones Mort., §§ 892, 1798; Patchin v. Pierce, 12 Wend. 61.

It is true, that in some of the States it is now held that a tender of the mortgage debt, made after breach of the condition, discharges the lien of a mortgage of real estate, because there, as well as in this State, the legal title does not pass even after breach of the condition; and it may be that here also a tender, after breach of the condition of a mortgage of real estate, of which the mortgagor remains in possession, would be held to be a discharge of the lien of the mortgage, inasmuch as the legal title never passed. But that question is not now before us, and we are not to be understood as passing upon it. Here, we are dealing with a mortgage of personal property, under which the legal title unquestionably does pass upon breach of the condition, and the common law rule applies, under which the tender cannot have the effect of revesting the title in the mortgagor.

It is quite clear that the mortgagees committed no violation of the rights of the mortgagor in seizing the mortgaged property upon default in the payment of the mortgage debt;

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and we *think it equally clear that the subsequent tender of the mortgage debt did not destroy the right of the mortgagees, as legal owners, to sell the property. The only rights which the mortgagor had, after breach of the condition of the mortgage, were either to bring an action to redeem the mortgaged property, which, of course, must have been commenced before the foreclosure of the mortgage by a sale, or an action against the mortgagees to account for any surplus proceeds of the sale which might remain after satisfying the mortgage debt. This action, not having been commenced until after the sale, cannot be maintained as an action to redeem; and the plaintiff's only right, as

mortgagor, was to an account of the proceeds of the sale, and to such an action the mortgagees would certainly have a right to set up any claim, whether secured by the mortgage or not, which they may have against the mortgagor. Such an action would be based upon the foundation of the implied contract of the mortgagees to pay back to the mortgagor the surplus proceeds of the sale, and any claim arising out of contract could be set up by the mortgagees as a counter-claim to such action.

Even in an action to redeem, the common law rule was that the mortgagor must pay not only the mortgage debt but also any other unsecured claim held by the mortgagee against the mortgagor; and this rule has been adopted in this State when the legal title is vested in the mortgagee. Walling v. Aiken, McMull. Eq. 1. Whether this rule would apply in the case of a formal mortgage of real estate, under which the mortgagor retained possession, we are not now called upon to decide. But where a mortgagor goes into a court of equity and asks to have a deed, absolute in form, construed to be nothing more than a mortgage, and asks to redeem, or where a mortgagor comes to redeem a mortgage of personal property, under which the legal title is always vested in the mortgagee upon condition broken, then, as he is asking the aid of equity, he is required to do equity by paying all that may be due by him to the mortgagor, whether secured by the mortgage or not.

The rule is different where the action is brought by the mortgagee to foreclose the mortgage. There the action being based upon the contract to pay the mortgage debt,

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the mortgagee is *entitled to recover no more than the amount secured by such contract. Hence, the cases of Magwood v. Lubbock, Bailey Eq. *382; McCaughrin & Co. v. Williams, 15 S. C. 505, and Walker v. Walker, 17 S. C. 329, cited by respondent's counsel, which were, in effect, cases to foreclose a mortgage, do not apply. So, too, the case of Hunter v. Wardlaw & Edwards, 6 S. C. 74, was a case in which a mortgagee of personal property attempted to foreclose by seizure and sale after the mortgage debt was paid, as the court held, and, therefore, there was then no breach of the condition of the mortgage, and, consequently, the legal title never vested in the mortgagee.

We think, therefore, that the Circuit judge erred in his charge to the jury; and that the case, as made by the plaintiff, cannot be sustained. It certainly cannot be maintained as an action of claim and delivery of personal property, for the plaintiff had no legal title, and no right to the possession of the property sued for. Nor can it be maintained as an action to redeem, as it was not commenced until after the foreclosure of the mortgage by seizure and sale. Nor is there any foundation upon which to rest an action for damages, as it does not appear that the defendants have committed any wrongful act. They had a right to seize and sell the property as they have done, and they cannot be made responsible in damages for so doing. The only right which the plaintiff has is to require an account from his mortgagees of the proceeds of the sale, in which accounting the defendants must be allowed credit, not only for the mortgage debt, with the expenses properly incident to the seizure and sale of the mortgaged property, but also for any unsecured claims which the defendants, upon such accounting, may be able to establish against the plaintiff.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for such further proceedings as may be necessary to carry into effect the views herein announced, with leave to the plaintiff, if he shall be so advised, to amend his complaint so as to enable him to demand an accounting from the mortgagees of the proceeds of the sale of the mortgaged property upon the principles hereinbefore laid down.

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20 S. C. *23

*LAKE v. SHUMATE.

(April Term, 1883.)

[1. *Mortgages* ⇐151.]

L. purchased at public sale a tract of land for M., paid the greater part of the purchase-money, and took titles in his own name, M. giving to L. a note for such his payment, and himself paying the balance, under a verbal agreement that L. should convey to M. when this note was paid. Subsequently M., being in possession, mortgaged this land to D., which mortgage was duly recorded. L. died and his widow became sole owner of the legal title to the land, and also of M.'s note to her husband, and afterwards, regarding such title as her security, she made a loan to M. of money belonging to a ward of whom she was guardian. Some years later, M. gave to this widow a new note for the balance due to her upon his two notes so held by her, she never having had actual notice of the mortgage to D. In action by the widow to have D.'s mortgage canceled and for other relief, this land was sold. *Held*, that D.'s mortgage was not entitled to receive any part of the proceeds of sale until after full payment to L.'s widow of the moneys due to her on M.'s consolidated note.

[Ed. Note.—Cited in Lipscomb v. Goode, 57 S. C. 185, 35 S. E. 493.

For other cases, see Mortgages, Cent. Dig. §§ 307, 309–311, 314–329, 332–336; Dec. Dig. ⇐151.]

[2. *Mortgages* ⇐112.]

The fact that the money lent by the widow belonged to her as guardian, while the original debt was due to her individually, does not affect her rights in the matter.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 222; Dec. Dig. ⇐112.]

[3. *Mortgages* ⇐137.]

In a contest between M. and L., M. could not demand titles without paying all of his indebtedness to L.; and D., under his mortgage of M.'s interest in the land, can claim only such interest—and that is, what remains after paying to the heir of L. the balance of the purchase-money and all other debts due to her by M.

[Ed. Note.—Cited in Levi v. Blackwell, 35 S. C. 516, 15 S. E. 243; Whitmire v. Boyd, 53 S. C. 342, 31 S. E. 306.

For other cases, see Mortgages, Cent. Dig. §§ 270–276; Dec. Dig. ⇐137.]

[4. *Mortgages* ⇐171.]

If actual notice of the mortgage to D. was had before other money was lent to M. by L. or his widow, the mortgage would be preferred to such subsequent loans, but neither possession of the premises by M., nor the record of the mortgage, were sufficient to charge the holder of the legal title with notice.

[Ed. Note.—Cited in Tant v. Guess, 37 S. C. 500, 16 S. E. 472; Trustees v. Jennings, 40 S. C. 186, 18 S. E. 257, 891, 42 Am. St. Rep. 854.

For other cases, see Mortgages, Cent. Dig. § 394; Dec. Dig. ⇐171.]

[5. *Costs* ⇐13.]

Costs in such a case are within the discretion of the Circuit judge.

[Ed. Note.—Cited in Brown v. Brown, 44 S. C. 383, 22 S. E. 412.

For other cases, see Costs, Cent. Dig. § 21; Dec. Dig. ⇐13.]

[This case is also cited in Lipscomb v. Goode, 57 S. C. 188, 35 S. E. 493 without specific application, and in Lewie v. Hallman, 53 S. C. 23, 30 S. E. 601, as to facts.]

Before Cothran, J., Greenville, November, 1882.

The appeal in this cause came to this court under the title of Mary P. Lake against W. T. Shumate, administrator of J. P. Moore, deceased, T. C. Gower, J. N. Greer, W. A. Williams and Samuel J. Douthit, Judge of Probate for Greenville county. The action was commenced in the life-time of J. P. Moore, not later than April, 1879. The complaint stated the facts of the case and prayed judgment "that the cloud upon her title be

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removed, that *the mortgage to the defendant Douthit be marked satisfied, and that she may have such other and further relief as the nature of the circumstances of the case may require, and to the court shall seem wise and just."

Answers were filed by Moore, Douthit, Williams and Greer, and the last three asked for a sale of the land, the subject-matter of the action. It was sold in the fall of 1879, under a decretal order of Judge Fraser—for how much does not appear. The facts which gave rise to this controversy are stated in the opinion of this court.

The decree of the Circuit judge, omitting its statement, was as follows:

Assuming that Moore had the right to give the mortgage in question to the Probate judge, and that the latter had the right to take the same as a valid and legal security (for without such assumption there is no case presented here), the question for consideration and determination now may be thus stated: Has the plaintiff here paramount right to be paid that portion of her debt for money advanced to Moore after the execution of the mortgage to the Probate judge; or is she to be limited to the sum with interest, which was advanced by Dr. Lake for Moore, with a claim as to the balance subordinate to the rights of the mortgagee? There is not enough to satisfy both.

The case was argued by the plaintiff's counsel as one of tacking, but I have no hesitation in saying that that iniquitous doctrine does not prevail in this State or in this country, where, in the language of Chancellor Kent, "by the operation of the registration laws, it has been torn up by the roots." If, therefore, the plaintiff is entitled to the whole of her demand, her right to it must rest upon other ground than this.

It cannot be denied that if the mortgage were out of the way, and Moore were here asserting his right to specific performance, he would be required to do equity by paying up the whole amount due by him before the court would enforce such right. Did his mortgage to the Probate judge convey anything except the right which he had to have

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the contract with Dr. Lake *specifically performed? That was all the interest that he had in the subject-matter, and it was all he could transfer to another.

Assuming that Moore had a mortgageable interest in the lot (see Witte v. Wolfe, 16 S. C. 256,) it must follow that the recording of such mortgage would be all that the law requires to affect any one who afterwards should take a mortgage of the same estate. But it by no means follows that the plaintiff here, who already had the legal estate, can be affected by such notice. This the law calls constructive notice, and it differs very essentially from that other kind of notice which gives actual knowledge and thereby affects the conscience. This actual knowledge the plaintiff, it appears, did not have, and in the absence of it, in good faith relying upon the legal title, she should be protected and secured. Nor was she bound to look down the line from the point of her legal title for subsequent incumbrances. Nothing short of actual knowledge of such could affect her—constructive notice was not sufficient. See National Bank of Chester v. Gunhouse, 17 S. C. 489.

This position derives valuable support from the analogous and well established principle of a release of his lien upon a portion of the premises by a senior mortgagee with actual knowledge of the existence of a second mortgage upon the premises. In such case the senior mortgagee must abate a proportionate part of his debt. But the mere record

of such second mortgage does not affect the first mortgagee. See Jones Mort., § 562. "It would not be reasonable to subject the mortgagee to the constant necessity of investigating transactions between the mortgagor and third persons subsequent to the mortgage." Continuing, the same author says: "A subsequent purchaser takes his title with full knowledge of the mortgage, and if he wishes to protect himself he should notify the mortgagee of his purchase. The record is constructive notice only to subsequent or those claiming under the same grantor." Ibid., § 723. And this is the case of mortgages pure and simple. Surely the holder of the legal title, as in the case at bar, could not be placed in worse condition.

It is true, as contended for by the defendants, that Dr. Lake's title from Dr. Furman, although absolute in its terms, must be construed to be only a mortgage in fact. But it

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must be con*strued by the court to be so, for in its terms it is not a mortgage, but an absolute deed, and in putting upon it the construction demanded, the court would be derelict in duty if it failed or refused to take into consideration all the facts and circumstances of the case; and conspicuous amongst these are (1) the security which ought always to attach to the possession of the legal title; (2) the further loans of money upon the faith of it, and (3) the ignorance of the actual existence of the intervening mortgage to the Probate judge.

Wherefore it is ordered and adjudged and decreed, that the plaintiff, Mary P. Lake, is entitled to have judgment in full of her demands against the defendant, James P. Moore, as ascertained and set down by the master in his report, from the proceeds of the sale of the lot in question.

Let the plaintiff have judgment against the defendants for her costs and disbursements.

From this decree the defendants appealed upon the following exceptions (omitting the first, which is immaterial):

2. "Because the Circuit judge erred in holding that the plaintiff was entitled to the full amount of the $4,000 note, the master having found that there was no agreement between the late J. P. Moore and Mrs. Lake, when the $1,300 was loaned him by her as guardian, that the house and lot should stand as security for that amount in addition to the other note. The decree should have been for the amount due on the $2,200 note, then for the amount due the defendant Douthit and then for the $1,300 note to plaintiff.

3. "Because the Circuit judge erred in holding that the plaintiff, Mrs. Lake, was not affected with notice by the recording of the mortgage from J. P. Moore to the defendant Douthit, Probate judge.

4. "Because the Circuit judge erred in holding that the defendant Douthit occupied the same position that J. P. Moore did, by the taking of the mortgage, and that before he could have had a specific performance from Dr. Lake, he (Douthit) would have been required to pay off both of these notes.

5. "Because the Circuit judge erred in de-

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creeing that the *plaintiff was entitled to the whole amount due on the two notes, when it appears from the testimony that the mortgage executed to Douthit was before the second loan was made, which second loan was by her in a different right, to wit: as guardian of her minor son, T. E. Lake.

6. "Because the defendant, Moore, being in possession of the house and lot in question, exercising acts of ownership over the same, paying no rents and paying the taxes on the same, which facts being well known to the plaintiff and being sufficient in law to put her on the inquiry, she is estopped from disclaiming actual knowledge of the Douthit mortgage, or other equities prior to the second loan. The Circuit judge erred in holding that actual knowledge was necessary to bind her.

7. "Because the Circuit judge, having held that 'Dr. Lake's title from Dr. Furman, although absolute in its terms, must be construed to be only a mortgage in fact,' and having admitted that the plaintiff occupied no higher position in this matter than Dr. Lake, erred in holding that defendant Douthit's mortgage was postponed until the second advance of money made by the plaintiff to Moore was paid.

8. "Because the Circuit judge, having held that the title from Dr. Furman to Dr. Lake was nothing more than a mortgage, then on the principle 'Once a mortgage always a mortgage' the claim should have been decreed to be paid according to their respective priorities.

9. "Because this being an equity proceeding, and the lands having been ordered sold upon the suggestion of the answers of the defendants, the Circuit judge should have provided for the costs to be paid out of the funds in the hands of the court and not by the defendants personally."

Messrs. T. Q. Donaldson and M. F. Ansel, for appellant, cited 1 Jones Mort., §§ 162, 181, 241, 255, 331, 591, 600, 676, 732, 1081; 2 Sumn. 533; 1 McMull. Eq. 1; Pom. Eq. Jur., §§ 747, 749; 2 Lead. Cas. Eq. (3d Am. Ed.) 160, 165, 182; Ad. Eq. 354; 2 Hill Ch. 421; 28 Iowa 413; 17 Ves. 227; 20 Beav. 586; 2 Ves. & B. 79–84; 11 Rich. 697; Frederick v.

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Corcoran, *100 Pa. St.; 10 S. C. 461; 4 Des. 256; 1 Johns. Ch. 566; 2 Id. 158; 5 Id. 29; 2 Paige 300; 13 Ves. 120.

Messrs. Earle & Wells, and Geo. Westmoreland, contra, cited Pom. Eq. Jur., §§ 385, 658; 1 Strobh. Eq. 356; Jones Mort., §§ 172, 331, 372, 562, 723; 8 Paige 361; 3 Stock. Ch. 246;

1 Johns. Ch. 566; 46 N. Y. 496; 13 Ill. 186; 4 Greene (Iowa) 34; 13 Iowa 467; 5 Myl. & C. 303; 2 Lead. Cas. Eq., Part II., p. 418; 2 S. C. 122; 7 Ves. 265; 1 Story Eq. Jur., § 776; 16 S. C. 256; Wade Not., §§ 96, 205.

September 24th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The facts of this case, as gathered from the decree of the Circuit judge, are substantially as follows: On January 4th, 1870, the late Dr. Lake, the husband of the plaintiff, through his nephew, James P. Moore, bought, at public sale, the tract of land over the proceeds of sale of which the present controversy arises, and titles were duly made to him. Five hundred dollars of the purchase-money was paid at the time by Moore, and the balance, amounting to something over $2,000, was paid by Lake. The purchase was, in fact, made for Moore, who went into possession under an agreement with Dr. Lake, that titles were to be made to Moore when he refunded the amount paid by Dr. Lake, for which amount Moore gave his note to Dr. Lake. Moore made valuable improvements on the land, and continued in possession until the same was sold under an order in this cause. Moore having died pending the action, the same was continued against his administrator, as we suppose, though that fact does not appear in the "Case."

On September 16th, 1871, Moore became the guardian of his co-defendant, Williams, gave bond as such to the Probate judge, Douthit, with defendant Gower as his surety; and also gave a mortgage of the said land as additional security to the Probate judge, Douthit, which was duly recorded. Soon afterwards, the Probate judge, either doubting his right to take that kind of security, or learning that Moore did not hold the legal title to the premises mortgaged, required additional

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personal security, *whereupon the defendant Greer signed the bond as an additional surety.

In September, 1872, Dr. Lake died intestate; and in the same month, the plaintiff and the heirs of Dr. Lake, all being sui juris, entered into an agreement by which the latter conveyed to the former all their interest in the land in question. In the settlement of Dr. Lake's estate, on May 12th, 1873, the note of Moore to Dr. Lake above referred to, then amounting to something over $2,000, was assigned to the plaintiff as part of her share of her husband's estate. On October 13th, 1874, the plaintiff, as guardian of one T. E. Lake, loaned to Moore other moneys amounting to $1,300; and afterwards, on August 7th, 1877, the balance due on these two notes was consolidated, and a new note given by Moore to the plaintiff, individually, for something over $4,000.

These transactions between Moore and the plaintiff were, as she says, based upon the security she felt in the possession of the legal title to the land, and were made without any actual notice of the existence of the mortgage to Douthit, which, however, was duly recorded in the proper office. Although the plaintiff made the subsequent loan to Moore upon the faith of the security she felt in the possession of the legal title to the land, there was no evidence of any special agreement between her and Moore that the land should stand as security for such further loan.

It was conceded that so much of the note held by the plaintiff, as represented the balance due on the note originally given by Moore to Dr. Lake, should be first paid out of the proceeds of the sale of the land; and the only controversy was whether the balance of the note now held by plaintiff, representing the amount due on the loan made by plaintiff to Moore, after the execution of the mortgage to Douthit as Probate judge, was entitled to priority over said mortgage. The Circuit judge held that such balance was entitled to priority over said mortgage, and from his decree defendants appeal.

We concur with the Circuit judge in the conclusion which he has reached. We are unable to see how the fact that the loan made by the plaintiff to Moore was originally

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made in her *capacity as guardian of T. E. Lake, can affect the question. She was responsible to her ward for the money loaned, and was legally entitled to enforce payment of the same. It was not the case of a chose in action belonging to her ward, assigned by her to Moore, but it was money in her hands which it was her duty to invest, and which she had a right to call in whenever she thought proper so to do. More than this, she did call in the investment of her ward's funds, and took a new note payable to herself individually, and it is upon this new note, and not upon the one payable to herself as guardian, that she now bases her claim. If the note now held by her does, in fact, represent funds of her ward, he may have an equity to pursue the same. But for aught we know he may have been settled with by plaintiff, and if so, then she would be equitably as well as legally entitled to the note. At all events, we do not see what concern either Moore or his mortgagee had in the matter.

There is no doubt that, under the facts proved, Moore would be entitled to demand from the plaintiff specific performance of the agreement between himself and Dr. Lake. But when he invoked the aid of a court of equity for that purpose, that court would require him to do equity by paying, not only the balance due on the purchase-money, but also any other indebtedness which he may have incurred to Dr. Lake, or to the plaintiff who stands in his shoes. Walling v. Aiken,

McMull. Eq. 1; Secrest v. McKenna, 1 Strobh. Eq. 356. Hence, if the contest here was between the plaintiff and Moore, there is no doubt but that the plaintiff would be entitled to payment of the whole amount of her demands.

But it is contended that the result must be different when the contest is between the plaintiff and Douthit, as mortgagee of Moore. Although Moore never held the legal title, and was entitled only to an equitable estate, yet, under the authorities, (Roddy v. Elam, 12 Rich. Eq. 343; Witte v. Wolfe, 16 S. C. 256,) such an estate can be made the subject of a mortgage. Assuming, then, for the purposes of this case, that the Probate judge had a right to take this kind of security, and that the Douthit mortgage is a valid one, the inquiry next presented is whether the mortgagee of Moore stands in any better position

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*than he does. The mortgage to Douthit did not operate as a transfer of Moore's estate in land, but it only impressed a lien upon such estate which could only be enforced to the extent of Moore's interest, which, as we have seen, was only what might remain after paying, not only the balance due on the purchase-money, but also any other debts that might be due by him to the holder of the legal title. Douthit cannot claim as assignee of Moore; his only claim is to enforce his lien upon Moore's interest, whatever that may be.

If, however, the plaintiff had loaned money to Moore after notice of his mortgage to Douthit, then, upon a plain, equitable principle, such loan would be postponed to the lien of such mortgage, as otherwise a fraud might be practiced upon Douthit in which the plaintiff, having notice, would be a participant. But in the absence of notice, which it would have been very easy for Douthit to have given, we see no reason why the case should be taken out of the operation of the general rule. The plaintiff as owner of the legal title loaned her money upon the faith of the security which she thus held, and it would be inequitable now to deprive her of such security or postpone it to a lien of which she had no notice.

Our next inquiry then is, Did the plaintiff, at the time she loaned her money to Moore, have notice of the lien of the Douthit mortgage? It is conceded that she had no actual notice, but the appellants contend that she had constructive notice, first, by the fact that Moore was in possession; second, by the record of the Douthit mortgage. It is quite true that when one purchases land of which a person, other than the vendor, is in possession, such possession is notice to him. But notice of what? Why simply, that the party so in possession may have some claim which he had better inquire into. Moore's possession, therefore, was only notice to the world that he had some kind of claim to the land, which, upon proper inquiry, would have been found to be a claim of a person in possession under a contract to purchase, with the right to enforce specific performance upon payment of the balance due by him. But how his possession could be regarded as notice of the Douthit mortgage we are unable to conceive.

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*Next, as to the notice which is claimed to be derived from the recording of the Douthit mortgage. This of course would only be constructive notice, and the question, therefore, is narrowed down to the inquiry whether constructive notice, derived from the recording of the Douthit mortgage, would be sufficient in a case of this kind. No case directly in point has been cited nor have we been able to find one, but, reasoning from analogous cases, we are satisfied that mere recording is not sufficient notice in a case of this kind. In addition to the analogy mentioned by the Circuit judge in his decree, derived from the rule in regard to the release of the lien of a mortgage upon a portion of the mortgaged premises without actual notice of a junior mortgage, as laid down in 1 Jones Mort., § 562, we may mention another analogy drawn from the rule in regard to a mortgage to secure future advances, as laid down in 1 Jones Mort., § 372. According to that rule a mortgagee under such a mortgage is not affected with notice by the record of a junior mortgage, and he may with safety continue to make advances subsequent to the recording of such second mortgage which will be protected by the lien of his mortgage. But any advance made after actual notice of such second mortgage will not be so protected.

Indeed, the rule as laid down in Jones Mort., §§ 557, 558, 562 and 723, seems to be that recording is only notice to subsequent purchasers and creditors, and that as to a prior mortgagee it is not even constructive notice. As is said in section 723, "A subsequent purchaser takes his title with full knowledge of the mortgage, and if he wishes to protect himself he should notify the mortgagee of his purchase. The record is constructive notice only to subsequent purchasers, or those claiming under the same grantor." The same rule would of course apply to a subsequent creditor secured by a mortgage. According to these authorities the recording of the Douthit mortgage did not operate even as constructive notice to the plaintiff. As the Circuit judge has well said, if these rules apply to the case of a formal legal mortgage, with how much more force should they apply in a case like this, where a legal title is construed to operate as a mortgage!

The authorities cited by the appellants to

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show that, in the *absence of any express or implied agreement between the parties, the lien of a mortgage cannot be extended so as

to cover indebtedness other than that intended to be secured by the mortgage, apply only to legal and formal mortgages, and not to a case like this where the court is asked to construe a strictly legal title as a mortgage. In such a case, the rule, as we have seen, is that when the court is asked to decree specific performance, or that the mortgagor, so called, may be allowed to redeem, the vendee will be required to pay not only the balance due on the purchase-money, but also any other debts which he may owe the vendor. Walling v. Aiken; Secrest v. McKenna, supra. In fact the transaction may be regarded, in equity, as a mortgage to secure not only the balance of the purchase-money, but also all future advances, and the rule, as we have seen, in such a case is, that nothing but actual notice of a subsequent incumbrance will be sufficient to postpone the lien for such advances to the lien of such subsequent incumbrance.

So, too, the remark made by Chancellor Harper, in Walling v. Aiken, relied on by the appellants, that the rule requiring a mortgagor coming to redeem to pay not only the mortgage debt, but also all that he might owe the mortgagee, did not apply when an assignee or creditor of the mortgagor brought his bill to redeem, was manifestly made in reference to a case involving a purely formal mortgage, and was not intended to apply to a case like this, for he immediately afterwards proceeded to draw a marked distinction between the two cases, and held that while a tender by the mortgagor at the day appointed of the amount of the mortgage debt would have the effect of revesting the legal title in the mortgagor, thereby rendering it unnecessary for him to invoke the aid of the Court of Equity, yet it could have no such effect in a case like that then before the court, and that, therefore, notwithstanding the tender had been made at the day appointed for the payment of the debt, the mortgagor, so called, must pay all that he owed.

In addition to this, it must be remembered that the remark of the distinguished chancellor, so much relied upon by the appellants, was made in a case in which the rights of

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assignees or *creditors were not involved, and was, therefore, a mere passing observation. Whether the question of notice would not be a material and necessary inquiry is not stated or even alluded to, as it need not have been, inasmuch as the case then under consideration did not call for any careful statement of the rule with its necessary qualifications.

We do not desire to be understood as intimating any opinion upon the question whether a mortgagor, under a strictly formal mortgage of real estate, who is in possession of the mortgaged premises, is bound, when he brings his bill to redeem, to pay not only the mortgage debt, but also any other debt which he may owe the mortgagee. That question is not involved in the present controversy and has not been discussed, and is not intended to be decided.

In cases of this kind the question of costs is a matter addressed to the discretion of the Circuit Court, and we see no reason for interfering with the matter.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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20 S. C. 34

BELL v. BELL.

(April Term, 1883.)

[1. *Payment* ⇐38, 39.]

A debtor, owing two debts to the same creditor, has the right, on making a payment, to direct its application; if the debtor has given no directions, the creditor may make the application at his pleasure. The doctrine considered and the reported cases cited.

[Ed. Note.—Cited in Frost & Co. v. Weathersbee, 23 S. C. 368, 369; Baum v. Trantham, 42 S. C. 109, 19 S. E. 973, 46 Am. St. Rep. 697; McCown v. Westbury, 52 S. C. 425, 29 S. E. 663, 30 S. E. 142; Rouss v. King, 69 S. C. 173, 48 S. E. 220; Wardlaw v. Troy Oil Mill, 74 S. C. 371, 54 S. E. 658, 114 Am. St. Rep. 1004.

For other cases, see Payment, Cent. Dig. §§ 99–114; Dec. Dig. ⇐38, 39.]

[2. *Payment* ⇐39.]

A creditor had an account against his debtor, for part of which he also held his debtor's note, and he credited generally upon the account payments which were made by the debtor without direction for their application, and the creditor indorsed no credits on the note. *Held*, that the creditor had the right to apply the payments to so much of the account as was not secured by the note, and that they had been so applied, and that the note remained unpaid.

[Ed. Note.—Cited in Pelzer, Rodgers & Co. v. Steadman, 22 S. C. 290; McCown v. Westbury, 52 S. C. 424, 29 S. E. 663, 30 S. E. 142; Wardlaw v. Troy Oil Mill, 74 S. C. 371, 54 S. E. 658, 114 Am. St. Rep. 1004.

For other cases, see Payment, Cent. Dig. § 111; Dec. Dig. ⇐39.]

[3. *Appeal and Error* ⇐1022.]

Findings of fact by master and Circuit judge affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. ⇐1022.]

[4. *Limitation of Actions* ⇐53.]

An account more than six years old is barred by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 285–294; Dec. Dig. ⇐53.]

[This case is also cited in Pelzer, Rodgers & Co. v. Steadman, 22 S. C. 288, without specific application.]

Before Wallace, J., Kershaw, February, 1882.

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*This was an action by W. T. Bell and M. A. Gordon, grandchildren of Willis B. Huckabee, against Annie E. Bell and others, grandchildren, and J. J. Huckabee and others, chil-

dren, of W. B. Huckabee, and against Witte Brothers. The facts connected with the claim of Witte Brothers are stated in the opinion of this court. Omitting this statement from the master's report, it was otherwise as follows:

The master respectfully reports that, in obedience to the order of reference in this case, evidence and testimony have been taken and herewith submitted. There seem to be three leading questions in the case, each of which will be stated, and conclusions of fact and law set forth.

I. The claims of Joseph J. Huckabee against the estate of his father, Willis B. Huckabee, to be paid his share of the crops made by them, working together on the farm, and also for one-third of the Nelson tract of land—370 acres. Joseph J. Huckabee testified that he worked with his father on this land from 1852 to 1872, except four years when he was in the army. His services were for overseeing and managing the farm, plowing, doing wood and blacksmith work; that his services were worth $300 per annum, and he had four hands (slaves) in the crop up to 1865; that his father was old and infirm, and unable to manage the farm. Proof is by other witnesses to same effect, that Joseph J. Huckabee did execute this work as stated above; and further, that during the war, Joseph J. Huckabee, his wife, his four children and eighteen slaves, W. G. Huckabee, wife, three children and two slaves, A. A. Huckabee, wife and three children, all lived on the farm with their father, his wife and daughter; and all these families were supported by the produce of the farm, which was chiefly provisions and little cotton, and the products were chiefly used in supporting the family and farm, and in paying taxes and tithes; that the father, Willis B. Huckabee, died April 3d, 1875, and J. J. Huckabee has never rendered any demand to his executor for any debt due to him by his father; that he confessed a judgment to his father on February 24th, 1874, for $2,905, for a note dated August 13th, 1873, due at one day, given by him and W. G. Huckabee, for a store account, as they both testified to. To this

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claim plaintiffs *plead statute of limitations, not having made any demand for it within four years after the death of testator, on April 3d, 1875, until he filed his answer in this case, March 26th, 1881.

Conclusion of Law.—The whole claim is stale and barred by statute of limitations; he never demanded it from W. B. Huckabee in his life-time, but, on the contrary, confessed a judgment to him for a debt due; never demanded same from his brother, the executor of his father; therefore the claim must be rejected.

The demand for one-third of the Nelson tract of land is equally untenable. Whatever contract was made by J. J. Huckabee with his father about the land was merely parol; never demanded to be executed in his life-time, or since his death, by the executor. The testimony on the subject is that of Joseph J. H., who says that he told his father to bid off the land at the sale by the commissioner in equity, and he would help to pay for it by the labor of himself and slaves, on condition that his father would give him his proper share of the land for such work, when the land was paid for. He does not say his father agreed to this proposition, but his father did buy the land, and he paid his proportion of the cost by the labor of himself and slaves. W. G. Huckabee testified that he heard his father say that J. J. Huckabee told him if he would buy the land, he (Joseph J. Huckabee) would come home and work the land and help to pay for it; that his father told him he would do what was right by his son Joseph; that Joseph J. Huckabee did move upon the land and made crops upon it by himself and his slaves, together with his father's slaves, and they, together, did pay for the land; that the labor performed by J. J. Huckabee was that of plowman, manager, blacksmith and carpenter, all of which he performed well and skillfully. All this work was done prior to 1872, when he left the farm and moved off, and two years thereafter he confessed a judgment to his father for $2,905, on a note dated August 13th, 1873, and swore that he owed the note. From this testimony the conclusion of law is reached, that the claim is untenable and barred by the statute of limitations, and should be rejected.

II. A judgment was confessed for $3,006.68 by Joseph J. and W. G. Huckabee to their

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father, Willis B. Huckabee before *the clerk of the court, on February 24th, 1874, founded on a note dated August 13th, 1873, with interest up to the date of confession, and execution thereon issued; that according to the requisition of law, the two parties confessing the judgment made oath before the clerk of the court on the same day, that the facts set forth in the confession and judgment were true.

Defendants (Witte Bros.) allege in the third section of their answer, that they have no knowledge of this judgment, and pray it may be proved; and they offered testimony to show that there was no consideration for the note on which the judgment was founded, and it was received under protest of plaintiffs. The testimony offered is that of J. J. Huckabee, who testifies that the consideration of the note for $2,905, on which the confession was founded, was a store account due by him and his brother, W. G. Huckabee, to their father; that the reason of confessing the judgment was to prevent creditors, to whom he was bound as surety for others, coming down upon him and breaking him up, as he was threatened to be sued

for such surety debts. Willis G. Huckabee testified that the consideration of the note was the store account that he and his brother owed to their father. This is the whole testimony on the subject. I find, therefore, as matter of fact, that there was a valuable and just consideration for the note on which the confession of judgment was founded, and, therefore, as matter of law, that same is valid, subsisting and unpaid.

III. Claims of Witte Brothers. I find the facts as follows: * * *

From these facts I draw the conclusion of law that the note of $2,000 to Witte Bros., by J. J., W. G. and A. A. Huckabee, dated January 20th, 1874, must be regarded as paid—

1. Because J. J. Huckabee made payments to Witte Bros. from the crops of 1874 of larger amounts than $2,000 and interest, and $1,200 agreed to be advanced, and the signers of said note being recognized as sureties only by Witte Bros., had the equity to require such payments to be applied to the payment of those amounts.

2. Because, when Witte Bros. advanced to J. J. Huckabee beyond the $1,200, they gave

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no notice to the signers of the note *that they were doing so, so that the said signers might protect themselves; that when they advanced beyond the $1,200, the said signers of the said note were not bound by it.

3. Because this note was due on December 1st, 1874, and by the taking of new securities and extending the time for payments of said debt for which the note was collateral, Witte Bros. have released the securities.

4. Because the advances made by Witte Bros. to J. J. Huckabee beyond the $1,200 provided for by the mortgage, were made subsequent to the date of the confession of judgment by J. J. Huckabee, and must be postponed to that judgment under the authority of Ror. Jud. Sale, § 824.

5. Because, by the authority of Story Eq. Jur., § 459, payments made by the debtor must be applied to the payment of the oldest debt; and here the note given being older than the advances, must be considered paid.

6. Because, when there are equities between the parties, the Court of Equity will not follow the strict rule of law that a creditor without instructions may apply payments to any debts due to him, but will take cognizance and decree in favor of the equity. Here the equity is that the signers of the note were sureties, without notice of the advances made beyond the $1,200. See Hammersly v. Knowlys, 2 Esp. N. P. 666, quoted by Chancellor Harper in Heilbron v. Bissell, Bailey Eq. 435.

7. Because, in no sense can the note of Joseph J., W. G. and A. A. Huckabee to Witte Bros. for $2,000, dated January 20th, 1874, be considered a continuing guarantee of the final balance due by J. J. Huckabee to Witte Bros., but must be confined to the year 1874.

IV. I find, therefore, that from the proceeds of the sale of the lands of Joseph J. Huckabee, 1,150 acres mortgaged to Witte Bros., the said judgment confessed to Willis B. Huckabee shall be first paid, and the balance be applied to pay on said mortgage debt, and recommend the same to be sold as prayed for by said Witte Bros.

V. I recommend that the following real estate belonging to the estate of Willis B. Huckabee, deceased, be sold * * *

J. M. Desaussure,
Master Kershaw Co.

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*To this report numerous exceptions were taken by all parties, upon which was passed the following decree:

This action is brought by certain legatees under the will of Willis B. Huckabee against the executor and others for the settlement of the estate of the testator. The whole case has been heard by the master for Kershaw county, and a report made as to the law and facts. The exceptions to the report are numerous, and taken by both sides. According to the view I take of the case, it will not be necessary to consider all of the exceptions in detail. The questions involved are not dependent one on the other, and the order in which they are considered is, therefore, not material.

The first question considered by the master relates to "the claim of Joseph J. Huckabee to be paid his share of the crops, made by them working together on the farm, and also for one-third of the Nelson tract of land." The findings of law and fact by the master in relation to this claim are approved by this court. The findings of the master in relation to the claim of J. J. Huckabee for one-third of the Nelson tract of land are approved and confirmed by this court.

In relation to the judgment confessed by J. J. Huckabee and W. G. Huckabee to Willis B. Huckabee on February 24th, 1874, the finding of fact by the master is approved and confirmed. To these facts I will add the remark, that there is nothing to show that Willis B. Huckabee, the plaintiff in the judgment, had any knowledge that the design of J. J. Huckabee or W. G. Huckabee in confessing the judgment was to hinder, defeat or delay their other creditors. The finding of law by the master in regard to this confession of judgment is approved and confirmed.

The allegation of the complaint, that A. A. Huckabee had purchased lands of the testator's estate at an undervalue, is not passed upon by the master or pressed before me. I assume therefore, that cause of action is abandoned.

The remaining question relates to the mortgage executed by J. J. Huckabee on January 24th, 1874, to secure a note executed on January 20th, 1874, for $2,000, to Witte Bros.

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Witte Bros. *make no objection to the litigation of their claims in this action, but join in so much of the prayer of the complaint as asks the sale of the land described in their mortgage. The findings of fact by the master in relation to the transactions between Witte Bros. and J. J., W. G. and W. B. Huckabee, are approved and confirmed. There may be some inaccuracy in the figures of the master, but this can be corrected upon a future reference, the design being to settle, as far as this court can, the principles upon which the rights of parties depend, and upon which the accounts may be subsequently made up.

Now, upon the facts, is the mortgage of January, 1874, satisfied? In January, 1874, J. J. Huckabee was indebted to Witte Bros. for the amount of balance unpaid of his account of 1873; for this balance, J. J. Huckabee executed his sealed note to Witte Bros. with W. B. and A. A. Huckabee as sureties; to further secure the note, and to secure advances for the year 1874, he executed the mortgage; the advances thus secured were not to exceed $1,200. Accordingly, advances were made in 1874 and exceeded $1,200 in amount. The amount of the balance of the account of 1873, including the $2,000 for which the note had been given, was brought forward and stood the first entry in the account for 1874. In November, 1874, J. J. Huckabee began to forward cotton to Witte Bros., and continued to do so, from time to time, up to February 26th, 1875. The sums for which these lots of cotton were sold were credited upon the account of J. J. Huckabee, but not upon the note.

In 1875 a new contract was entered into by Witte Bros. and J. J. Huckabee, in which another mortgage of the same land was executed by J. J. Huckabee to Witte Bros. This mortgage, among other things, contains a stipulation that this land is again mortgaged to secure the same $2,000. There is no evidence to show that the note of $2,000 was given and accepted in payment of the balance of 1873 pro tanto. Yet, notwithstanding the sum of that balance stood at the head of the account of 1874, $2,000 of that sum was represented by the note secured by sureties and a mortgage. That balance, as it stood at the head of the account, was unsecured, while the following items

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of the account, to the *amount of $1,200, were secured by the same mortgage that secured the $2,000.

These facts sufficiently differentiated the note to enable the parties to agree as to the application of the payments. And the agreement of January 15th, 1875, shows that J. J. Huckabee and Witte Bros. had agreed that the payments should not be considered as applied to the $2,000. It is therefore adjudged, that the note of $2,000 is not paid, and that the mortgage of January 24th, 1874, is unsatisfied.

There is no explanation as to any further agreement as to the application of the payments to the account for advances for the year 1874; it must be, therefore, adjudged, that the payments must be applied, beginning at the first item for supplies, and continued regularly in succession until the payments are exhausted. It is further adjudged, that the supplies, payment for which was secured by the mortgage of January, 1874, were the supplies, to that amount, first delivered and charged to J. J. Huckabee, and that the supplies, payment for which was secured by the said mortgage, are paid for.

It is clear that the balance due Witte Bros. on the account of 1875, is not secured by the mortgage of January, 1874. That mortgage was security for another and independent debt, and there is nothing to show that it was ever intended to cover any other debt than the one described on its face. On the contrary, for the debt of 1875, there was, in addition to other securities, a new mortgage of the same lands.

It is therefore ordered and adjudged, that the land described in the mortgage of J. J. Huckabee to Witte Bros. be sold by the master for Kershaw county, the time and terms of said sale to be fixed by a subsequent order of this court, and that the proceeds of said sale be first applied to the amount of the note and interest the mortgage was given to secure, and, after the satisfaction of the said note and interest, to the judgments against J. J. Huckabee and others in favor of Willis B. Huckabee, and any balance to the mortgage of Witte Bros., of January, 1875. * * *

From this decree the plaintiffs and A. A.

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Huckabee appealed, *and also the defendant, J. J. Huckabee, upon the exceptions stated in the opinion.

Messrs. Chesnut & Workman, for plaintiffs and A. A. Huckabee.

Messrs. Leitner & Dunlap, for J. J. Huckabee and Witte Bros., and for the latter, also, Messrs. Buist & Buist.

September 26th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This action was brought for the settlement of the estate of Willis B. Huckabee, deceased, who died in March, 1865, bequeathing his estate to plaintiffs, and several of the defendants, his children; the defendant A. A. Huckabee, one of them, being appointed executor. The will directed that each of the legatees should account to the estate for whatever amounts they might be indebted thereto, without interest.

It appeared that some time before the death of the testator, to wit, in August, 1873,

the defendant J. J. Huckabee executed a note to his father, with W. C. Huckabee, his brother, as surety, for $2,905; that in February, 1874, these parties confessed a judgment to W. B. Huckabee on this note, amounting at that time to $3,006.68. It further appeared that, on account of certain dealings between J. J. Huckabee and the defendants Witte Bros., of Charleston, the said J. J. Huckabee, on or before January 22d, 1874, had become indebted to the said Witte Bros. in the sum of $2,000, for which Huckabee gave his note at said date, with W. B. Huckabee, the testator, and A. A. Huckabee, as his sureties, with interest at the rate of fourteen per cent. per annum, and payable on or before December 1st, 1874. At the same time, as further security to this note, and for supplies to be advanced to him to an amount not exceeding $1,200, with interest at fourteen per cent., he executed a mortgage to Witte Bros. of a tract of land containing 1,150 acres, situated on the waters of Wateree river in Kershaw county.

This mortgage bore date prior to the confession of judgment of J. J. Huckabee and

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W. G. Huckabee to their father, the *testator. The plaintiffs, however, claimed that the debt had been satisfied by produce consigned by Huckabee to Witte Bros., and one object of the complaint was to have it so declared in order that the land of J. J. Huckabee covered by this mortgage might be sold to pay the judgment confessed to the testator free from the cloud of the mortgage; and to this end Witte Bros. were made parties to the action, who answered, denying that their mortgage had been satisfied, and alleging that the confession of judgment was without consideration, and, therefore, void. J. J. Huckabee and W. G. Huckabee also set up the defense that the confession was without consideration; and J. J. Huckabee further claimed that his father was largely indebted to him for services as manager of his father's business from 1851 to 1862—nine years and seven months, and again from 1865 to 1872, six years and eight months—and for other services as blacksmith at the rate of $300 per annum; and further, for one-third interest in a tract of land, known as the Jack Nelson land, which he alleged had been purchased by his father with the understanding that he was to have one-third interest therein.

The case was referred to the master, who, after full testimony, reported that the judgment by confession was founded upon a sufficient consideration, to wit, a store account, and was a valid judgment; that the Witte Bros.' mortgage had been satisfied by sales of produce shipped by J. J. Huckabee, and that the claim of J. J. Huckabee against the estate of his father was stale and barred by the statute of limitations; and he recommended that out of the proceeds of the sale of the 1,150 acres of land mortgaged to Witte Bros. the judgment confessed to the testator, W. B. Huckabee, be first paid, and the balance, if any, be applied to a second mortgage of Witte Bros., executed in 1875, and junior to the judgment confessed.

Upon exceptions to this report, Judge Wallace sustained it, except as to the satisfaction of the Witte Bros.' mortgage; as to this, he held that the note of $2,000, secured by said mortgage, had not been paid, and he ordered the land sold, the proceeds thereof to be applied first to the amount and interest of said note, and, after the satisfaction thereof, then to the judgment against J. J. Huckabee and W. G. Huckabee, and any bal-

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ance to *the second mortgage of Witte Bros. From this decree the plaintiffs and the defendant J. J. Huckabee have appealed; the plaintiffs upon the ground that his Honor should have held, upon the facts and law of the case, that the $2,000 note secured by mortgage to Witte Bros. had been paid; and the defendant, upon the grounds: 1. Because his Honor erred in sustaining the report of the master, wherein he held that defendant's whole claim for services was barred by the statute of limitations; 2. Because his Honor erred in sustaining the report of the master, wherein he holds that the demand for one-third of the Jack Nelson land, set up by J. J. Huckabee, was untenable; 3. Because his Honor erred in sustaining the master's report, that the confession of judgment was a valid and subsisting debt.

We will take up the plaintiffs' exceptions first. To a proper understanding of the question raised in this exception, it will be necessary to go a little deeper into the facts connected with the business transactions of J. J. Huckabee and Witte Bros. It seems that Huckabee was a planter in Kershaw county, and that he obtained his supplies, &c., necessary to the running of his farm, from Witte Bros, merchants, in Charleston, to whom he shipped his cotton and other produce; that at the end of the year 1873, the balance against Huckabee, in favor of Witte Bros., was something over $2,000, for which Huckabee gave his note (the note in question). The account of 1873, on the books of Witte Bros., was left standing, no entry of the note as a credit being made; the balance of 1873, including the $2,000, being carried forward and left standing as the first entry on the account of 1874.

At the time the note was taken, as has already been stated, Witte Bros. agreed to advance, for the year 1874, an amount not to exceed $1,200. And with the view to secure this note and the advances agreed upon, Huckabee then executed the first mortgage, to wit, in January, 1874. During that year Witte Bros. furnished supplies considerably over the amount agreed upon, to wit, $3,229.80, instead of $1,200. In November, Hucka-

bee began to send forward cotton to Witte Bros., which he continued to do until January, 1875. The proceeds of this cotton were

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*credited upon the account of Huckabee, no part being paid to the note.

In January, 1875, Witte Bros. agreed to make advances for that year to an amount not to exceed $3,000, with interest at fourteen per cent., to be paid in December, 1875; and Huckabee agreed to send forward his crop of cotton for that year, the proceeds to be applied to pay expenses of papers, the advances and interest, "and then to the payment of any amounts that may now be due" to them; and should any balance remain, to be placed to the credit of Huckabee. That agreement was in writing, and contains a lien on the crop and a mortgage on the 1,150 acres before mentioned, to secure the $3,000 and interest, and also the sum of $2,000 now due for past advances. At the end of the cotton season for 1875, upon a balance being struck, March 28th, 1876, Huckabee was indebted $3,746.10, which included the $2,000 note.

The parties had little or no dealings in 1876. Their relations, however, were renewed in 1877, when further advances were made during that year. No balance was struck in 1877–8 or 9, but on January 26th, 1880, a balance is struck of $223.69 in favor of Huckabee, which balance, it is admitted, should be credited on the balance against him in 1875, to wit, the $3,446.10. This amount, to wit, $3,446.10—$223.19, is the amount claimed by Witte Bros. in the account up to March 28th, 1875, including the $2,000 note and interest. It is not contended that the first mortgage secures any portion of this balance except the $2,000 note and interest, and the sole question is, whether, under the facts as above, that note should be regarded as paid.

The solution of this question depends upon the principles applicable to the application of payments. This doctrine has been much discussed both in England and also in the American States; and because of the contrariety in the decisions much confusion has resulted. This has given rise to a separate work on the subject by Mr. George H. Munger, where numerous cases are collected and discussed. At one time and in many cases in England, the civil law, which seemed to regard the interests of the debtor as most to be protected, was followed; at another

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and *in other cases, the creditor was the favorite. Finally, as Mr. Munger concludes, the rule adopted in Great Britain and most of the States of this country, is as follows (Munger, ch. III., p. 10): 1. Where money is paid by a debtor to his creditor, the debtor, has a right to make the appropriation to which account he pleases. 2. If the debtor make no appropriation, then the creditor may apply it at his own pleasure to the satisfaction of any demand which he has against his debtor. 3. If neither party make any such application, then if there be various debts due the creditor, the court will make the application according to its own view of the law and equity of the case under all the circumstances.

In our State this doctrine has also been much discussed and a conclusion reached somewhat in unison with the above principles, but rather more distinctly defined and limited. The most important of the cases in our reports are the following: Smith ads. Screven, 1 McCord 368; Black v. Shooler, 2 McCord 294; Schnell v. Schroder, Bailey Eq. 342; Heilbron v. Bissell and Warner, Bailey Eq. 430; McDonald v. Pickett, 2 Bailey 618; Carson v. Hill and Jones, 1 McMull. 83; Jones v. Kilgore, 2 Rich. Eq. 66; Brice v. Hamilton, 12 S. C. 37. In the first three cases the proposition first above stated is distinctly announced, to wit: that a debtor when he makes a payment has the right to direct and control the application. This seems to be the well-settled doctrine everywhere. The second proposition, as a general rule, is also well settled, to wit, that the creditor may make the application if the debtor has not done so. This was held in Schnell v. Schroder, supra, and in Heilbron v. Bissell and Warner, supra. It was further held, that the creditor in making the application was not limited as to the time within which he may do so, in accordance with Stewart v. Cochran, Bailey Eq. 380. And in Brice v. Hamilton, 12 S. C., supra, the last case upon this subject, this court held, that when the debtor directs no application at the time of payment the rule is that the creditor may make the application at any time before judgment or verdict; approving Heilbron v. Bissell and Warner, and limiting Jones v. Kilgore.

In Heilbron v. Bissell and Warner, Chan-

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cellor Harper goes *fully into a discussion of the whole subject, and after a thorough and most able examination of the prominent decisions, concludes in opposition to the leaning of the master of the rolls, as follows: "With the respect due to so great an authority, I have examined the cases referred to and some others on the same subject, and my conclusion is, on the preponderance of authority, that the creditor has the unlimited right to appropriate, when the debtor has made no appropriation at the time of payment." This, then, seems to be the law in our State, and such being the law, the third proposition above is not very important, as it will not be often that the creditor would fail to exercise his right. It was said, however, in Jones v. Kilgore, if neither party would fix the application, then it devolves on the court, and will be made pro tanto to the demands held by him who receives the

money, or if one demand be less secured than the other the application would be made to it in the first instance, citing 5 Mason 82; 4 J. J. Marsh. 97; 9 Cow. 420.

Now, apply these principles to the facts of this case. The payments made by Huckabee to Witte Bros. in 1874, after the $2,000 debt had been contracted and the note therefor given, were made from the proceeds of the cotton shipped by Huckabee after November of that year. There is no evidence that Huckabee gave any directions as to the precise application when the consignments went forward. In the absence of this, Witte Bros. had the right to make the application which in their answer they say they did do, making the application to the advances of that year. This application was subsequently recognized as proper by Huckabee in the agreement made the next year, 1875, for advances of that year, as that agreement contains a lien on the crop and a mortgage on the 1,150 acres of land to secure said advances, and also the sum of $2,000, due for past advances with the interest thereon. Besides this, we think that the same result would follow from a careful examination of the original contract between the parties, and a proper construction thereof.

At the close of the year 1873, Huckabee was found indebted about $2,000; this was ascertained, and a note given for the amount, with delay of payment until December, 1874. This note was given by Hucka-

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bee, with his father and brother as *sureties. It is true the amount was carried forward at the head of the account for 1874. This was, no doubt, done early in the year, and before it was settled by note; the note was not given until January 20th, 1874, and standing at that time in the shape of an account, it was never changed; yet, the facts are that the debt was ascertained, and was closed up by note before the business of the next year commenced. The argument of the appellant is that, notwithstanding the arrangement made as above, yet the debt of 1873 and 1874 was all one debt, represented by a running account; and that, under the law, where payments are made in such a case, the payments should be applied to the first items; and many authorities are referred to sustaining this latter proposition. These are not denied. The general rule of law, no doubt, is as stated; but, in our judgment, the facts do not fit. We think there was a separation here of the two debts; one was ascertained and liquidated before the other was contracted; one was present and the other in the future, when the mortgage was given, and the doctrine of the application of payments to two or more debts applied, and sustains the ruling of Judge Wallace on this subject.

As to the claims of J. J. Huckabee against the estate of his father for services, &c., and also his claim for a portion of the Jack Nelson land, the findings of fact and law of the master have been approved by Judge Wallace. We see no reason to disturb either. There seems to be no foundation in the facts for either claim; and, certainly, as to the first, the statute of limitations would be a complete answer in any event.

As to the judgment confessed by the Huckabees, the master finds as matter of fact that it was based upon a store account. The Circuit judge sustains this finding; and further, he states that there is nothing to show that Willis B. Huckabee, the plaintiff in the judgment, had any knowledge that the design of J. J. Huckabee or W. G. Huckabee, in confessing the judgment, was to hinder, defeat or delay their other creditors. We cannot say that these findings have no support in the testimony.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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***SHUBRICK v. ADAMS.**

(April Term, 1883.)

[1. *Limitation of Actions* ⟸112.]

The stay-laws of 1861–1865, did not create a legal disability to sue. State v. Carew, 13 Rich. 506.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 522; Dec. Dig. ⟸112.]

[2. *Limitation of Actions* ⟸104½, New, vol. 6 Key-No. Series; *Payment* ⟸66.]

Where a disability intervenes after a right of action has accrued, the currency of the statute of limitations is not arrested, and the same principle applies to a presumption of payment arising from the lapse of time.

[Ed. Note.—Cited in Duren v. Kee, 26 S. C. 225, 2 S. E. 4; Satcher v. Grice, 53 S. C. 128, 31 S. E. 3; Maccaw v. Crawley, 59 S. C. 348, 37 S. E. 934; Sutton v. Clark, 59 S. C. 451, 38 S. E. 150, 82 Am. St. Rep. 848; Gaston v. Gaston, 80 S. C. 163, 61 S. E. 393.

For other cases, see Payment, Cent. Dig. §§ 176–188; Dec. Dig. ⟸66.]

[3. *Limitation of Actions* ⟸114.]

The suspension of the statute of limitations by act of the legislature does not affect the presumption of payment arising from the lapse of time.

[Ed. Note.—Cited in Langston v. Shands, 23 S. C. 152, 153, 154.

For other cases, see Limitation of Actions, Cent. Dig. § 524; Dec. Dig. ⟸114.]

[4. *Payment* ⟸66.]

When a presumption of payment commenced to run in February, 1861, it became complete in twenty-years, notwithstanding the stay-laws of 1861–1865, and the suspension thereby of the statute of limitations.

[Ed. Note.—Cited in McKinlay v. Gaddy, 26 S. C. 576, 2 S. E. 497.

For other cases, see Payment, Cent. Dig. § 182; Dec. Dig. ⟸66.]

[5. *Bonds* ⟸130.]

The death of one of the obligors on a joint and several bond severed the obligation, and

payments thereafter made on the bond by the survivor did not prevent the presumption of payment from running in favor of the deceased's estate.

[Ed. Note.—Cited in Dickson v. Gourdin, 26 S. C. 400, 2 S. E. 303; Id., 29 S. C. 344, 352, 7 S. E. 510, 1 L. R. A. 628.

For other cases, see Bonds, Cent. Dig. § 226; Dec. Dig. ⟸130.]

[6. *Payment* ⟸66.]

[Cited in McKinlay v. Gaddy, 26 S. C. 576, 2 S. E. 497, to the point that the presumption of payment arising from the lapse of 20 years can only be rebutted by such facts as would take a note not under seal out of the operation of the statutes, and that the onus is on the creditor to establish such facts.]

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 176–188; Dec. Dig. ⟸66.]

Before Pressley, J., Charleston, November, 1882.

This was an action by E. T. Shubrick, trustee, against L. G. Adams, administratrix of W. C. Gatewood. The opinion states the case.

Messrs. Rutledge & Young, for appellant.

Mr. S. Hyde, Jr., contra.

September 26th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This was an action brought against the respondent as administratrix of W. C. Gatewood, deceased, on a joint and several bond executed by Dr. Geddings, with Gatewood as surety. Gatewood died in February, 1861. Dr. Geddings made several payments on the bond after the death of Gatewood—the last on April 9th, 1877. Dr. Geddings died in 1878, leaving a balance on the bond unpaid. This action was commenced against the estate of Gatewood on August 21st, 1882, to recover this balance. The defendant pleaded payment, relying on the presumption arising

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from the lapse of time, more *than twenty-one years having intervened between the death of Gatewood and the commencement of the action.

Judge Pressley, who heard the case, sustained this plea, holding that the death of Gatewood severed the obligation, and more than twenty years having elapsed since the death of Gatewood, and before the commencement of this action, that the estate of Gatewood was entitled to the presumption of payment, notwithstanding the stay-law. He therefore ordered and adjudged that judgment be for the defendant with costs. The case now comes before this court on appeal; the main question involved being whether the presiding judge erred in declining to deduct the time which elapsed during the existence of what is known as the stay-laws.

The presumption of payment arising from the lapse of twenty years, as a general principle of law, is not contested by the appellant; but it is denied that the principle applies in this case, for the reason, as it is alleged, that twenty years in the sense of that principle has not elapsed here, because, as contended by the appellant, the four years of the stay-laws should be deducted, which, if done, it is conceded that less than twenty years will be left; and such being the case, the facts would not then warrant the application of the presumption. So, as we have already said, the principal question in the case is, should the four years of the stay-laws have been eliminated.

This is the first time that this question has been distinctly made in this State as applicable to the presumption of payment of a sealed note arising from the lapse of time. The question is important, and requires mature consideration. In the recent case of Boyce v. Lake, 17 S. C. 481 [43 Am. Rep. 618] where the Circuit judge had held that the presumption of payment arising from the lapse of time was rebuttable—dependent upon the weight of the testimony as to the fact of payment, and that lunacy, the insolvency or solvency of the defendant, and the stay-law were facts that might be considered as bearing upon that question, which he ruled should be decided by the preponderance of the evidence—this court reversed the judgment because of error, as we held, in the ruling of the Circuit judge,

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that the presumption could be *rebutted by the preponderance of testimony as to the actual fact of payment.

In our opinion, founded upon authority, (see the cases referred to in Boyce v. Lake,) we regarded the presumption as having acquired an artificial force much stronger than a mere possibility, subject to be overthrown by a simple preponderance of testimony to the contrary, and that the question in such case was not one of payment to be decided by the weight of the testimony directed to that point with the onus on the plaintiff, but that on account of the artificial force which the lapse of time had given to the presumption, this was conclusive unless overthrown by testimony of the character required to resist a debt barred by the statute of limitations. This was the pith of the opinion in Boyce v. Lake, following Judge Wardlaw, Chancellor Harper and Dunkin, and Lord Ellenborough in the cases cited therein. There was no distinct motion made in Boyce v. Lake to deduct the four years of the stay-law, nor was the point squarely made or decided, although it was incidentally involved in the case. Such being the fact, we feel at liberty to consider this question independent of that case now for the first time distinctly presented.

The argument of the appellant is that the stay-law created a legal disability which prevented the assertion of his rights; and that, under the law, the currency of the presumption of payment was arrested during the continuance of such disability. The first question to be considered, in connection with this

argument, is the proposition that the stay-law created a legal disability. Is this proposition a sound one? if not, and upon examination it should fall, of course, the remainder, which is a conclusion drawn from it, would go with it. Upon this point it is needless to do more than to refer to the case of the State v. Carew, 13 Rich. 506 [91 Am. Dec. 245]. The legislature, on December 21st, 1861, passed an act entitled "An act to extend relief to debtors, and to prevent the sacrifice of property at public sales." By the first section it is provided "that it should be unlawful for any officer of this State to serve or execute any mesne or final process of any courts of the State for the collection of money until after the expiration of the first session of the next general assembly of this State," &c. This act was renewed in December, 1863, again in December, 1864;

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*and in December, 1865, it was continued of force until the adjournment of the next regular session. At the May Term of the Appeal Court, 1866, these acts, in so far as they interdicted the service of process, mesne or final, were declared unconstitutional by the Court of Errors, in the case above referred to, in a most elaborate and able opinion delivered by Dunkin, C. J.

In the face of this opinion it cannot be consistently contended that creditors were laboring under any legal disability in the enforcement of their claims by virtue of these acts. It is true for four years they stood unimpeached, and were acquiesced in; but this did not give them the sanction of law, and it is the legal aspect of the interdiction which is now under consideration. Did these acts create a legal disability which prevented the plaintiff from asserting his right? That is the question. There can be no other answer but a negative one. Upon the very first assault, and before they had been sanctioned by time or construed by inferior courts, they fell by an almost unanimous opinion of the highest court in the State, the Court of Errors. In such a case there is is no room for the doctrine of communis error. Nor is there any ground upon which it can be claimed that a legal disability existed.

But even admitting that such disability existed, would that help the appellant under the facts of this case? The following legal propositions have been established in reference to the statute of limitations in numerous decisions, and they may be regarded as firmly settled. 1. That where a party is under a legal disability at the time his right of action accrues, the statute is not put in operation until the disability ceases. For instance, in the cases of infancy, coverture, or where the defendant is absent from the State. Riddlehoover v. Kinard, 1 Hill Eq. 376; Gray v. Givens, 2 Hill Eq. 514. 2. Where the disability intervenes after the right of action accrues, and, consequently, after the currency of the statute has commenced, as a general rule, it is powerless to stop the statute.

These principles are as firmly established and as well settled, perhaps, as any connected with our jurisprudence. See the cases of Fewell v. Collins, 3 Brev. 286; Adamson v. Smith, 2 Mill. Con. R. 269 [12 Am. Dec. 665]; Faysoux v. Prather, 1 N. & M. 296 [9 Am.

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Dec. 691], where Judge *Cheves collects and discusses many authorities. Richardson v. Whitfield, 1 McCord 403. In consequence of this latter principle, whenever it has been deemed proper that the statute of limitations should not operate after its currency has once commenced, an act of the legislature became necessary to arrest it. Hence, in the stay-laws, the statute was suspended by a special provision. This provision of these acts has been declared constitutional. Barry v. Iseman, 14 Rich. 129 [91 Am. Dec. 262]. And it has been enforced in the case of Wardlaw v. Buzzard, 15 Rich. 162 [94 Am. Dec. 148], where the plaintiff was given the benefit of the suspension.

Now, the important question arises, do these principles apply to the presumption of payment growing out of the lapse of time? Judge Wardlaw, in the case of Wadsworthville Poor School v. McCully, 11 Rich. 430, said: "The period of twenty years was originally adopted in analogy to the English statute of limitations." Judge Cheves, in the case of Adamson v. Smith, 2 Mill Con. R. 272 [12 Am. Dec. 665], makes the same suggestion in reference to the statutes. He says: "They are statutes of peace and repose, necessary to the comfort of society. They are found in some shape or other in every country, and under every government. Their adoption is scarcely a matter of choice. If the positive enactments of the legislature do not put a limit to the time within which claims should be made, that limit results from the rules of evidence; and the law presumes that the claim which has been for a great length of time forborne, does not exist. Time, with its long train of inevitable and incidental auxiliaries, destroys the muniments of rights, and the evidences of acquittances, and these statutes and legal presumptions which perpetuate their effect, are indispensable." He concludes, that the balance is infinitely in their favor, and that they should be upheld and sustained, notwithstanding the fact that in special cases injury may be done.

The two, then, originally adopted for the same reasons and standing upon the same grounds, that of repose and peace, should be governed and enforced upon the same general principles, and decisions which have been made in reference to the one should apply with more or less force to the other. Governed by this rule then, and applying the cases above cited in which the statute

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*was involved, to the presumption arising from the lapse of time, it would follow that where the disability existed before the right of action accrued, the currency of the presumption would not begin, but where it intervened afterwards, the presumption would not be arrested unless by special act the presumption had been suspended. It requires a special act to suspend the statute, and why not the presumption.

Now the facts in this case are, that even supposing the stay-laws to have created a legal disability, yet this was a disability after the presumption of payment had commenced. The last payment on the note during the life of the intestate, Gatewood, was in February, 1860. This was made by Dr. Geddings. Gatewood died in February, 1861. This payment of Geddings no doubt continued the liability of Gatewood from its date, and the presumption of payment by lapse of time began then. The first stay-law was enacted on December 21st, 1861, nearly two years after the right of action accrued, and after the currency of the presumption began.

Here, then, the disability, if it be a disability, intervened. Can we, upon authority, or from the analogy of decided cases in reference to the statute, say that the presumption was arrested? This is, at least, doubtful. If this was a case under the statute, we might so conclude; but it would not be by the authority of the decided cases, but upon the ground that the acts creating the stay of mesne and final process, supra, also contained a provision suspending, in such cases, the limitation to bringing action in express words. This provision of these acts would be relied on and enforced, not from common law principles demanding it, but because it was so enacted. The legislature, however, did not see proper to suspend the presumption of payment in such cases, but simply suspended the statute of limitations; and we can find no sufficient authority for this court to go beyond the act. We would feel bound, if the statute was alone involved, to declare it suspended whether the stay-laws were constitutional or not, because the suspension of the statute has been declared constitutional, and it would be our duty to follow this decision. This was done in Wardlaw v. Buzzard, supra. But where the presumption of payment is alone involved, and in the

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absence of *any enactment suspending that presumption in a given case, what other guide have we but the weight of the decisions holding that no intervening disability can avail.

The Wadsworthville Poor School v. McCully was very similar in some of its features to this case. Mr. Wadsworth had devised his lands to certain persons in trust for the establishment and maintenance of a poor school. The legislature, recognizing and appreciating the benevolence of Mr. Wadsworth, and to secure the lands to the purposes intended, by special act suspended the statute of limitations as to all the lands thus devised. In after years, the trustees sued to recover from McCully a portion of the lands then in his possession. McCully relied on the presumption of title arising from twenty years' possession. The plaintiff urged that the statute of limitations had been perpetually suspended, and that this should apply to the presumption of title founded on long possession, as well as to the technical statute of limitations. The court held that the act suspending the statute as to these lands did not affect the presumption of a conveyance from the owner arising from twenty years' possession.

How does this case differ from the one at bar in principle? Here, as in that case, the statute of limitations was suspended; and this suspension would have protected the plaintiff in either case had the statute been the defense interposed by defendant; but the defense has not, in either case, relied on the statute. They have relied upon a different defense altogether, and one not affected by the suspension, to wit, lapse of time. Judge Wardlaw, in delivering the opinion of the court in the Wadsworthville Poor School case, said: "The period of twenty years was originally adopted in analogy to the English statute of limitations; but it has no connection with our statute. It would be a great stretch of special indulgence, given by the suspending act, to say that thereby the plaintiff was not only shielded against the effect of ten years' possession, but was indemnified against all the effect of time and acquiescence." He further said, "But we cannot perceive the influence which the suspending act of 1805 has upon the presumption." Neither can we perceive the in-

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fluence which *the suspending provisions of the stay-laws have upon the presumption in this case.

It is urged by appellant, in reply to this, that while the statute was suspended in favor of Wadsworth, yet that he was under no disability to sue; that he might have brought his action notwithstanding the suspension; that instead of doing this he submitted to the invasion of his rights, and, therefore, had no cause to complain. So too, did the plaintiff in the case at bar. The case of State v. Carew, supra, holds that the stay-laws never had any binding force; they were nullities from the beginning. They were not in the way of the plaintiff to bring her action. No doubt she thought otherwise, but she was mistaken. True, it was a reasonable mistake, and one which, under the circumstances, was entitled to all respect, and it would be gratifying to the court to relieve her if it could be done consistently

with the rules of law, but we do not see how this can be done.

We have examined the cases relied on by the appellant, to wit, Brewton v. Cannon, 1 Bay 482; Higginson v. Air, 1 Desaus. 427, and Dunlop & Co. v. Ball, 2 Cr. 180 [2 L. Ed. 246]. The first case, reported in Bay, was heard in 1795. But few of the facts are given; and the opinion of the court is embraced in less than a dozen lines. It simply stated that while twenty years presumed payment of a bond, yet that the war and the variety of distresses occasioned by a revolution alter the situation of a country greatly; and, therefore, all these circumstances should have been permitted to have gone to the jury to judge whether the presumption was so strong as to warrant them to find for the plaintiffs, overruling Judge Bay, who tried the case, and who held that it was a rule of law that twenty years would presume payment of a bond, and in directing the jury to so find as matter of law. The point of the case must have been this error of law in the ruling of Judge Bay.

In Higginson v. Air, one of the points made was that the deceased partner was bound by the payments and admissions of the surviving partner. In Dunlop & Co. v. Ball, the plaintiff was an alien enemy, and the court held that no presumption could arise during a state of war as between these parties. These cases, then, are not in point. They fail to

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touch the precise *question here. Even admitting them to be authority to the extent claimed by appellant, to wit, that a legal disability, whether it exists before action brought or intervenes afterwards, should be deducted; yet the appellant could claim no relief thereby, because, as we have seen, there was no legal disability in this case. The foundation rock upon which the structure is attempted to be built is absent. State v. Carew, supra.

The ruling of Judge Pressley, that the death of Gatewood severed the obligation, and that, therefore, subsequent payments by Dr. Geddings did not bind the estate of Gatewood, is sustained by the cases of Smith v. Caldwell, 15 Rich. 374, and Smith v. Townsend, 9 Rich. 44.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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20 S. C. 57

LANIER & CO. v. TOLLESON.

(April Term, 1883.)

[1. *Bankruptcy* ⊂⊃51.]

In action against a discharged bankrupt on a new promise to pay a debt contracted before the bankruptcy, a distinct, positive and unequivocal promise to pay must be shown to have been made by defendant after his discharge in bankruptcy; neither partial payment nor expression of an intention to pay amount to such promise.

[Ed. Note.—Cited in Park v. Brooks, 38 S. C. 306, 17 S. E. 22.

For other cases, see Bankruptcy, Cent. Dig. §§ 853–866; Dec. Dig. ⊂⊃51.]

[2. *Bankruptcy* ⊂⊃434.]

Such a promise is sufficient, although only verbal, and made upon a condition, if the condition is shown to have been performed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 855, 860; Dec. Dig. ⊂⊃434.]

[3. *Bankruptcy* ⊂⊃418.]

It is also sufficient, notwithstanding the plaintiffs' written consent to defendant's discharge in bankruptcy; for such discharge did not operate as an extinguishment, payment or release of the debt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 764; Dec. Dig. ⊂⊃418.]

[4. *Appeal and Error* ⊂⊃732.]

An exception not considered because couched in terms too general.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3023; Dec. Dig. ⊂⊃732.]

[5. *New Trial* ⊂⊃40.]

After a verdict responsive to the issues raised by the pleadings, the Circuit judge, on motion for new trial, is not bound to pass upon matters which should have been presented by requests to charge but were not; and his refusal to grant a new trial does not involve any ruling upon the grounds so taken in support of the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 62–66; Dec. Dig. ⊂⊃40.]

Before Wallace, J., Spartanburg, October, 1882.

Action by Lucius L. Lanier & Co. against Alfred Tolleson. The opinion states the case.

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*Mr. J. S. R. Thomson, for appellant.

Mr. Stanyarne Wilson, contra.

September 28th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This action, which was commenced February 10th, 1882, was brought to recover the amount due on two promissory notes, given by defendant to plaintiffs, one payable on June 9th, and the other on July 9th, 1877, prior to the discharge of the defendant in bankruptcy, the plaintiffs relying upon a promise alleged to have been made subsequent to such discharge.

It appeared in evidence that the defendant was adjudged a bankrupt on March 6th, 1878, and was duly discharged on October 23d, 1879, with the written consent of plaintiffs to such discharge. L. L. Lanier, one of the plaintiffs, was introduced as a witness, and testified that after defendant had filed his petition in bankruptcy, he paid him on account of said notes $20, and that after his discharge, to wit, on October 7th, 1881, the defendant paid him the further sum of $5, and at the same time "promised to pay them more the next time that he should see L. L.

Lanier, one of the plaintiffs herein," and that in December, 1881, he promised to pay the balance due on said notes, "as soon as he was able."

The plaintiffs also put in evidence two letters of defendant written while the proceedings in bankruptcy were pending, in one of which, after asking plaintiffs to sign their consent to his discharge, he uses this expression: "I hope to live to see the day when my friends will not regret this act of kindness," and in the other, after asking plaintiffs to forward proof of their debt to the register in bankruptcy, he says: "I hope some day to be a man again, and will not forget my friends." None of this testimony was objected to at the trial, and when the letters were offered in evidence "plaintiffs' counsel stated to the jury that these letters were introduced, not to prove a promise, (as those promises only could bind defendant that were made after his discharge in bankruptcy October, 1879,) but only to show that

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the *defendant had always intended to pay debts of this kind, and thus corroborate the testimony of Lanier." The tax returns of defendant, dated June 30th, 1882, were then introduced, showing personal property to the amount of $380, and real estate assessed at $2,500.

Defendant put in evidence his discharge in bankruptcy, and testified that he had never made the promise testified to by Lanier, and had not paid him the $5, as alleged, on the said notes; that he was auditor of the county for several years prior to 1876, and that his family consisted of himself, his wife and grandson, and that defendant's health was bad. M. A. Newland and James R. Tolleson were also offered as witnesses to corroborate defendant as to his version of the conversation between him and Lanier, in which the latter alleged the promise relied upon was made, and as to the alleged payment of the $5 to Lanier; but he offered no testimony as to his inability to pay the note at the time the action was commenced.

At the close of the testimony the defendant's counsel requested the Circuit judge to charge the jury "that the letters of Tolleson, put in testimony, do not constitute a new promise to pay the notes," to which the judge replied "that he considered that a question of fact for the jury, having told them what sort of a promise would bind defendant, to wit, that it must be a distinct, positive and unequivocal promise to pay, made after his discharge in bankruptcy, and that neither partial payment nor expression of an intention to pay, did amount to such promise. His Honor then turned to plaintiffs' counsel, in the presence of the jury, and asked him, did he claim that the letters constituted a promise to pay, and he replied that he did not. His Honor further charged that the question whether or not defendant made the promise to plaintiffs alleged in the complaint must be determined by them from all the testimony. That this question of fact must be determined from the testimony; that if the jury believed the testimony for the defense, the verdict must be in his favor, but if they believed the testimony for the plaintiffs they should find for the plaintiffs." In response to an inquiry from the court before the jury retired, defendant's counsel stated that he did not desire to make any other requests to charge.

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*The jury having found for the plaintiffs, the defendant moved for a new trial on the grounds "that the verdict was contrary to both law and the testimony; that on a recovery on a new promise it was essential for plaintiffs to show that the promisor was more able to pay at time of suit than when the promise was made; that such a promise to pay was to be governed or controlled or modified by the condition and wants of the defendant and his family, and that a promise to pay when able was not such a promise to pay as would support an action like this." The motion for a new trial was refused, the judge ruling "that if the testimony for the plaintiffs was believed by the jury, it was sufficient to sustain their verdict. He further ruled that the testimony whether or not defendant was able to pay had gone to the jury; that they were the proper judges of the matter, and he was not disposed to disturb their finding. He remarked, by way of illustration, in refusing the motion, that he thought a promise to pay when able resembled a promise of an administrator to pay when in funds, but he did not take this as a reason for refusing the motion on this ground. In refusing the motion he also stated inferentially as much as is contained in paragraphs V. and VII. of the grounds of appeal, infra, inasmuch as he was requested, by such motion, to grant a new trial for the reasons contained in them, and he refused to do so, saying that the jury were the proper judges of the matter whether defendant was able to pay, and he was not disposed to disturb their finding. The matters contained in paragraphs IV., V., VI. and VII. of the grounds of appeal were not brought to the attention of his Honor by defendant's counsel, by request to charge or otherwise, till by this motion for a new trial."

The defendant appeals upon various grounds which will hereinafter be considered in detail. We are unable to perceive wherein the Circuit judge has committed any error of law, and that is all that we are at liberty to inquire into. The whole of his charge, we assume, is not before us, for in that portion of it which is stated in the "Case," nothing is said as to the fact that the promise relied upon was a conditional promise, and that in such a case it would be necessary to prove the allegation made in

the complaint that the condition had been
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fulfilled, and that *defendant, at the time the action was commenced, was able to pay. But we can scarcely suppose that the Circuit judge omitted so to instruct the jury, or if he had, that the counsel for defendant would have failed to ask for such instruction; and it does not appear that there was any such request to charge. The jury were told, and properly told, that a promise which would be sufficient to bind the defendant "must be a distinct, positive and unequivocal promise to pay, made after his discharge in bankruptcy; and that neither partial payment nor expression of an intention to pay did amount to such promise." And then the jury were left to pass upon the question of fact. We do not see what more could be expected.

But we will proceed to consider the several grounds of appeal in which error is imputed to the Circuit judge. "I. In refusing to charge the jury that the letters of Tolleson, put in testimony, do not constitute a new promise to pay the claim." We think it clear, from the statement which we have made—copied largely from the "Case" as prepared for argument here—that this ground has been taken under a misapprehension of the charge. For it seems to us, from that statement, that the jury were not only so charged, in effect, but that the proposition contended for was emphatically impressed upon their minds by the distinct statement, twice made to them by the plaintiffs' counsel, that the letters were not offered in evidence for the purpose of proving a new promise, but simply for the purpose of corroborating the testimony of Lanier. We do not see, therefore, how the jury could have been misled, for when they were told by the Circuit judge that a promise to be binding must have been made after the discharge in bankruptcy, and when the letters showed on their face that they were written before such discharge, the jury must necessarily have known that the letters did not constitute such a promise as would bind the defendant, especially when the plaintiffs' counsel had twice, in their presence, distinctly disavowed offering the letters with any such purpose.

"II. In charging that if a verbal promise, such as is alleged in the complaint, was proved, the plaintiffs were entitled to recover." We do not exactly perceive the point of this exception. If the allegations of the com-
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plaint were proved, then it *would appear that the defendant, after his discharge in bankruptcy, had made a distinct and positive promise to pay, upon a certain condition which had been fulfilled; and if so, we see no reason why the plaintiffs could not recover. If, however, the point of the exception is that the promise was merely verbal and not in writing, then we know of no authority here requiring such a promise to be in writing. It is only by special statutory enactment, and that, too, of recent date, that a promise to take a case out of the statute of limitations must be in writing; but we know of no such statute requiring a promise to pay a debt, after the debtor has been discharged in bankruptcy, to be made in writing. But if it is meant that the promise alleged in the complaint was not sufficient, because it was conditional, we are unable to see any grounds for such a position. A conditional promise is, and ought to be, as valid and binding as any other when the performance of the condition has been proved. 1 Pars. Cont. 434; Brown v. Joyner, 1 Rich. 211; Hayes v. Clinkscales, 9 S. C. 441. And if the point of the exception is that the promise in this case cannot be enforced, because it is alleged in the complaint that the plaintiffs consented to defendant's discharge in bankruptcy, it is still without foundation. The reason why a promise to pay a debt voluntarily released cannot be enforced is that there is no consideration for such a promise. Hence, if the debt had been released in this case, there would have been no consideration for the promise relied upon. But a consent to a debtor's discharge in bankruptcy is a very different thing from a release of the debt. Such a discharge, like a successful plea of the statute of limitations, operates only as a bar to an action for its recovery, but does not operate as a payment, release or extinguishment of the debt. Wilson v. Kelly, 16 S. C. 216. Hence, the fact that the plaintiffs consented to defendant's discharge in bankruptcy is of no consequence here. The debt still remained unpaid, and the moral obligation to pay it constituted a sufficient consideration to support the promise relied upon.

"III. In refusing a new trial." It has been so repeatedly decided that an exception,
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couched in such general terms as this, *cannot be considered here, that we need not say more upon the subject.

"IV. In ruling, upon the motion for a new trial, that a promise to pay, when able, had the same effect as a promise of an administrator to pay when in funds." We do not understand that the Circuit judge so ruled, or, in fact, made any ruling at all upon this subject. All that he said was said by way of illustration; and it is expressly stated that he did not take this as a ground for refusing the motion. Indeed, what he really did say was that "a promise to pay when able, resembled a promise of an administrator to pay when in funds," and not, as alleged in this ground of appeal, that such a promise "had the same effect as a promise of an administrator to pay when in funds." The two promises may resemble each other, and, in fact, do, both being conditional promises, and yet they may, possibly, not have the same effect.

"V. In ruling that it was not essential to show, on a promise to pay when able, that

the promisor was more able to pay at the time of suit than when the promise was made. VI. In ruling that the testimony of the plaintiffs, if believed by the jury, was sufficient to sustain the verdict. VII. In ruling that a promise to pay, when able, was not to be governed or controlled or modified by the condition and wants of the defendant and his family." These three grounds of appeal will be considered together. They seem to have been taken under a misapprehension of the judge's ruling upon the motion for a new trial. It is true these were grounds urged in support of the motion for a new trial which was overruled, but they presented points which should have been, and were not, made by requests to charge. The Circuit judge, in rendering his decision upon a motion for new trial, did not undertake to pass upon them as separate and distinct propositions, as he need not have done. If they had been presented by requests to charge and had been refused, then, possibly, this appeal would have had better support. But after the jury have rendered their verdict, we are bound to assume that they were satisfied from the evidence that the promise had been made as alleged, and that the condition upon which it was made had been fulfilled. There having been no error of law

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in *the charge of the Circuit judge, as we have seen, all that he was called upon, by the motion for a new trial, to do, was to say whether the evidence adduced was sufficient to warrant the verdict. This he did, and from his decision, as to this point, there is no appeal.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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20 S. C. 64

Ex parte GLENN.

(April Term, 1883.)

[1. *Descent and Distribution* ⇐102.]
Where a parent died after the abolition of slavery, slaves previously given to a child cannot, under our statute, be charged as an advancement to such child in the settlement of the parent's estate. Hughey v. Eichelberger, 11 S. C. 51, approved.

[Ed. Note.—Cited in Wilson v. Kelly, 21 S. C. 535, 537.

For other cases, see Descent and Distribution, Cent. Dig. § 412; Dec. Dig. ⇐102.]

[2. *Executors and Administrators* ⇐86.]
Where an administrator received for the estate $500 in gold, then worth a premium of forty per cent., and had, in part, disbursed this gold at such premium, and he fails to show that he retained the balance for estate purposes until it had depreciated, he should be charged with the amount received and also with a premium of forty per cent.

[Ed. Note.—Cited in Burnside v. Robertson, 28 S. C. 587, 6 S. E. 843.

For other cases, see Executors and Administrators, Cent. Dig. § 376; Dec. Dig. ⇐86.]

[3. *Descent and Distribution* ⇐113.]
Interest cannot be charged on advancements until the death of the intestate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 422; Dec. Dig. ⇐113.]

[4. *Descent and Distribution* ⇐99.]
A father was surety on a note for his two sons A. and B. The payee died and this father administered, and received a payment from A. on the note, and then destroyed the note, having charged himself with its amount in his administration accounts. Afterwards the father died intestate. *Held*, that the amount of principal and interest due at the time of the payment by A. was an advancement to the two sons, the half due by A. being reduced by the amount of such payment.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 409; Dec. Dig. ⇐99.]

[5. *Executors and Administrators* ⇐104.]
Where the facts do not show that an administrator retained funds of the estate in his hands, and was warranted in so retaining them to meet the demands and exigencies of the estate, he should be charged with interest on his annual balances according to the principles declared in Baker v. Lafitte, 4 Rich. Eq. 392.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 423–432; Dec. Dig. ⇐104.]

[6. *Descent and Distribution* ⇐101.]
Where a father gave to his daughter a gold watch to make her equal with his advancements in negro slaves to another of his children, and, after emancipation, died intestate, the watch must be charged as an advancement to the daughter.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 411½; Dec. Dig. ⇐101.]

Before Pressley, J., Newberry, February, 1882.

This was a petition by George W. Glenn and John E. Glenn, as administrators of the estate of G. W. Glenn, Sr., deceased, for

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*final settlement. The decree of the Probate Court was as follows:

1. The abolition of slavery took place before the death of Geo. W. Glenn, and slaves given by him cannot be regarded as advancements. By the statute the value of the advancement is to be estimated at the death of the ancestor, relation being had to its condition at the time of the gift. This point is decided in the case of Hughey v. Eichelberger, 11 S. C. 51, where the Supreme Court holds that "we do not see how a slave can be regarded as an advancement when the intestate died after the abolition of slavery, when slaves lost their attributes as property." It was contended by counsel for G. W. Glenn, administrator, that in that case the donor reserved title in himself, and had a life interest in the slaves, and that the principle does not apply in this case. Regardless of the contingent titles held by the donor in that case, it was there decided that the slaves were not advancements, and so I hold in this case.

2. The question of interest in final accounts has been much discussed. I have reviewed

the authorities submitted by both sides. The true mode of computing interest is laid down in the case of Baker v. Lafitte, 4 Rich. Eq. 392.

3. The cash rents for the year 1867 are estimated at $500 in gold, and it is admitted that the premium on gold was 40 per cent. I think that in the final account the administrator should be held accountable for the amount of $700, being the value of gold at that time in United States treasury notes.

4. It is in evidence that G. W. Glenn, Jr., and J. E. Glenn borrowed $5,000 from Col. John Glenn, and Dr. G. W. Glenn, Sr., was their surety. It seems that John E. Glenn owed G. W. Glenn, Jr., a note of $1,800, with interest, amounting to $2,300, for which G. W. Glenn received, in 1865, a credit on the note of $5,000, leaving a balance of $2,700 still due on said note; that interest was paid on the note of Col. John Glenn up to the death of the latter. There is, then, now due on the note of $5,000, interest from the death of Col. John Glenn up to 1865, when a credit of $2,300 should be placed upon the same, and the balance to bear interest to May 13th,

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1881. The note is for *money borrowed from Col. John Glenn, and assured by Dr. G. W. Glenn, Sr., and the evidence shows that it was considered by Dr. G. W. Glenn, Sr., to be an advancement to his sons G. W. and J. E. I think the proper way to estimate the amount which each should be liable for, is to ascertain the balance due at the date of the credit, and divide that amount equally, and allow the amount of advancement made to G. W., Jr., to be credited by $2,300, and then compute the interest on the balance due by each one to July 1st, 1881.

5. The note of $1,130 due by R. C. Gilliam is founded on the basis of slavery still existing, and the consideration is for negroes advanced, and, on the principle heretofore announced, it is not an advancement.

6. The gold watch was added to $1,000 note given to J. H. Mims to make his distributive share equal to R. C. Gilliam, the which consideration is based on negroes as an advancement, and therefore cannot be regarded as an advancement. Although the watch of itself did not partake of the same character, yet, taken in connection with the whole transaction, it, too, is tinged with the idea as held in Hughes v. Eichelberger, and under all these circumstances cannot be considered an advancement.

The note of $1,000 given by J. H. Mims stands in the same category as the $1,130 note of R. C. Gilliam, and for the same reasons cannot be regarded as an advancement.

It is therefore ordered that the distribution of the assets of the estate of Dr. Geo. W. Glenn, deceased, in the hands of the administrator be made in accordance with this decree, after the costs and disbursements of this action, and all advancements which were made as indicated herein, and such payments as may have been made by the administrator since the death of George W. Glenn, Sr., shall have been deducted.

From this decree an appeal was taken to the Circuit Court. The Circuit decree is sufficiently stated in the opinion of this court, as are also the exceptions.

Messrs. Jones & Jones and George Johnstone, for appellants.

Messrs. J. T. Barron and W. H. Lyles, contra.

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*September 28th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Dr. George W. Glenn, Sr., late of Newberry county, died in 1866. The appellants, his two sons, administered upon his estate. In June, 1870, they filed a petition in the Probate Court for a final settlement, but this was delayed, as it is alleged, by suits against the estate, especially the suit of one Harvey Terry against the stockholderss of the Commercial Bank, which suit largely involved the estate. This suit, however, having terminated in July, 1881, another publication was made, and the settlement proceeded to a decree by the Probate Court. From this decree an appeal was taken to the Circuit Court, Judge Pressley presiding, and from Judge Pressley's decree, the matter is now before us on appeal.

The questions presented are: First. Whether certain of the distributees should account, as for advancements, for certain slaves given off to them by their father, the intestate, during his life, to wit, in 1860; the said intestate having died after emancipation, and some of the distributees having sold the slaves received, before emancipation. Second. G. W. Glenn, Jr., one of the appellants, under an order of court, rented the real estate of his father in 1867 at $500 in gold, and had charged himself in December, 1867, for said rent, $500, $166 of which he had paid out to Mary A. Glenn, one of the distributees. Gold at that time was at 40 per cent. premium, and the question is, Should he be charged with this premium, or simply for gold? Third. The appellants, some time before the death of their father, to wit, in 1859, had borrowed of their uncle, one John Glenn, the sum of $5,000, for which they gave their note, with their father, the intestate, as surety. In 1859 John Glenn died, and G. W. Glenn, Sr., the intestate, administered on his estate and became possessed of this note. In 1863, G. W. Glenn, Jr., paid on this note about $2,300. After this payment, and a short time before his death, G. W. Glenn, Sr., destroyed this note, having charged himself with it in the estate of his intestate, John Glenn, and the question as to this note is, whether the appellants should account for the same in full, debt and interest, or whether it should be regarded as an advancement to them by their father,

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*and, if so, at what time, or rather to what time, should interest on the note be added in ascertaining the amount of the advancement, and, also, in what proportion should each appellant account? Fourth. Should the appellants be charged with interest on the funds of the estate in their hands during the delayed settlement? Fifth. Should a gold watch, valued at $130, given to one of the distributees, Mrs. Mims, be charged as an advancement with the negroes bought by her husband?

As to these questions, Judge Pressley held: 1. Under the case of Hughey v. Eichelberger, 11 S. C. 51, that the negroes could not be regarded as advancements. 2. That the $5,000 note destroyed by the intestate, should be charged as an advancement to the appellants without interest until after the death of the intestate. 3. That G. W. Glenn, Jr., should be charged with 40 per cent. premium on the $500 rental of the land of his father. 4. That in the absence of all proof that appellants had kept the funds idle and uninvested, pending the litigation against them, they are liable for interest on their annual balances, and the interest should be calculated according to the rule laid down in Baker v. Lafitte, 4 Rich. Eq. 392. He made no decree as to the gold watch.

The appeal involves a review of these questions, and the rulings thereon by the Circuit judge. The decree adjudged other matters of interest to the parties, but the appeal embraces only the questions above stated. As to the first question, we regard the case of Hughey v. Eichelberger, supra, as conclusive and controlling. It was there held distinctly, Justice McIver delivering the opinion of the court, that where the parent had died after the abolition of slavery, slaves previously given off to a child, could not, under our statute, be charged as an advancement in the settlement of the estate of the father, the question as to the services of such slaves while in the child's possession being reserved, as the point was not raised in the case. Nor is that point raised here. It is true that, in the case of Hughey v. Eichelberger, the court was somewhat influenced by the ground taken by the appellant's counsel, to wit, that the father there had reserved a life-estate in the negroes given to the child; but the main ground relied upon by the court

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was the construction of *the act on the subject of advancements, and upon this Justice McIver said: "We do not see how a slave can be regarded as an advancement when the intestate died after abolition of slavery, whereby slaves lost their attributes as property. It is manifestly impossible to ascertain the value of such an advancement, if advancement it be called. By our act of 1791, corresponding in terms with section 7, ch. LXXXV. Gen. Stat. 440, the value of the advancement is to be estimated at the death of the ancestor, relation being had to its condition at the time of gift. McCaw v. Blewit, 2 McCord Eq. 104. * * * Now, in this case, the intestate having died after the slaves were emancipated, it is clearly impossible to ascertain the value of these slaves by the rule established by the statute, and we are not at liberty to invent any other." This reasoning is unanswerable, and applies to the case now before the court as strongly as it did to the case in which it was used. The ruling of the court below is sustained as to this point.

As to the second question, Judge Pressley says in his decree, that "for the year 1867 George Glenn, administrator, rented intestate's plantation for $500, payable in gold, and at the end of the year charged himself with $500, then received for such rent. About the same time he paid one of the distributees $166 in gold and charged in addition 40 per cent. premium on said payment. It is very clear that the remainder of said gold in his hands, as administrator, is chargeable with a like premium in the absence of all proof by him that he continued to hold said gold for estate purposes, until it depreciated in comparison with currency. The Judge of Probate has so decided, and I sustain him on that point."

There is nothing objectionable in this. The gold which the administrator received was the property of the estate. It was received by him for the estate; and at the time it was worth forty per cent. more than its nominal value, and the administrator should account for it at that value, unless it was held by him for estate purposes until it depreciated without fault on his part. If it was so held, and had depreciated, he above all others was cognizant of the fact, and it was incumbent on him to make proof thereof, otherwise its

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original value will be presumed *against him. This he seems to have understood, as he obtained credit for $166 paid to one of the distributees at the premium of forty per cent. It would not be just to charge him simply with the $500, and then credit him with its disbursement in whole or in part at a premium of forty per cent.

Third. In Rees v. Rees, 11 Rich. Eq. 108, where a mother held a bond against her son, given for eleven slaves, which, previous to her death, he had purchased from her, and which bond the mother destroyed, it was held as an advancement of so much money, and the son was required to account for it as such. This case is in point as to the $5,000 note held by the intestate on the appellants, and determines the question as to the fact whether this note should be regarded as an advancement. It must be so regarded, and being so regarded, it must be governed by the law applicable to advancements generally

on the subject of interest. No interest can be charged until the death of the intestate. This is as to advancements generally, and it must apply here.

But the main questions are, When was the advancement made? What was its amount? and How should it be proportioned between the two sons? The note seems to have been destroyed by G. W. Glenn, Sr., a short time before his death, which took place in May, 1866. A payment of $2,300 had been made by G. W. Glenn, Jr., some time previous to the death of the intestate; but at what precise time it does not appear in the briefs. At one place it is stated in 1863, and at another in 1865. We suppose it was really made in 1865, as it is so stated in the decree of the Probate judge. At the time of this payment, the intestate had not determined to destroy the note. He still held it and received a large payment upon it from one of the makers. He must have concluded, however, within a short time after this payment, to destroy it—as he died early in the next year—and the evidence is that he destroyed it a short time before his death; but up to the time it was destroyed, it was a subsisting obligation against the two sons, principal and interest, and the amount then due must be regarded as the advancement. Taking the payment to have been made in 1865, the proper way to estimate the advancement would be to compute the interest up to the payment in 1865, then divide the amount be-

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tween the two, charging each *with one-half at the death of the intestate as an advancement, the advancement of G. W. Glenn being diminished by a credit of the $2,300 paid by him on the note, and it is so adjudged.

Fourth. There is no error in the ruling of the Circuit judge as to the interest to be charged to the appellants, administrators, on the funds of the estate in their hands. The judge said: "In the absence of all proof that appellants kept the funds in hand uninvested and unused by them to meet pending litigation against them, they are liable for interest on their annual balances, &c., &c., the calculation to be made according to the rule stated in Baker v. Lafitte, 4 Rich. Eq. 392." Doubtless there are many cases where the rule would be deflected, and where the administrator or executor should be excused from interest altogether; but this should be upon facts warranting the holding of the funds idle to meet the demands and exigencies of the estate, and developing the fact that the funds were actually so held idle.

Fifth. We can see no reason why Mrs. Mims should not be charged with $130 as an advancement, the value of the gold watch received by her.

It is the judgment of the court that the decree below be modified in accordance with the principles hereinabove announced; and it is ordered that this judgment be certified to the Probate Court for Newberry county, so that the settlement may be made in conformity thereto.

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20 S. C. 71

LEROY v. CITY COUNCIL OF CHARLESTON.

(April Term, 1883.)

[1. *Wills* ⇐634.]

A lot of land was devised to remain in the hands of the executors until they should settle and assure the same to trustees to receive the rents, &c., and pay the same to the sole and separate use of E. during her life, and then to transfer the same to such children of E., or the issue of such deceased child as E. should leave surviving her, the issue of deceased children to represent their parents; and if she should have neither children, nor their issue living at her death, then to such person or persons as by the laws of this State shall be entitled to distribution of her estate. *Held*, that E. had a life-interest, and that the remainder over was contingent and not vested.

[Ed. Note.—Cited in Moseley v. Hankinson, 22 S. C. 328.

For other cases, see Wills, Cent. Dig. § 1496; Dec. Dig. ⇐634.]

[2. *Trusts* ⇐134.]

The executors having accordingly conveyed this land to a trustee in trust for the uses and purposes directed by the will, the legal title was in the trustee, and after his death, in his heir-at-law.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 177; Dec. Dig. ⇐134.]

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[3. *Executors and Administrators* ⇐335.]

*This land having been sold under proceedings to which E. and her children were parties, but not the living grandchildren of E., nor the heir-at-law of the trustee, *held*, on rule to show cause, that the purchaser was not bound to comply.

[Ed. Note.—Cited in Moseley v. Hankinson, 22 S. C. 329; De Leon v. Barrett, 22 S. C. 413, 423; Huckabee v. Newton, 23 S. C. 295; Moore v. Scott, 66 S. C. 297, 44 S. E. 737.

For other cases, see Executors and Administrators, Cent. Dig. § 1381; Dec. Dig. ⇐335.]

[This case is also cited in Faber v. Faber, 76 S. C. 161, 56 S. E. 677, without specific application.]

Before Cothran, J., Charleston, April, 1883.

The opinion fully states the case.

Messrs. Hayne & Ficken, for appellant.

Mr. J. Barrett Cohen, contra.

October 2d, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. At the sale of certain real estate, situated in the city of Charleston, under a consent decree pronounced by Judge Fraser in the above-entitled cause, Peter Tecklenburg became the purchaser at the price of $1,280, who failing to comply, a rule to show cause was issued against him by Judge Cothran, presiding, on March 9th, 1883. To this rule the said Tecklenburg made return, admitting that he had

refused to comply, and gave as a reason, that he was advised by counsel that the title offered was not good and marketable. In support of this answer he submitted the following statements: "1. That the legal estate to said land is vested in the trustee, Francis Dupont, his successor or his heir-at-law; and neither the said Francis Dupont, or, if he be dead, his heir-at-law, nor any substituted trustee is a party to the proceeding under which the sale was made. 2. That there are in esse remaindermen, the grandchildren of the said Emma Leroy, who are not parties to the said proceedings. 3. That the purpose of said proceeding is not to effect a change of investment, but to destroy the trust estate, and scatter the corpus thereof. 4. That it is sought to apply one-half of the proceeds of sale in liquidation of a large arrearage of taxes, which taxes, under the law, are exclusively the debt of the life-tenant, and he prayed that the rule be dismissed with costs.

On hearing the rule and answer, Judge

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Cothran ordered that *it be made absolute; and further, that the proceeds of the sale, after payment of costs and expenses, be retained, subject to the further order of the court modifying the previous order of sale to that extent. Tecklenburg has appealed, assigning error, substantially, on the grounds stated in his answer to the rule.

The main question involved is, whether Tecklenburg could obtain a complete title under his purchase; whether a deed from the officer of the court, under the circumstances, could convey such a title. This is denied by the respondent to the rule, because, as he alleges, all persons interested in the land were not made parties to the proceeding under which it was sold. If this position is correct, the conclusion urged by the appellant would follow, because it is well settled, that to divest one of his interest in property of any kind by the judgment of a court, he must be a party to the proceeding, either in person or by a representative, otherwise the judgment is a nullity as to him. The precise point to be considered, then, is, whether all necessary parties were before the court when this consent decree was rendered by Judge Fraser.

The land originally belonged to Mrs. Heloise Boudo, who died in 1837, leaving of force her last will and testament, under which the said land, with the balance of her estate, was devised and bequeathed to the parties therein named upon certain terms and conditions. To ascertain the rights of the parties it will be necessary to consider the provisions of this will, and the codicil thereto. One Charles Edmondston, was the executor, and the testatrix directed that he should duly settle and assure to a competent trustee one moiety of her estate to certain uses, that is to say, in trust to receive the rents, issues, income and profits thereof during the natural lives of Narcisse Leroy and Emma Leroy, his wife, (a daughter of testatrix,) and from time to time to pay the same to the said Emma and her assigns, for her sole and separate use, &c. &c. So that the said Emma Leroy shall not sell, mortgage, charge, or otherwise dispose of the same in the way of anticipation. And if the said Emma Leroy should survive her husband, then in trust to convey the said moiety to the said Emma, her heirs and assigns forever.

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*By a codicil, the testatrix afterwards changed somewhat the terms of this bequest as follows, to wit: She directed that the said one moiety should be settled and assured to the sole and separate use of the said Emma in the manner and upon the conditions mentioned in her will, but subject to the alterations made in the codicil. She then revokes so much of her will as directed the moiety to go to Emma absolutely, in the event that she survived her husband, and directs that said moiety shall be settled to the sole and separate use of the said Emma, notwithstanding her coverture, free from the direction, control or interference, debts or contracts of her present or any future husband, so that she shall not sell, mortgage, charge or otherwise dispose of her interest in the same by anticipation. And that the said interest shall be for the term of her natural life, and no longer. And after the death of the said Emma, then said moiety to be equally divided among such children as she shall leave surviving her, the issue of deceased children to represent their parents, and take shares accordingly. And if the said Emma should leave no children nor their issue living at her death, then said moiety was to go to such persons then living as by the laws of the State shall at that time be entitled to distribution thereof.

In April, 1841, Charles Edmondston, who had qualified as executor, conveyed by deed, reciting therein the will and codicil, to one Francis Dupont, one moiety of the lot of land now in controversy, to have and to hold the same unto him, his heirs and assigns forever, in trust nevertheless to have and to hold the same and to take and receive the rents, issues and profits of the same and every part thereof, &c., to the sole use of the said Emma, notwithstanding her coverture, free from the direction, control or debts of her husband, &c. And from and after her death, then the said moiety shall be equally divided among such children of the said Emma, or the issue of such deceased children, as she shall leave surviving her, the issue of such deceased children to represent their parents, &c. And if the said Emma shall leave neither children nor their issue living at her death, then to such person or persons as by the laws of the State shall then be entitled to distribution of her estate.

F. Dupont accepted the trust. He has,

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however, been dead *for some years. Narcisse Leroy, the husband of Emma, is also dead. The plaintiff, Emma Leroy, is the Emma mentioned in the will, and her children are all parties plaintiff with her. Some of these children have children, none of whom are parties. No trustee has been substituted for Dupont, nor has his heir-at-law been made a party. It is admitted that the lot is vacant and unproductive. It is claimed that it has been forfeited for non-payment of taxes, and the city council of Charleston has titles from the sinking fund commission. The plaintiff and the city council obtained a consent decree that the land should be sold and the proceeds divided equally. This last provision, as it has been stated, was modified by Judge Cothran's order, so that the proceeds of the sale should be retained in court subject to its further order. The position of the appellant is, that the heir of the deceased trustee and the grandchildren of the life-tenant, Emma, should have been made parties, which not having been done, a marketable title cannot be made to him. This raises the question as to the character of the interests of the different parties under the will, the codicil and the trust deed to Dupont.

There can be no doubt that the interest of Emma is a life-estate in equity. But what is the estate of the remaindermen? Is this a vested, or contingent remainder? The plaintiffs, under the authority of Seabrook v. Gregg, 2 S. C. 68; Rivers v. Fripp, 4 Rich. Eq. 276; Williamson v. Berry, 8 How. 495 [12 L. Ed. 1170], and other cases of like character, contend that the children of Emma have a vested remainder, with a condition subsequent attached, by which this remainder may be defeated, it is true, but in advance of this defeat, no other persons except those before the court have an appreciable interest, and no others, therefore, need be made parties. Is this construction tenable?

It is true that the inclination of the courts is against contingent remainders, for good and sufficient reasons, and, in doubtful cases, the balance will always be turned against a construction which leads to their establishment; but where such remainders have been clearly created, founded upon the well-settled rules of law, they must be sustained. Persons owning property have the right to dispose of their acquisition as to them shall seem proper, and so long as they keep within

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the rules of law, *no court is invested with power to defeat this right. The general definition of a contingent remainder as found in Blackstone (and no better can be given) is, that it is "an estate in remainder limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event." 2 Bl. Com. 169. The limitation here is "to such children of Emma Leroy, or the issue of such deceased children as she should leave surviving her, the issue of deceased children to represent their parents, and if she shall have neither children nor their issue living at her death, then to such person or persons as by the laws of this State shall be entitled to distribution of her estate."

It will be observed that the limitation is not to the children generally as a class, but to such children as shall survive her. This language is peculiar and seems significant. The event which is to determine the beneficiary, is survivorship. This is in the future, and is certainly an uncertain and dubious event. It may never take place, either as to a child of Emma, or as to the issue of a deceased child. Emma may outlive all of her descendants, children and grandchildren. In such case, among these there would be no remaindermen, and no such estate could ever vest. But even should this event happen, until it does take place, it is quite as uncertain who of the children, or of their issue, will be embraced among the survivors, as is the happening of the event itself. Thus the limitation is both to a dubious and uncertain person and upon an uncertain event. See the cases of Dehon v. Redfern, Dud. Eq. 118, and Faber v. Police, 10 S. C. 385.

In the first, Chancellor Harper, in speaking of remainders like this, used the following language: "They were to the children who should be living at the death of the daughters, respectively, or to the children of those who had died leaving children. Until the death of the daughters it must remain perfectly uncertain who will be the persons to take, and this is the definition of one species of contingent remainders." In the latter case, Mr. Justice McIver delivered the opinion of the court. In that case the language of the will was substantially the same as in this. The court held the remainder contin-

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gent. But the case is here *referred to especially on account of the able and conclusive reasoning of Justice McIver on the questions now before us.

The cases relied on by the respondent, Rivers v. Fripp, supra, and others, do not apply. In these cases, generally, there was an event fixed, which was to happen, or not happen, at a time beyond the termination of the life-estate, to wit, the majority of the remaindermen, and upon which the absolute character of the remainder was to depend. In such cases the courts have held that this was a condition subsequent, which might defeat the remainder already vested, and not a condition precedent, upon which it was to attach. The courts presumed this to be the intention of the donor, otherwise there would be a period, to wit, the time between the death of the life-tenant and the majority of the remaindermen, when no one would be entitled to the estate.

It is true that all of the cases relied on by the respondent are not characterized by this feature, and especially in the case of Williamson v. Berry, supra, is it absent. It is difficult to reconcile that case with the law, as seems to be settled in other cases; and it is to be regretted that the learned court pronouncing the judgment in that case did not go deeper into this question. It will be seen, however, upon an examination of that case, that while the court expressed a very decided opinion upon the point involved here, yet that question was not raised in the grounds of appeal which carried the case up, and, therefore, was not really before the court for adjudication. But be that as it may, the weight of authority in our State is the other way, and in obedience to these we must hold, that the remainder here is a contingent remainder to such of the children of Emma Leroy as may survive her, and to the surviving issue of such as may be deceased at her death, the said issue taking the share which their parent would have taken in case of surviving.

It is further the opinion of the court, that the legal title of the property in question was in the trustee, Dupont, during his life, which, at his death, descended to his heir-at-law. This follows from the terms of the trust deed, and it must be so held unless the estate was executed by the statute. It is a familiar doctrine that the statute never executes a use while there is anything for the trustee to do. Here there were active and responsible

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duties *devolving upon the trustee. He was to receive and pay over the rents and profits, and he was to preserve the trust, so that the life-tenant could in no event sell, mortgage, charge or otherwise dispose of her interest by anticipation.

Now the questions arise, Should the grandchildren of Emma Leroy, known to be alive, have been made parties, as well as her children, and should the heir-at-law of the trustee, Dupont, have been before the court? In Bofil v. Fisher, 3 Rich. Eq. 1 [55 Am. Dec. 627], the court said: "That the Court of Equity has the power to sell the estates of infants, remaindermen, whether vested or contingent, when they are parties before the court, is unquestionable." It further said: "The court has also power to bar by its decree for sale of property, the interest of unborn contingent remaindermen, and of contingent remaindermen, residing abroad, whose names and places of residence are unknown, and who, of course, cannot be made parties before the court." See, also, the case of Van Lew v. Parr, 2 Rich. Eq. 331. This is in accordance with the general rule in equity, that all who are materially interested in the subject of the suit, however numerous, that can be, ought to be made parties in the shape of either plaintiffs or defendants. Trescot v. Smyth, 1 McCord Eq. 301.

We think that the grandchildren in this case, at least those whose names and residences are known, should have been made parties. We think, too, that the proceeding was defective in the fact that the heir-at-law of the trustee was not summoned. The fee of this land was in him during his life, and at his death it descended to his heir-at-law. Without their presence, or the presence of a substituted trustee in whom the fee could vest, it is not in court, nor has it any representative here. Nor can it under the circumstances be conveyed to the purchaser. The proposed title to the appellant is then defective, wanting a material link—Story Eq. Pl., §§ 207–211; Hopkins v. Mazyck, Rich. Eq. Cas. 263—and he is not bound to accept it. The other questions in the case, as to the destruction of the trust, and who should be responsible for the taxes, need not be considered.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the rule be discharged.

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20 S. C. *79

*SULLIVAN v. SULLIVAN MANUFACTURING COMPANY.

(April Term, 1883.)

[1. *Corporations* ⇐338.]

The liability of the officers personally for debts of a corporation, in case of their violation of sections 16, 17 and 28 of the general incorporation act of 1869, (General Statutes of 1872, Chap. LXIV.,) under which the company was chartered, arises by contract under the provisions of their charter. Sullivan v. Sullivan Manufacturing Company, 14 S. C. 494.

[Ed. Note.—Cited in Bird & Co. v. Calvert, 22 S. C. 298; Hall & Co. v. Klinck, 25 S. C. 352, 60 Am. Rep. 505.

For other cases, see Corporations, Cent. Dig. §§ 1460–1466; Dec. Dig. ⇐338.]

[2. *Corporations* ⇐338.]

The certificates in this case held not to have been made and recorded in compliance with the requirements of sections 16, 17 and 28 of the act of 1869, and, therefore, under section 29, the officers were jointly and severally liable as individuals for the debts of the corporation contracted during the time of such violation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1460–1466; Dec. Dig. ⇐338.]

[3. *Corporations* ⇐341.]

To substitute actual notice, by a creditor, of the facts required by this act to be reported and recorded, the actual notice should be of all the facts required in the record; moreover, actual notice by the creditor could not relieve the officers of the company of the liability imposed by the act, which became a contract by them when they accepted their office, to the effect that if they failed to perform the duties then assumed, they would pay the debts of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1481; Dec. Dig. ⇐341.]

[4. *Limitation of Actions* ⟸58.]

The personal liability of the officers resulted, under section 29, from a failure to perform the duties imposed by sections 16, 17 and 28, and from the time of such failure, the statute of limitations began to run in their favor, as individuals.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 327; Dec. Dig. ⟸58.]

[5. *Limitation of Actions* ⟸58.]

Several pre-existing notes having been consolidated into one large note, the statute of limitations would not run in favor of the officers on their personal liability until the maturity of the last note, if such last note was taken as payment, such personal liability being dependent upon the fact of indebtedness and failure to perform their corporate duties, and not upon the character or consideration of the debt.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 327; Dec. Dig. ⟸58.]

[6. *Limitation of Actions* ⟸155.]

But the latest note not being shown to have been payment of the older notes, the liability attached to the persons in office at the dates of the earlier notes, from which time the statute of limitations as to such indebtedness began to run in the officers' favor.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 623–630; Dec. Dig. ⟸155.]

[7. *Limitation of Actions* ⟸143.]

The relation of the officers, personally, to the debts of the corporation was not like that of partners and joint contractors, where admissions by one before the debt is barred have been held to bind the others.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 578–583, 587; Dec. Dig. ⟸143.]

[8. *Bills and Notes* ⟸430.]

[The question whether a note issued by a corporation on the taking up of several of its prior notes was in payment of such notes, or merely a renewal in consolidated form, is one of intention, the burden of proof resting on the party claiming it to be a payment.]

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1251; Dec. Dig. ⟸430.]

Before Pressley, J., Greenville, July, 1882.

This was an action by Hewlett Sullivan against the Sullivan Manufacturing Company and its officers, commenced in February, 1880. The cause has been before this court on appeal once before, and will be found reported,

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14 S. C. 494. The *character of the action, the indebtedness and other matters will be found in the opinion of this court at the present hearing.

At the hearing, Judge Pressley permitted one of the defendants to plead the statute of limitations, the others having plead it in their original answer.

All the certificates are furnished in the brief; but it will be sufficient to state here the original certificate of March 23d, 1871, and that of September 13th, 1872. All the certificates were signed and sworn to by the officers, and recorded by the register of mesne conveyance for Greenville county. The original certificate was as follows:

"State of South Carolina, }
"Greenville County. }

"March 23d, 1871.

"To F. L. Cardoza, Secretary of State:

"Sir—In accordance with the provisions of an act of the general assembly of said State entitled an 'Act to regulate the formation of corporations,' approved December 10th, 1869, we beg leave to make the following certificate, to wit:

"That we, stockholders of the corporation known as the Sullivan Manufacturing Company, cotton-yarn and cotton-cloth manufacturers, organized June 8th, 1870, and re-organized on the 28th September, 1870, with a capital stock of not less than twenty thousand dollars, and doing business at Fork Shoals on Reedy Fork creek, waters of Reedy river, in the county of Greenville and State aforesaid, did, on the 28th day of September, 1870, at a meeting called for that purpose, at which meeting four-fifths of the stock of the company was represented, organize our company under the provisions of the act of the general assembly above referred to, and elected the officers required by said act. Thirteen thousand four hundred and sixty-one dollars of the capital stock of the company have actually been paid in, and the par value of the share has been fixed at one hundred dollars per share."

The other certificate referred to was as follows:

"Fork Shoals, Greenville Co., S. C.
"13th Sept., 1872.

"To W. A. McDaniel, Clerk of the Court for said County:

"Sir—In accordance with the provisions of an 'Act to regulate the formation of cor-

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porations,' approved December 10th, *1869, we beg leave to make the following certificate, viz.: At our annual meeting held on the fourth, the president and some of the stockholders being absent, the annual meeting was adjourned to this day. A quorum being present from notice having been given previously that the capital stock of the Sullivan Manufacturing Company would be increased by subscriptions to the original stock of said company; whereupon thirteen thousand and three hundred dollars ($13,300) in new stock was taken, namely, G. W. Sullivan, Sr., eighty-three hundred dollars ($8,300); Jane C. Todd, one thousand dollars ($1,000); E. A. Featherston, one thousand dollars ($1,000); Emma Austin, one thousand dollars ($1,000); H. E. Holland, one thousand dollars ($1,000); and James M. Sullivan, one thousand dollars ($1,000). All of said sums being paid in full, except subscription of James M. Sullivan. And further, the treasurer's books being examined, we find that from the beginning, sixteen thousand four hundred and forty-two dollars

and forty cents ($16,442.40) of the original stock has been paid, and on the assessment of twenty per cent. of the original stock, the sum of thirty-one hundred and sixty-three dollars and fourteen cents ($3,163.14) has been paid. The par value of the shares being one hundred dollars each. And we further find there is due the company on original stock and assessments, thirty-one hundred and ninety-six dollars and ninety-six cents ($3,196.96), and that the liabilities of the company are about seven thousand dollars ($7,000)."

The Circuit decree was as follows:

The matters in this case, which the decree of Judge Hudson leaves open, are the amount due the plaintiff by the said company, and the liability of its directors for the same.

I find that said company is indebted to plaintiff in the sum of $8,008.27 on note dated October 16th, 1876, with interest at 10 per cent. from December 25th, 1876. I further find that there is a balance due plaintiff on open account of $1,432.98 for cotton sold to said company during that year. For the amounts above stated, plaintiff is entitled, and is hereby authorized, to enter judgment and issue execution against the said company.

As to the liability of the directors of said company, I find that the certificate filed by them with the secretary of state is not a proper compliance with section 16 of the act of 1869, and that when the capital of said

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company was opened to admit new *stockholders, no certificate was filed according to section 17 of said act. I further find that none of the annual certificates filed by the directors with the clerk of the Court of Common Pleas contain the necessary information to persons dealing with said company, which section 17 of said act plainly requires.

The directors have pleaded the statute of limitations, and my judgment is that the statute runs in their favor from the time the several debts were contracted. There is no sufficient proof before me as to the exact date of the several contracts, which were consolidated in the said note of October 16th, 1876. My judgment, therefore, is, that the directors who were acting at the various times when the several items of debt included in said note were contracted, are liable jointly and severally for such portions of said note as cover debts contracted during their year of service, but subject to plea of the statute of limitations, to run from the date each item of debt was contracted.

As to balance due on open account for the year 1879, I find that G. W. Sullivan, Sr., and G. W. Sullivan, Jr., were the only acting directors for that year. The testimony is clear that the company was then insolvent, and that the stockholders left it to the management of these two directors. P. D. Cureton was elected one of the directors in 1877, and then signed the defective certificate which was filed with the clerk of the Court of Common Pleas, but he took no part in any of the subsequent proceedings of said company. That fact was known to the plaintiff, and it is clear from his own testimony, and that of G. W. Sullivan, Sr., and G. W. Sullivan, Jr., that his dealings were solely with them during the year 1879.

It is, therefore, adjudged that plaintiff is entitled, and hereby authorized to enter judgment and issue execution against G. W. Sullivan, Sr. and G. W. Sullivan, Jr. for $1,432.98, balance of 1879. It is further ordered, that the master do take the testimony and report as to what items of debt, and their respective dates, were consolidated in the said note of October 16th, 1876, and who were the directors of said company at the time each debt was contracted.

All parties appealed upon exceptions which raised the points considered in the opinion.

[For subsequent opinion, see 24 S. C. 341.]

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*Messrs. Perry & Perry and J. H. Whitner, for plaintiff.

Messrs. M. F. Ansel and J. C. C. Featherston, contra.

October 2d, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The defendant, the Sullivan Manufacturing Company, doing business in Greenville county, on October 16th, 1876, gave its sealed note to plaintiff for $8,008.27, payable on or by December 25th thereafter, with interest at the rate of 10 per cent. after maturity. This note was the consolidation of other notes held by plaintiff on this company, previously given. The said company was also indebted to the plaintiff, as he claimed, in the sum of $8,228.48 for cotton sold to it during the year 1879. The action below was brought by the plaintiff to recover payment of these demands, and to that end he prayed, with other relief, that he should have judgment for said sums against the company and also against the directors, George W. Sullivan, Sr., G. W. Sullivan, Jr., D. Dunklin Moore and Paschal D. Cureton, alleging that for reasons hereafter to be examined, the said directors were personally liable for these debts.

Judge Pressley, who heard the case, held and decreed that because of the failure of the directors to comply with certain requirements of the act of 1869, entitled an "Act to regulate the formation of corporations," that the directors, G. W. Sullivan, Sr., G. W. Sullivan, Jr., and D. D. Moore, were personally liable for such of the plaintiff's claim as was not barred by the statute of limitations, which statute the said defendants had interposed. He further held, that as the large note of plaintiff's was but the consolidation

of other smaller notes given by the company at different dates prior to said consolidation, that the statute would begin to run in favor of the directors at the maturity of each of these smaller notes. He therefore gave judgment in favor of the plaintiff for $1,432.98, the amount of the cotton debt as found by him, and to which the statute had not been interposed, and ordered that it be referred to the master to take the testimony and re-

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port as to the items of the consoli*dated debt, their respective dates, and who were the directors at the time each debt was contracted.

Both sides have appealed. The directors from so much of the decree as holds them personally liable for any part of the debts, and the plaintiff from so much as allows the said directors the protection of the statute of limitations.

First. Was it error in the Circuit judge to hold the directors liable for the plaintiff's debts? and, second, if not, was it error to permit them to shield themselves from any portion thereof by the statute of limitations? These are the questions before the court. The solution of the first must depend upon the construction of those sections of the act of 1869, under which this company became a corporate being, and then upon the fact whether the requirements of the sections had been complied with by the directors. The second upon the question whether the statute had a new starting point at the consolidation of the previous notes, or whether, having commenced with each of the old notes as they fell due, its currency continued.

The sections of the act of 1869, under which Judge Pressley held the directors liable, are sections 16, 17 and 28. He said: "As to the liability of the directors of said company, I find that the certificate filed by them with the secretary of state is not a proper compliance with section 16 of the act of 1869; and that when the capital of said company was opened to admit new stockholders, no certificate was filed according to section 17 of said act. I further find that none of the annual certificates filed by the directors with the clerk of the Court of Common Pleas contain the necessary information to persons dealing with said company, which section 28 of said act plainly requires."

The act of 1869 referred to is found in 14 Statutes at Large, p. 297, and the sections involved are as follows:

"Section 16. Before such corporations commence business, the president, treasurer and a majority of the directors shall sign, swear to, publish three times in some newspaper, printed in the town or county wherein such corporation is situated, and deposit with the secretary of state a certificate setting forth the corporate name and purpose of the association, the amount of the capital stock, the amount actually paid in, and the par value

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of the *shares in the corporation, and shall file a copy thereof with the clerk of the Court of Common Pleas in the county wherein the corporation is situated, to be by him recorded in a book kept for the purpose within thirty days after the payment of any installment called for by the directors; a certificate thereof shall be in like manner signed, sworn to, deposited, filed and recorded.

"Section 17. When the capital stock and shares of any such corporation are increased or reduced under the provisions of section 14, a certificate thereof shall be made, signed, sworn to, deposited and recorded in the manner aforesaid.

"Section 28. Every corporation organized under the provisions of this act shall file the certificate required of corporations by sections 23 and 24, and the directors shall make, and the president, treasurer and a majority of the directors shall sign, swear to, and deposit with the clerk of the Court of Common Pleas for the county in which said corporation is established or located, within thirty days after the date of the annual or semi-annual meeting next preceding the date of such certificate, a certificate stating the date of such annual and semi-annual meeting, the amount of capital stock paid in, the name and number of shares held by such stockholders, the amount invested in real and in personal estate, and the amount as nearly as can be ascertained of existing demands against the corporation, all as ascertained at the date of such annual or semi-annual meeting."

Section 29 provides that "if the officers of any such corporations violate the provisions of section 2, or neglect or refuse to perform the duties required by sections 16, 17 and 28, they shall be jointly and severally liable for debts contracted during the continuance of such violation, refusal or neglect."

Sections 16, 17 and 28 are not difficult to comprehend, nor do they need interpretation. The duties imposed and required are plainly and distinctly stated. They are applicable to all corporations like this. They were imposed for a wise purpose, and the consequences of a failure to comply therewith on the part of the officers are unmistakably announced. The act of 1869 is a public act. It is not hid under a bushel, but it is spread upon the statute books; and a corporation organizing under its terms, is supposed, members, officers and

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all, to know its different pro*visions and to accept its obligations, and whether the statutes be penal or remedial can in fact make but little difference, because, let it fall under the one class or the other, there can be no mistake as to the real meaning of section 29, supra, wherein the legislature in terms not to be misunderstood enacted: That if the officers of any such corporation shall violate section 2, or neglect or refuse to perform the

duties required by the other sections mentioned, they shall be jointly and severally liable for all debts contracted during the continuance of such violation, refusal or neglect.

In the face of this plain enactment it would be unnecessary refining to halt at the question, even if it were an open question, whether this liability results as a penalty or by contract. The name which may be given to it will not alter its character or lighten the burden imposed. But it is not an open question, because the point was distinctly considered and adjudged in the former case between these same parties, 14 S. C. 494. The question, therefore, recurs, Did the directors comply with the required conditions and terms during the time the plaintiff's debts were contracted? if not, prima facie liability has attached and it must be enforced unless the defenses invoked amount to a shield.

The findings of Judge Pressley as to the violation of sections 16 and 17 do not seem to have been expressly excepted to by the defendants, and according to the law governing appeals these findings are not subject to our review; but if they were, we do not see that they have been or can be successfully assailed. In fact it is admitted in the argument, that no certificate of the increase of the capital stock was made as seems to be required by section 17.

Section 16 requires that before the company commences business a certificate containing certain facts, made, signed and sworn to by the president, treasurer and a majority of the directors, shall be: 1. Published three times in some newspaper printed in the town or county wherein such corporation is situated; 2. Deposited with the secretary of state; and, 3. A copy thereof filed with the clerk of the Court of Common Pleas in the county wherein the corporation is situat-

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ed, *to be by him recorded in a book kept for that purpose. In response to these requirements the company addressed a communication to the then secretary of state, and we suppose deposited with the secretary of state the first certificate found in the brief, containing substantially the fact required, upon which is indorsed the following: "Greenville, S. C. Clerk's Office. Recorded in Register Mesne Conveyance Book CC, page 566, and recorded 27 March, 1871. (Signed,) W. A. McDaniel, R. M. C." Also, "Greenville, S. C. Clerk's Office. Recorded in Corporation Book, page 1, and recorded 27 March, 1871. (Signed,) W. A. McDaniel, R. M. C."

Judge Pressley held that this certificate filed in the secretary of state's office was not a compliance with section 16 of the act. How could he have held otherwise? Where is the evidence that it was published three times in a newspaper printed in the city of Greenville or in Greenville county? Where is the evidence that a copy thereof was filed with the clerk of the court of that county? It is needless for us to inquire why the legislature demanded such special and particular acts on the part of the officers of such companies. All that it is for us to know is, ita lex scripta est.

Section 17, immediately following the provisions of section 16, as to depositing, recording, &c., of the certificate therein required, provides, that when the capital stock and shares of any such corporation are increased or reduced under the provisions of section 14, a certificate shall be made, signed and sworn to, deposited and recorded in manner aforesaid. The response to this was the certificate of September 13th, 1872, (found in the brief), addressed to W. A. McDaniel, and recorded in register of mesne conveyance, book EE, page 53. Recorded September 27th, 1872; signed W. A. McDaniel, R. M. C. Was this a deposit and a record in manner aforesaid? Did the annual certificates comply with section 28?

We find in the brief five certificates which we suppose were intended as the annual certificate required by the section, to wit, September 13th, 1871; September 13th, 1872; September 4th, 1873; September 2d, 1874, and September 5th, 1877. The first is defective in that it does not state the names and num-

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bers *of shares held by the stockholders, the amount invested in real and personal estate, nor the estimated amount of existing demands against the corporation. The second, third, fourth and fifth are defective in the two first particulars of the first. The third was not recorded until September 21st, 1874. There seems to have been no certificate for the years 1875, 1876 and 1878. Why, does not appear fully in the brief. It was said, however, that there was no annual meeting for the years 1876 and 1878. Enough appears to sustain Judge Pressley's findings. There was not a full compliance with the terms or spirit of the act under which this company was attempting to do business, and Judge Pressley had no alternative but to enforce the liability imposed by section 29, which is a joint and several liability upon the officers for all debts contracted during the continuance of such violation, refusal or neglect.

As to the open account claim of plaintiff, its date and the officers of the company were known, and the judge authorized judgment and execution to enter for the amount found by him, $1,432.98, against G. W. Sullivan, Sr., and G. W. Sullivan, Jr., the acting officers. As to the large claim inasmuch as the dates of the different notes of which it was made up were not known, nor who were the officers at the time they were contracted, to apply the principles of law held by the judge to these demands, to wit, as to the statute of limitations, the judge ordered the master to take testimony as to the dates of these items, and who were the directors of said company at the time each debt was contracted.

This brings us to an examination of the main ground of the defense, which is, admitting the findings of the Circuit Judge to be correct as to the defects in the certificates required by sections 16, 17 and 28 of the act, yet, these defects were all cured as to the plaintiff by his personal knowledge of the facts thus required, the argument being, that these requirements were intended to put persons dealing with such companies upon their guard; to give them all necessary information as to their financial condition so that they might be dealt with understandingly; and that while this was important and necessary as to outsiders, yet, to one actually informed as to these matters by personal con-

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tact and *familiarity with the corporation, this was wholly unnecessary; that actual notice was the equivalent if not better than constructive notice. And it is urged that the plaintiff was so informed; that he was, in fact, the financial friend and adviser of the company.

This position is founded upon the analogy drawn from the familiar doctrine in reference to the recording of mortgages and other papers required to be recorded. It is true there are many such cases where actual notice will cure the defect of non-record. Can this doctrine be applied here? In the first place there is conflict in the testimony as to the extent of plaintiff's knowledge. He was not a stockholder, though he did attend some of the annual meetings; and in one meeting in 1875 seems to have represented the stock of one Mrs. Holland. As late as 1879, however, he swears that he "had no idea that the company was then insolvent." This is sustained by the fact that during that year he sold a large amount of cotton to the company. To substitute "actual notice" for a record, in a case like this, the actual notice should convey all the facts required in the record. Here the record was required to contain many minute and special facts. It will not do to say that all this was dispensed with, because the plaintiff was the brother of the president, uncle to the directors, the financial adviser of the concern, and, generally, the confidant and friend of all the parties. All this, if true, did not necessarily bring home to him the facts which the law required these officers to set forth in their annual certificates and to be deposited and filed in public office.

But a complete answer to this position is, that the liability of the directors, under the act of 1869, arises upon contract. Mr. Justice McIver, in this case, (14 S. C. 500,) said that "when these defendants accepted the positions of directors of a company, organized under an act declaring that in certain contingencies they should become liable for the debts of the company, they must be regarded as having agreed that if such contingencies should happen they must pay the debts of the company." This is the true theory of the act, and the liability thereunder is based on positive contract springing into existence the moment there is a failure to do what the

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act requires. The plaintiff comes *into court, proves the failure, and demands the enforcement of the incident contract. Can his right be frittered away by the construction urged by the defendants? The doctrine as to recording mortgages cannot be invoked here.

The true doctrine is found in Thomp. Corp. Off. 422, 423, where, in discussing the question as to the outside information of the creditor, he says: "The other reports, if filed, could give him no additional information of value. How, then, could the failure, neglect or refusal to file them injure him? Why, under such circumstances, should the directors be held personally liable for their neglect or refusal to comply with sections 18 and 19? What good reason could a creditor set up for insisting upon such liability? There could be but one—the positive provisions of the statute creating such liability, &c. The liability is the same whether the corporation is solvent or insolvent at the time the debt was contracted." And again, at 426, "The reliance of the creditor, therefore, one way or the other, the fact that he may be injured or not injured because of the failure to make and file the report, the fact that the corporation may be solvent or insolvent, or that the creditor at the time he dealt with the corporation had actual knowledge of the financial condition of the corporation, will not affect the liability created by the statutes."

The consideration of the plea of the statute of limitations comes next. When this statute is applicable at all, it commences to run at the accrual of the right of action. Now we have seen that the liability of the directors arises on contract; the right of action, therefore, of plaintiff, if he has any, must come from a breach of this contract and must accrue at the time of the breach. What is the contract? It is a general agreement made by the directors through the twenty-ninth section of the act of 1869, that they will, upon certain conditions, jointly and severally become liable for all debts contracted by the corporation. This agreement is not a necessary incident to every debt of the corporation founded upon the same consideration and attaching to such, but it is separate and apart from the debts and may or may not attach, dependent upon the contingencies specified in the act. The debt of the corpora-

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tion is the primary, or rather *the original liability, and the contract of the directors is a subsequent matter and founded upon different and other considerations. The debt of the corporation is evidenced by note of open account for goods sold or services rendered, as the case may be; the liability of the directors by the terms of the section 29 of the act.

Now, it seems that the plaintiff held various notes on the corporation, all of which were given before the large note mentioned herein, and all of which were consolidated in said note. It further appears that during the times these various notes were given, the directors then in office failed to comply with sections 16, 17 and 28 of the act of 1869, and, therefore, that these directors became liable under their agreement as specified in section 29. The cause of action to the plaintiff was the failure on the part of the directors to comply with this agreement, to wit, to pay the notes of the company according to their tenor and effect, and a right of action accrued to him, as to said directors, upon the occurrence of this failure, to wit, at the maturity of each of the notes. And now, whether that right has been barred and lost as to any or all of these notes must, of course, depend upon the lapse of time since. Has six years intervened? It was to ascertain this that the Circuit judge referred the case to the master, and the final determination of the question must await his report.

The above is based upon the idea that the subsequent consolidation of these previous notes into the large note of plaintiff has not changed the status so far as to create new rights and impose new obligations. Let us now inquire into the correctness of this position. The consolidation of the previous notes into the large note had one of two effects. First, it created a new debt upon the corporation, of which the previous notes were the consideration, which notes it paid off and extinguished; or, secondly, it was a mere renewal of the previous notes which, for convenience, were consolidated into one and not a new debt creating a new liability. If it had the first effect, then we do not see why the directors, who were then in office, should not be liable for this large note under section 29, if at that time they failed or refused to com-

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ply with sections 16, 17 and 28. The *liability of the directors does not depend upon the character or consideration of the debt of the company, but upon the fact of that indebtedness accompanied with a failure on their part to perform certain imposed duties at or about the time the said indebtedness was contracted by the company, and in this event the currency of the statute would commence at the maturity of said large note. Under such a view, the ruling of his Honor, the Circuit judge, would be error. If, however, the second effect was the result, and the previous notes were not, in fact, paid off and extinguished, then the liability of the directors would depend upon the application of the statute to their agreement as to said notes, and the ruling of his Honor would be correct.

The pivot, then, in this branch of the case is, did this consolidation effect a payment and extinguishment of the previous debts, or was it a mere renewal, leaving those debts unpaid and still in existence. It was said in Johnson v. Clarke, 15 S. C. 80, that whether one security operates in payment and satisfaction of another is always a question of intention. And this seems to be the well-settled doctrine upon this subject. Burton v. Pressly, Cheves Eq. 1; Costelo v. Cave & Bradley, 2 Hill 528 [27 Am. Dec. 404]; Adger & Co. v. Pringle, 11 S. C. 527, and many other cases. The Circuit judge has found, in substance, that the pre-existing notes had not been paid. He has, therefore, gone back behind the note sued on and ordered an inquiry as to the items and the dates of the several debts included therein, holding that the directors who were acting at those various dates were liable, but subject to the plea of the statute of limitations. We have found but little testimony in the case directed to this point. The most that there is comes from the plaintiff, where he speaks of the large note as a consolidation. The rule seems to be that the intention must govern, the onus probandi resting upon the party affirming it. The defendants deny payment, and the testimony of the plaintiff, so far as it goes, is against it. There was no error, therefore, in this finding of the judge.

We do not think that the relation of the directors to the company was such as to warrant the application of the principles of law contended for by plaintiff's counsel, in

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cases of joint and *several notes, copartnerships, &c., where the admissions, acts and payments of one will bind the others and prevent the statute or give it a new starting point. In such cases the parties are so closely connected that they are regarded in some sense as agents, one of the other, and bound, therefore, by each other's acts and admissions. But here no such connection exists. There the parties are all in the same contract, entered into at the same time and upon the same consideration. Here the contracts are different, that of the company being upon notes given by them for goods sold or services rendered, and that of the directors upon a general agreement made when the terms of the act of 1869 were accepted as evidenced by the organization of their company under its provisions. There is no analogy between the two, and, therefore, not subject necessarily to the same principles of law.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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20 S. C. 93

GRAVELEY v. GRAVELEY.

(April Term, 1883.)

[1. *Appearance* ⇨24; *Executors and Administrators* ⇨525.]

Where an executrix, resident in England, of a testator who had died there, proved the

will both in England and in South Carolina, she may be sued in the courts of this State; and having appeared and answered to the merits, she cannot object that she had been made a party by publication only.

[Ed. Note.—Cited in Oliver v. Fowler, 22 S. C. 540; Rembert v. South Carolina Ry. Co., 31 S. C. 313, 9 S. E. 968; Meinhard Bros. v. Youngblood, 37 S. C. 236, 15 S. E. 950, 16 S. E. 771; Ex parte Keeler, 45 S. C. 559, 23 S. E. 865, 31 L. R. A. 678, 55 Am. St. Rep. 785; Townes v. City Council of Augusta, 46 S. C. 32, 23 S. E. 984.

For other cases, see Appearance, Cent. Dig. §§ 118–143; Dec. Dig. ⊂⊃24; Executors and Administrators, Cent. Dig. §§ 2344–2349; Dec. Dig. ⊂⊃525.]

[2. *Equity* ⊂⊃138.]

When the facts stated in the complaint make out substantially a case for equitable relief, the court will so regard it, notwithstanding judgment for legal relief only was prayed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 319–321; Dec. Dig. ⊂⊃138.]

[3. *Wills* ⊂⊃681.]

Where a legacy of $2,000 was given by a testator, who died in England, to A. a citizen of this country, "to be held in trust for him by my executors and paid him with the accumulations of interest when he attains the age of twenty-one years," the will did not thereby create the distinct and separate office of trustees, but only imposed a duty on the executors as such. This case distinguished from Anderson v. Earle, 9 S. C. 461.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1600; Dec. Dig. ⊂⊃681.]

[4. *Executors and Administrators* ⊂⊃102.]

The executrix having invested in English consols an amount equivalent to American dollars of currency at their value in English coin one year after the testator's death. *Held*, that the legatee, on attaining his majority, could maintain an action against the executrix as such for the purpose of impeaching the fairness, propriety and legality of such transfer and investment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 420; Dec. Dig. ⊂⊃102.]

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[5. *Executors and Administrators* ⊂⊃525.]

*Whether such executrix can be sued in the courts of this State depends upon (1) the domicil of the testator, and (2) if domiciled in England, whether there are assets of his estate still remaining here. These facts not appearing in the pleadings or in the proof, the case was remanded.

[Ed. Note.—Cited in Fields v. Watson, 23 S. C. 49, 50; Fields v. Watson, 23 S. C. 55.

For other cases, see Executors and Administrators, Cent. Dig. § 2344; Dec. Dig. ⊂⊃525.]

[6. *Pleading* ⊂⊃176.]

Matters stated in a reply are deemed to be controverted. Code, § 189.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 343, 345–353; Dec. Dig. ⊂⊃176.]

Result only concurred in.

Before Hudson, J., Charleston, December, 1881.

The complaint in this case was as follows:

The complaint of the above-named plaintiff alleges—

1. That John Graveley, the above-named testator, formerly of Charleston, in the county and State aforesaid, departed this life in England, on or about the 31st day of March, 1865, leaving, unrevoked and in full force and virtue, a last will and testament, a copy of which is hereto annexed as a part of this complaint.

2. That said will was proved in England, and subsequently thereto, to wit, on or about the 3d day of April, A. D. 1872, was admitted to probate on an exemplification thereof, by George Buist, Esq., judge of the Court of Probate for the county aforesaid, and then and there qualified Maria Torrens Graveley, one of the executors named and appointed by said will, and one of the defendants above named.

3. That the said testator inter alia bequeathed to John Graveley, the plaintiff herein, a legacy of $2,000 as follows, to wit, "I give and bequeath two thousand dollars each to John Graveley and Francis Porcher Graveley, the sons of my nephew, Cowlam Graveley, to be held in trust for them by my executors, and paid them with the accumulations of interest as they respectively attain the age of twenty-one years."

4. That John Graveley, the above-named plaintiff and legatee, has attained the age of twenty-one years, to wit, on or about the 18th day of September, A. D. 1879, and thereupon became entitled to the payment of the said legacy of $2,000, with the accumulations of interest thereon, but that he has not received the said legacy or any part thereof, nor have the accumulations of interest thereon nor any part thereof been paid him.

Wherefore, the plaintiff demands judgment for the said sum of $2,000, with the accumulations of interest thereon, at the rate

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*of seven per centum per annum, from the said 31st day of March, A. D. 1865, and the costs of this action.

The Circuit decree was as follows:

The testator, John Graveley, executed his will in 1862; he died in March, 1865. Letters testamentary were granted to his widow, Maria Torrens Graveley, as executrix, in England, in May, 1865, and subsequently in America, in 1872. By this will the testator bequeathed to John Graveley, the plaintiff, a legacy of $2,000, to be paid him, with the accumulations of interest, when he attained the age of twenty-one years, which age was attained by the plaintiff on or about the 18th day of September, 1879.

The testator was a British subject by birth, but was, according to the testimony of Cowlam Graveley, to which no exception was taken, a denizen of South Carolina, and made his fortune as a merchant of Charleston. At about the time of the breaking out of the late war in the United States he removed to England, was in that country at the date of the will, and died there in March, 1865, just about the close of hostilities in America. The

will contained a similar bequest to Francis Porcher Graveley, who was a resident of Charleston, and who has been settled with. It contained also a bequest to the St. George's Society of Charleston, and the residue of the testator's estate is given in trust for his widow and children.

Subsequent to qualifying in this State, the executrix, in 1873, invested in England the sum of £327 11s. 5d. and £90 6s. 0d., which, with accumulations added, and legacy duty to the British government subtracted, she submits amounted to the sum of £521 4s. 10d., about the time of the coming of age of the plaintiff. This she was willing to pay to the plaintiff on condition that he receipted for his legacy, which he refused to do. And the plaintiff has been paid no part of his legacy, nor the accumulations. He now brings this suit to recover the legacy bequeathed to him, and the accumulations of interest thereon.

On the threshold the plaintiff is met with the objection on the part of the defendant that this is an action ex contractu; that the summons is in the form of such as are pre-

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scribed in the code *for actions ex contractu; that the summons and complaint fix the character of the proceeding, and that the complaint, containing no averment of the assent of the executrix to the legacy from which a promise may be implied, does not state facts sufficient to sustain an action ex contractu on the implied promise of the executrix. We, who are accustomed to the old equity practice, find great difficulty in realizing that the code has abolished the various forms of action, and that but one form of action (criminal actions excepted) now is known to the law, denominated a "civil action;" and yet it is a fact that by recent legislation all distinctions between actions at law and suits in equity, and the forms of the same, are abolished.

A civil action is commenced by service of a summons, the requirements of which are stated in section 151 of the code. Section 152 requires a notice to be inserted in such summons. In actions ex contractu, the summons must state that the plaintiff will take judgment (in case of failure to answer) for a "sum specified therein." In other actions that (in case of failure to answer) the plaintiff will apply for the relief demanded in the complaint. When the action is not ex contractu, it does not follow that the plaintiff must use the exact words of the section, if he does, in fact, give notice that he will ask for the relief demanded in the complaint; and in this action that is just what the summons gives notice to the defendant, the plaintiff will apply for in case of default, to wit, the amount of the legacy ($2,000), with the accumulations of interest thereon. The complaint herein states all the facts necessary to entitle the plaintiff to equitable relief, and the technical objection to the form of his summons, even if it could have availed the defendant on a motion to set it aside, now comes too late.

But it is not the summons which decides whether or not the action is, in its nature, legal or equitable; this depends upon the facts stated in the complaint. The complaint must state concisely the facts which constitute the cause of action, and when, as in this case, the summons and complaint are served together, the defendant has notice of the nature of the action. If the facts stated in the complaint entitle the plaintiff to legal relief, it will be granted, and if to equitable

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relief, that will be decreed. *Conceding the summons to be irregular, the plaintiff, at this stage of the proceedings, would be entitled to amend the same, and if it were necessary, I would allow him so to do.

The legatee is next met with the objection that this is the ancillary jurisdiction, and that he cannot here hold the executrix to account for the legacy. I do not find it incumbent on me to determine the question of domicil thus raised, for the case can now be decided on other issues. This I do not regret, as the defendants claim that the question is not presented in the pleadings and that the raising of it at the hearing has in some measure operated as a surprise to them. I avoid, therefore, resting the decree on this issue, but were it necessary to decide it, I should hold that the question of domicil was properly raised, and that, from all the facts before me, the domicil of the testator, at the time of his death, was in Charleston. To this conclusion I arrive, not from the mere language of witnesses, but from the facts and circumstances proved. The evidence shows that the testator made his fortune in Charleston, resided there up to about the time of the civil war, was a denizen of this State, married a Charleston lady, his children were born in that city, and most of his estate, of which we have knowledge, was in this country.

'Tis true he went to England about 1860 to reside during the war, and being in that country in 1862, he executed his will, in which, as his executrix and executor, he appoints his widow, a South Carolinian, and a merchant of Charleston, the place where the bulk of his fortune lay. Just about the close of hostilities he died (March, 1865). I cannot gather from these circumstances a purpose on his part to permanently sever his wife and children from the friends and associates of their lives and the home of their birth, nor himself from his interests in this country. On the contrary, my opinion is that his stay in England was occasioned by the conflict in America, and was only of a temporary character. His domicil in this State having been proved, the evidence that it was lost is not sufficient.

But in rendering this decree I will treat this administration as ancillary. And now as to the right of the legatee to proceed in this jurisdiction, I deem no higher authority

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requisite than the *case of Harvey v. Richards, 1 Mason 381 [Fed. Cas. No. 6184]. That case expressly rules that legatees and distributees, as well as creditors, have the right to demand distribution of the estate in the ancillary jurisdiction where the necessities of the estate do not otherwise require, and the law of the domicil as to the order of distribution is duly regarded. I hold it to be the duty of a State to protect its own citizens, whether legatees or creditors, and this court will not send a legatee, a citizen and resident of South Carolina, where ample assets are, where the executrix has qualified, without cause, to a foreign tribunal for redress.

Nor will it, where, as in this case, no cause is shown for the exercise of comity, remit the assets to a foreign country merely to compel the legatee to follow them. If the condition of the estate, or the ends of justice demanded it, the court would remit the assets, but such is not the case here; no allegation or pretense of insufficiency of assets is alleged; on the contrary, the executrix professes her readiness to pay a sum, the result of an investment made in England, no reason having been suggested for remitting the funds in the hands of the South Carolina executrix to England; the legatee is entitled to recover his legacy here, and such, I am of opinion, was the intention of the testator, for the use of the word "dollars" in connection with the legacy, the appointment of a Charleston merchant and a Carolina lady as executor and executrix, and the scheme of the will, all tend to create this belief.

It is unnecessary to look into the investment in England, or consider its propriety; sufficient it is that the legatee demands his legacy in this forum of competent jurisdiction, under such a state of facts as entitles him to relief. I am of opinion that the plaintiff is entitled to recover the amount of his legacy, with interest from one year after the testator's death, at the rate of seven per cent. per annum.

It is therefore ordered, adjudged and decreed that the plaintiff do recover against the said Maria Torrens Graveley, executrix of the last will and testament of John Graveley, deceased, the sum of $4,198, together with the costs and disbursements of this suit, to be levied of the goods and chattels which are of the said testator, the said John

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Graveley, deceased, in the hands of *the said Maria Torrens Graveley, as executrix, as aforesaid, to be administered, and if she has not so much thereof in her hands to be administered, then to be levied of the proper goods and chattels of the said Maria Torrens Graveley.

Memorandum.—As defendants' counsel is fearful that the language of this decree does not, with sufficient fullness and correctness, set forth the grounds of his objection to the plaintiff's cause of action, both as to form and substance, and may be construed as having found facts against him, as for example, the denizenship of John Graveley, the testator, I have here to remark that it is not designed, in the least, to put the defendants' counsel in any position which might be at variance with the facts; nor can he be so placed, as all legal positions are still left to be fully taken by exceptions to the judgment, and the facts of the case are derived almost entirely from record testimony, and that taken by commission.

Other matters are stated in the opinion of this court.

[For subsequent opinion, see 25 S. C. 1, 60 Am. Rep. 478.]

Messrs. Simonton & Barker, for appellants.

Messrs. T. W. Bacot and Lord & Inglesby, contra.

October 25th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action brought to recover a legacy from Maria Torrens Graveley, executrix, bequeathed to the plaintiff by the will of John Graveley, deceased. The bequest is in the following words: "I give and bequeath two thousand dollars each to John Graveley and Francis Porcher Graveley, the sons of my nephew, Cowlam Graveley, to be held in trust for them by my executors, and paid them, with the accumulations of interest, as they respectively attain the age of twenty-one years."

The testator was a British subject, who, for many years, had resided in the city of Charleston, in this State, where he carried on the business of a merchant, and where he accumulated most, if not all, of the property

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he left at the time of his death. About *the beginning of the late civil war between the States—the exact time does not appear—he went to Leamington, in England, where he died before the war ended, on March 31st, 1865, leaving a will which bears date June 27th, 1862, and of which Maria Torrens Graveley, his widow, was named executrix, and Cowlam Graveley, of Charleston, executor. The beginning of the will is in these words: "This is the last will and testament of me, John Graveley, late of Charleston, in the State of South Carolina, but now of Leamington Priors, in the county of Warwick, England."

The will was admitted to probate at Birmingham, England, on May 27th, 1865, and letters testamentary granted to Maria Torrens Graveley, power being reserved of making the like grant to Cowlam Graveley, the other executor, who by formal deed, re-

nounced and disclaimed the "office of trustee," and declined to accept the devises and bequests made to him by the will upon certain trusts thereby declared; but he has not renounced the "office of executor," either here or in England. On April 3d, 1872, Mrs. Graveley also qualified as executrix in this State. In the application for administration in England, the executrix stated that the value of the estate was under £9,000; and it appeared by the inventory and appraisement in 1872, when she qualified in South Carolina, that the property in this State amounted to the face value of $53,212, of which $19,000 was stated to be doubtful, showing, it would seem, that much the larger part of the estate was at that time in South Carolina.

On February 6th, 1873, according to the answer of the executrix, she invested for the plaintiff, in three per cent. consols of England, such a sum of English money as would, on March 31st, 1866, have purchased $2,000 of American currency, then greatly less valuable than gold, £327 11s. 5d., and added thereto £90 5s. 2d. for interest thereon from March 31st, 1866, to February 6th, 1873, being at the rate of four per cent. per annum. According to this statement of the executrix, the legacy of $2,000, "with accumulations of interest" from March 31st, 1866, to September, 1879, when the plaintiff became of age, a period of more than thirteen years,

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amounted to something less *than $2,500, which she offered to the plaintiff as his legacy. He declined to accept this result, and, after some correspondence, this action was commenced December 20th, 1879. The executrix being in England, an order of publication was made against her, and copies of summons and complaint served on her January 15th, 1880.

The defendant executrix answered to the merits, claiming, among other things that, as executrix, she had paid the legacy to herself as trustee; that she was no longer liable as executrix, and the plaintiff was bound to accept the results of the investment which she had made for him in England; stating in the last paragraph of her answer that "these defendants [her daughters, as legatees, had been impleaded with her,] deny the right of the plaintiff to institute suit in this court against them, or any of them."

The cause came on to be heard by Judge Hudson, who held that the plaintiff was entitled to recover in this jurisdiction against the executrix; and gave judgment for the amount of the legacy, $2,000, in American money, and interest thereon from one year after the testator's death, at the rate of seven per cent. per annum, amounting to $4,198. From this decree the defendant executrix appeals to this court upon the following exceptions:

1. "That a foreign executrix who has administered the general estate of her testator in the jurisdiction in which her testator died, where his will was proved and registered, and where his executrix qualified and is accountable for such administration, cannot be sued in the jurisdiction of her ancillary administration generally, but can only be sued therein 'in respect of such assets' of her testator as may be held by her within such ancillary jurisdiction.

2. "That when such general executrix is resident beyond the jurisdiction of the courts of South Carolina, she cannot be made a party defendant to a suit in South Carolina by publication and service of summons at her home in a foreign country.

3. "That to make such non-resident executrix a party defendant to a suit in the jurisdiction of her ancillary administration in South Carolina, process against the assets

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of her testator, *which may be alleged to be held by the executrix in South Carolina, should be prayed.

4. "That an executrix holding ancillary administration cannot be held liable to a legatee upon a money demand only, in a suit, as upon contract, with no allegation of assent by the executrix to the legacy here, nor allegation of assets in her possession, nor charge of maladministration, nor of neglect in respect of such assets.

5. "That where, to a suit by a legatee generally demanding judgment of a specified sum of money as his legacy, the foreign executrix answers, objecting to the jurisdiction, and shows that she has administered the general estate of her testator in the original jurisdiction, where the will was admitted to probate, and where she is accountable for such administration; that out of the estate so administered abroad, she had, under the advice of learned counsel, laid aside and invested a fund in trust for the legatee, in pursuance of the terms of the will, and offers the legatee the results of that trust, so arising and so executed; and the plaintiff does not deny, but admits the facts, the complaint should be dismissed and the legatee be left to his remedy against the defendant for an account of her trust, or for a breach thereof.

6. "That an executrix is not liable to judgment for a sum of money claimed by a legatee, with damages, as for a wrongful detention, except upon allegation and proof of assent of the executrix to such legacy, from which assent a promise can be implied, and upon allegation and proof of the breach of such contract to pay, or upon allegation and proof of such wrongful detention.

7. "That for the proper exercise of the jurisdiction of the court against an executrix in a suit by a legatee, the allegations necessary to a suit for an account of such assets, and for enforcement of the trust involved, must be made, and the proper relief should be sought against the executrix in her character as trustee, and not as executrix.

8. "That a judgment against an executrix

as for a devastavit cannot be rendered where no devastavit has been alleged or proven, and still less where the record shows that none has been committed.

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*9. "That a legatee (unlike a creditor) is bound by the will of a testator who gives him the legacy, and if the will directs the executrix to raise a fund out of the general estate, and to invest such fund and hold it in trust for the legatee, the will binds the legatee to seek the enforcement or execution of such trust against the executrix as trustee.

10. "That if the legatee, as cestui que trust to the executor under the will, could ask the courts of South Carolina to enforce a trust against an English executrix, holding in England a trust fund arising out of an administration of an estate in England, or if such legatee could complain in the courts of South Carolina against such executrix, domiciled in England, such executrix-trustee could only be brought into court to answer for a breach of trust by process of attachment against her own property here.

11. "That in such case the judgment could only be against her own property, and would not go against the assets of her testator.

12. "That upon the complaint in this case, his Honor, the presiding judge, erred in admitting testimony going to show the existence of assets within the jurisdiction, for the introduction of which testimony, either as to the fact of the existence of such assets, or their character or amount, no foundation had been laid in the pleadings, and for which plaintiff was necessarily unprepared.

13. "That his Honor erred in admitting testimony on the question of domicil as affecting the character of the administration held by defendant as executor in South Carolina, which question had not been put in issue by the pleadings."

At the threshold it is objected that the court has no jurisdiction of the case. If so, that should be an end of it. In order to pronounce an effective judgment, it is necessary that the court should have jurisdiction both of the subject-matter and of the person, which are distinct, and one may exist without the other.

The first question is, whether the court has jurisdiction of the person of Maria Torrens Graveley, as executrix of the will of John Graveley, deceased. She is the qualified executrix of his will in this State as well as in England; but being personally absent in England, the usual publication against absent defendants was made against her, and she was then served with copies of the

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*summons and complaint, informing her of the nature of the action. She did not make objection to the service, that she was sued as executrix and beyond the limits of the State, but, through her counsel, appeared, and "in her own right, and as executrix of the last will and testament of John Graveley, deceased," answered fully the allegations of the complaint, stating in the last paragraph of her answer that "the defendants [including her daughters] deny the right of the plaintiff to institute suit in this court against them, or any of them."

For manifest reasons, it is the policy of the law that an executor should be a resident of the State, or at least always ready to discharge here the duties voluntarily assumed, and to account, if so required, at least in respect to the assets, which may be located in the State. If a continuous absence of ten months can be shown, "such failure shall be received as a formal renunciation of the office of executor." Gen. Stat., § 1892. It cannot be that an executor shall be allowed to hold his office under the law of the State, and yet disclaim all power on the part of the courts of the State to hold him to account as such executor. There can be no doubt, if the executrix had been here in person, that she could have been sued here—that is to say, brought into court as a party. The objection, then, must be as to the means—the process by which she was brought into court. It is not necessary to consider that subject; for it seems to us that, by answering to the merits, she properly submitted herself to the jurisdiction of the court, and the matter stands as if she accepted service or authorized her attorney to do so for her. State v. Sarratt, 14 Rich. 29; Toland v. Sprague, 12 Pet. 331 [9 L. Ed. 1093].

This last case was foreign attachment in the United States Court, and it being decided that the publication was void on the ground that the United States Court had no right to issue such a process, it was yet held, that the defendant having appeared and pleaded to the merits, the judgment was valid. In delivering the judgment, Judge Barbour said: "The next inquiry is, whether, the process of attachment having issued improperly, there has anything been done which has cured the error. And we think there is enough apparent on the record to produce that effect. It appears that the

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party appeared and pleaded to the *issue.

Now, if the case were one of a want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties, by any act of theirs, to give it. But that is not the case. The court has jurisdiction over the parties and the matter in dispute; the objection was that the party defendant, not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him; and that the process of attachment could only be properly issued against a party under circumstances which subjected him to process in personam. Now, this was a personal privilege or exemption which it was competent for the party to waive. * * * After appearance and plea the case stands

as if the suit was brought in the usual manner." &c.

We do not, however, think that becoming a party, either by process or consent, deprived the executrix of the right to make any objection to the jurisdiction of the court as to the subject-matter, and we understand that to be the intent of her answer, denying "the right of the plaintiff to institute suit in this court against her," which was equivalent to a plea to the jurisdiction on the subject-matter in controversy, and so we shall consider it.

Considering the defendant as executrix in this State before the court, we do not lay much stress upon the objections of want of form in the complaint and prayer. The spirit of the code is in favor of amendments, and of having all cases, which have a status in court, tried and decided upon their merits. In most cases, where it can be done without surprise or injustice to the defendant, leave will be given to amend. We think the law upon the subject properly stated by Mr. Pomeroy in his work on Remedies, § 580: "The prayer for relief is generally regarded as forming no part of the cause of action, and as having no effect, and as furnishing no test or criterion by which its nature may be determined. * * * The fact that, after the allegation of the facts relied upon, the plaintiff has demanded judgment for a sum of money by way of damages, does not preclude the recovery of the same amount upon the same state of facts by way of equitable relief." See Wait Ann. Code 325; Hammond v. N. E. R. R. Co., 6 S. C. 130 [24 Am. Rep. 467]; Childers v. Verner, 12 S. C. 1.

But considering the defendant as in court,

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and the cause of *action to be one for equitable relief, with proper prayers to charge the executrix, she still interposes what may be considered as a plea in bar to the jurisdiction of the court, viz., that as to the legacy claimed by the plaintiff, she is not liable as executrix, either in this court, or, indeed, in any other, in England or America, (for the objection goes to that extent,) for the reason that the legacy has already been paid by her as executrix to herself as trustee, and she can only now be made liable for the amount in her hands as such trustee, or, as stated for her at the bar, her conclusive answer to the plaintiff is, "that your legacy was not left to you, or to be paid to you, but it was left to the executor of your uncle, to be held by him or her in trust, to be invested, and with the accumulations of interest, to be so held until you should attain the age of twenty-one, when the investments or their proceeds were to be paid over to you by your trustee as the result of the trust. The legacy, as bequeathed, was paid by the executrix when she set apart, under the advice of counsel, a fund to be invested for you. The will placed your money in the hands of the executor without security, confiding in the honesty and fidelity of your trustee, and only by impeaching her action as your trustee, by specific allegations and proof of violation of duty, or breach of her trust, can you hope to recover money against her in this or any other court of equity."

We do not clearly see what difference it can make whether the defendant is held liable as executrix or as trustee, but as the point has been strongly pressed, and the ground of liability may have some bearing upon the right of the plaintiff to be paid out of assets as such, let us look a little into the matter. The clause of the will, under which this legacy is claimed, is as follows: "I give and bequeath two thousand dollars each to John Graveley and Francis Porcher Graveley, the sons of my nephew, Cowlam Graveley, to be held in trust for them by my executors, and paid them with the accumulations of interest as they respectively attain the age of twenty-one years." Do these words create two offices—that of trustee as separate and distinct from that of executor? It seems to us that the intention was only to impose a particular duty on the executors as such. It will be observed that the legacy is not given to the executor in trust

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for the *legatee, as in the case of Anderson v. Earle, 9 S. C. 461, where it was given "to my executors in trust for Henrietta and Eloise, to be invested in slaves for them, with ample power to sell and re-invest."

An executor is personally liable in "equity for all breaches of the ordinary trusts, which, in courts of equity, are considered to arise from his office. And it may here be observed, that when personal property is bequeathed to executors as trustees, the circumstance of taking probate of the will is, in itself, an acceptance of the particular trusts. Therefore, when the will contains express directions what to do, an executor who proves the will must do all which he is directed to do as executor, and he cannot say that, though executor, he is not clothed with any of these trusts." 3 Wms. Ex., p. 1894, and authorities in note (6 Am. Ed.).

But, even if there were two separate and distinct offices, would the alleged transfer by the executrix to herself as trustee be absolutely conclusive against the legatee, so that when he comes of age he would be bound to take, without challenge, what was offered to him and characterized as his legacy under his uncle's will, without any reference to the amount set apart, or to the currency, the interest, or the country in which it was invested? We cannot think so; that would be giving to the act of the executrix the force of a judgment, the effect of which would be to allow her, and not the testator, to fix the amount of the legacy and the manner of its payment. It may be that the purpose of the executrix was good, and that,

in the operation of setting apart and investing a certain amount of English money, she had the assistance of an able solicitor and of counsel learned in the law, yet that was no more than her own act, the result of her own volition, ex parte, purely private, being neither "authoritative" nor "notorious," without the direction or sanction of any public authority, or having in it any of the elements of a matter res adjudicata. See Newcomb v. Williams, 9 Metc. 534, and other authorities in note to 3 Wms. Ex., supra.

Suppose that an executor, under like circumstances, should put down a legacy to himself, as trustee, at half its true amount, could it be claimed for an instant that such

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transfer would con*clude the legatee? In such case, surely, he could go behind the transfer and investment and have the true amount ascertained, and this proceeding would not be against the party as trustee to charge him; for that would be an admission that the right amount had been transferred; but, on the contrary, the proceeding would be against him as executor, for not properly executing the will and paying the legacy in pursuance thereof. That is precisely the character of the plaintiff's claim. He does impeach the propriety and legality of this alleged transfer and investment. He says, in substance, that he has not received the legacy given to him by his uncle's will, properly construed; that he gave him an American legacy ($2,000 in American money) which, of course, meant coin; but that the executrix, construing the will as giving an English legacy, payable in American paper currency, much less valuable than gold, which currency was not even in existence when the will was executed, now claims upon this basis to have transferred and invested his legacy in England, and at English interest.

We think the plaintiff has the right to have the fairness of that alleged transfer and investment inquired into by a proceeding in equity against the executrix as such in any court where the executrix is amenable to account, in this country or in England.

That brings us to the question, whether the defendant, as executrix, is amenable in the courts of South Carolina for the legacy of the plaintiff, an American citizen, who was born and has always lived here. She insists that she is not liable to account here, for the reason that her administration in South Carolina must be regarded only as ancillary to that in England, where the testator died, and that the estate, so far as legatees are concerned, must be, and, indeed, has already been settled there. The question is somewhat intricate, and the authorities not in accord. Its solution must, to a large extent, depend upon two facts: First. Where was the domicil of the testator at the time of his death? and, second, whether there were assets of the estate still remaining here at the time the action was brought. And we think that these points do not appear with

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sufficient clearness, *either in the pleadings or proof, to enable us now to decide the question satisfactorily.

In regard to the question of domicil, there is, in the pleadings, no reference whatever, and the only evidence which could be considered as bearing upon the subject was the circumstances, and what fell out incidentally in the progress of the case. It did not appear at what precise time, or under what circumstances, the testator left Charleston—whether he intended only a temporary or permanent absence, or whether he left undisposed of any tangible property there, except, as appeared from the will, his "wines, liquors and plate." The defendants complain, as no such issue was made, that they were taken by surprise, and did not offer their evidence on the subject. The Circuit judge adverted to the question; but he did not base his decree in whole or in part upon it. He says: "I do not find it incumbent on me to determine the question of domicil thus raised; for the case can now be decided on other issues. This I do not regret, as the defendants claim that the question is not presented in the pleadings, and that the raising of it at the hearing has, in some degree, operated as a surprise to them. I avoid, therefore, resting the decree on this issue. But were it necessary to decide it, I should hold that the question of domicil was properly raised, and that from all the facts before me, the domicil of the testator at the time of his death was in Charleston."

In regard to the other fact mentioned as important, the matter stands in this way: The complaint did not expressly charge that there were assets of the estate remaining in the State at the time the action was brought, but such charge was made in the reply. The code, section 189, provides, that "every material allegation of the complaint, not controverted by the answer, as provided in section 170, and every material allegation of new matter in the answer constituting a counter-claim, not controverted by the reply as provided in section 174, shall, for the purpose of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counter-claim, or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require," &c. The answer of the defendants

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did not set up a counter*claim; but was in the nature of a plea in bar, and, therefore, we cannot say that the very important fact in question may be considered as proved by the pleadings.

There was no actual proof upon the subject, except the record of administration pa-

pers from the office of the judge of Probate, in which was an inventory of the South Carolina property, consisting of notes, choses, stocks, &c., filed in 1872. This action was brought in 1879, seven years after, and we are not informed whether anything, and, if so, what had been done with said bonds, stocks, &c., during that long interval of time. The judgment below without regard to the question of domicil, proceeded solely upon the view that there was property of the estate of the testator still within the State, when the action was brought in 1879, and that fact was presumed from proof of assets in 1872. Without now making any ruling upon the subject, we think the principle involved is too important for the decision to rest entirely upon such presumption of a jurisdictional fact, and that, before deciding the question, in case it should become necessary, it would be safer to have proper allegations, and positive proof.

The judgment of this court is that the judgment of the Circuit Court be set aside without prejudice; and the cause remanded with leave to the plaintiff, if so advised, to amend his complaint by making proper allegations, so as to make the question of the domicil of the testator at the time of his death, and as to the existence of assets, their character and amount of the estate of John Graveley, in the State of South Carolina, where the action was commenced.

Mr. Chief Justice SIMPSON and Mr. Justive McIVER concurred in the result.

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20 S. C. 110

TUTT v. PORT ROYAL AND AUGUSTA RAILWAY COMPANY.

(April Term, 1883.)

[1. *Appeal and Error* ⇐854.]

In a case at law, this court has the right to affirm a judgment of non-suit ordered by the court below, although basing their conclusion upon a ground other than that taken by the Circuit judge.

[Ed. Note.—Cited in Thomas v. Dempsey, 53 S. C. 220, 31 S. E. 231.

For other cases, see Appeal and Error, Cent. Dig. § 3408; Dec. Dig. ⇐854.]

2. The points ruled in Tutt v. Port Royal and Augusta Railway Company, 16 S. C. 365, stated.

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[3. *Trusts* ⇐147.]

*The trustee, under a trust deed, which gave to one C., for life, the possession and use of a tract of land, cannot, during C.'s life-time, recover from a railroad company a strip of land granted to it by C. for a road-bed until C.'s right of possession has been adjudged forfeited, which can only be done in a case to which he is a party.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 192; Dec. Dig. ⇐147.]

Before Pressley, J., Aiken, February, 1883.

This was an action by C. G. Tutt, trustee of Helena H. M. Cook and Horatio R. Cook, and their children, against the Port Royal and Augusta Railway Company, for the recovery of the possession of a strip of land used by the defendant for a roadbed, and for $2,500 damages. The plaintiff claimed as substituted trustee under a deed of trust from John Miller to George W. Miller, in trust for the use and benefit of Helena H. M. Cook and Horatio R. Cook, her husband, for their joint lives, with remainder to the survivor, and then to their children, &c.; "and upon this further trust and condition that during the life of the said Horatio R., the said property, real and personal, shall remain in the possession and under the control and management of the said Horatio R., who shall be free from accountability for the annual rents, issues and profits thereof over and above the support of the family, provided he shall abstain from waste and destruction thereof."

The defendants claimed the strip of land in controversy (which is a portion of the land granted by the deed above mentioned) under a paper from Horatio R. Cook—in form a deed, but without seal—conveying it to their vendors for the use of a railroad track. Helena H. M. Cook and her husband, and three children are living. Other matters are stated in the opinion.

Messrs. Henderson Bros., for appellant.

Mr. William Elliott, contra.

October 25th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This is the second time this case has been before the court, and reference must be had to the former decision, as reported in 16 S. C. 365, for a history of the case.

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*After that decision, the plaintiff amended his complaint by alleging that H. R. Cook was entitled to the possession of the land, of which the strip in controversy is a part, so long as he abstained from waste and destruction thereof, or so long as he maintained his wife and children from the proceeds of the plantation; that the said H. R. Cook permitted the Port Royal Railroad Company to take possession of the said strip of land, and waste and destroy the same, by reason whereof the said plantation has failed to yield a sufficient support for the wife and children of said H. R. Cook, and the defendant corporation, who claim under said Port Royal Railroad Company, is in possession of said strip of land, using it as a track for their railroad, and committing great damage to the same and the plantation adjoining. Wherefore the plaintiff demanded judgment for pos-

session of the said strip of land and for damages.

At the trial below the plaintiff offered testimony tending to prove these allegations and closed. The defendant then moved for a non-suit, but upon what particular ground is not stated in the "Case." The non-suit was ordered, the Circuit judge stating his reasons as follows: "This action, originally based on the title of the plaintiff to the land held or used by the defendant, has, by leave of the Supreme Court, been changed into an action to enforce an alleged forfeiture of H. R. Cook's right to possess and control the said plantation during his life. Whatever may be the form of plaintiff's allegation, that is its substance, and he cannot recover, unless, under the rulings of the Supreme Court, H. R. Cook has done that which forfeits his right of possession. Admitting that there is sufficient testimony on that point to justify my sending the case to the jury; and, further, admitting that they would find that there had been waste or destruction by H. R. Cook, nevertheless, when the facts are not disputed on the question of the waiver of that forfeiture, it is my duty to decide whether they amount in law to a waiver. The proof is that the former trustee of this estate lived on the adjoining plantation; that he gave the defendants right of way through his own lands; that he knew when defendants were making their railroad through this plantation; that Mrs. Cook also knew it; that said trustee lived for several years after

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the road was made *there; that plaintiff, successor of the former trustee, after his death, permitted H. R. Cook to remain in possession and control of said plantation under the trust deed; that he is still in such possession, and that no procedure has ever been instituted against him to establish a forfeiture of his possession. In this state of the case, I hold that the parties interested in this action have clearly waived such forfeiture, if any, and they cannot recall said waiver."

The plaintiff appeals from this judgment of non-suit upon the following grounds: First. Because the Circuit judge erred in excluding certain testimony offered by the plaintiff for the purpose of showing "the decreased value of the plantation in question; also the decrease in the income; also its present condition as compared with its condition when the road first ran through; and in holding that the testimony must be limited to facts tending to show, either that H. R. Cook's license to the Port Royal Railroad Company was a reckless act, or that said act was voluntary waste." Second. Because the Circuit judge erred in holding "that if there had been a forfeiture on the part of H. R. Cook and those who claim under him, the plaintiff cannot enforce said forfeiture because it had been waived by the trustee, Miller, the predecessor of the plaintiff, and by Mrs. Cook, and because H. R. Cook has been permitted to remain in possession of the remainder of the place after said alleged forfeiture. Whereas, it is submitted that waiver is a question of fact, and should have been submitted to the jury; and, further, it is submitted that a trustee, such as Miller was, and Tutt is, without power to sell, could not waive a forfeiture prejudicial to the trust-estate, especially when such forfeiture was committed by strangers to the trust-estate who had notice of equities of the cestuis que trust."

The defendant also, according to the proper practice, gave notice that, if this court should be unable to sustain the judgment of non-suit upon the ground upon which it was based by the Circuit judge, defendant would ask that it be sustained upon sundry other grounds set out in the "Case," amongst which is the following: "Because forfeiture against

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the railroad company *cannot be enforced unless it be enforced against H. R. Cook also; and it cannot be enforced against him in this action, because he is not a party hereto."

We are entirely satisfied that the judgment of non-suit was properly granted; but we prefer to rest our conclusion upon a different ground from that taken by the Circuit judge. Our right to do this, in a case at law, seems to be questioned by the appellant in his argument; but we have no doubt at all upon the point. What we are called upon to review is the judgment—not the reasons which may have been given for such judgment. Hence, if, in our opinion, the judgment appealed from is right, we are bound to affirm it whether we concur in the reasons given for it or not.

It seems to us that the following points were settled by the former decision in this case: First. That H. R. Cook was entitled to possession of the plantation, of which the strip of land in controversy is a part, not under or by permission of the trustee, but under the terms of the deed of trust. Second. That, by virtue of this right of possession, Cook, while he could not convey the title of the land to the railroad company, could license them to use the right of way over it; and, having done so, no one could object to this easement thus conferred by Cook to the railroad company as long as Cook's rights to the possession of the plantation continued. Third. That Cook still retained his right, under the deed, to the possession of the entire plantation, including the strip of land in controversy, the defendant being only entitled to the right of way under the license from Cook. Fourth. That before appellant could interfere with this license to the company from Cook, it must be made to appear that Cook had forfeited his

right to possession under the trust deed by a failure to comply with the conditions upon which his right to possession was assured.

The language of the chief justice, in delivering the opinion of the court at the former hearing, is as follows: "All the right which the defendant obtained was the right of way. The tract of land through which it ran was rightfully in the possession of Cook, and it is still in his possession, subject to this easement of appellant [the defendant]; and we

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do not see that the *respondent [the plaintiff] can legally claim the possession because Cook has consented to this easement. Before the appellant, as trustee, could interpose, Cook's acts should amount to a forfeiture, either because he had diminished the capacity of the land to afford his wife and children support and maintenance out of the rents and profits, or because he had committed waste or destruction."

It follows from this that the plaintiff has no right of action to recover the possession of any part of the lands until Cook's right of possession, which he holds under the deed of trust, has been adjudged forfeited; and, certainly, this can only be done in a case to which Cook is a party. For even if it should be established beyond controversy, in this case, that the acts done and permitted by Cook would work a forfeiture of his right of possession, this would not be binding upon Cook, he not being a party, and he would still retain his right of possession; and, if so, certainly the plaintiff would not be entitled to judgment for the possession. It is clear, therefore, that upon this ground, if no other, the non-suit was properly ordered.

The other question raised by this appeal, as to the rejection of the testimony referred to in plaintiff's first ground of appeal, becomes wholly unimportant in this view of the case. Indeed, this, as well as most of the other questions presented in the argument, cannot now be properly considered, inasmuch as in our judgment the proper parties for their adjudication are not now before the court. Cook, whose right of possession is assailed, has, undoubtedly, the right to be heard on these questions; and it would be not only premature but unjust to discuss or decide them now. Whether Cook can be made a party to this case jointly with the defendant, or whether a separate action should not first be brought against him for the purpose of having his right of possession under the deed adjudged forfeited, and whether to such action all the beneficiaries under the deed should not be made parties, are all questions which it would be premature to discuss or decide in this case.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

20 S. C. *116

*YOUNG v. CITY COUNCIL OF CHARLESTON.

(April Term, 1883.)

[1. *Municipal Corporations* ⇐755.]

One injured in his person and property by a decay in a drain, which had been constructed across one of its streets by a municipal corporation charged by its charter with the duty of keeping its streets in proper repair, has no right of action for damages against such corporation, there being no statute authorizing it.

[Ed. Note.—Cited in Gibbes v. Town Council of Beaufort, 20 S. C. 218; Hill v. Laurens County, 34 S. C. 145, 13 S. E. 318; Parks v. Greenville, 44 S. C. 172, 21 S. E. 540; Bramlett v. City of Laurens, 58 S. C. 63, 36 S. E. 444; Matheny v. Aiken, 68 S. C. 177, 182, 183, 47 S. E. 56; Bryant v. City Council of Orangeburg, 70 S. C. 140, 49 S. E. 229; Parish v. Town of Yorkville, 96 S. C. 26, 79 S. E. 635.

For other cases, see Municipal Corporations, Cent. Dig. § 1590; Dec. Dig. ⇐755.]

[2. *Municipal Corporations* ⇐832.]

There is no distinction in this respect between municipal corporations and such other public bodies, or quasi-corporations, as are charged with like duties; there is no liability to civil action unless imposed by statute.

[Ed. Note.—Cited in Jennings v. Abbeville County, 24 S. C. 548; Chick v. Newberry and Union Counties, 27 S. C. 421, 425, 3 S. E. 787; Chapman v. City Council of Charleston, 28 S. C. 381, 6 S. E. 158, 13 Am. St. Rep. 681; Walker v. Chester County, 40 S. C. 344, 18 S. E. 936; McFail v. Barnwell County, 57 S. C. 302, 35 S. E. 562.

For other cases, see Municipal Corporations, Cent. Dig. § 1782; Dec. Dig. ⇐832.]

[This case is also cited in Matheny v. Aiken, 68 S. C. 181, 47 S. E. 56, without specific application.]

Before Pressley, J., Charleston, February, 1880.

This was an action by Henry E. Young against the city council of Charleston, to recover damages for injuries sustained in his person and property, caused by a defect in a drain across one of the streets of the city of Charleston. Plaintiff was riding his horse on Sunday afternoon along a street or highway in the upper portion of the city, when the horse was thrown down, and horse and rider were both severely injured. The horse's fall was caused by a hidden hole in a trunk or drain, which had been put there some years before by the city council, and had decayed. The case is otherwise stated in the opinion.

Messrs. H. A. M. Smith and B. H. Rutledge, for appellant.

A municipal corporation is responsible for an injury to an individual for non-feasance or failure to keep the streets in repair. Quasi-corporations generally are not liable. 2 Dill. Mun. Corp., §§ 996–1000; 2 T. R. 667; 91 U. S. 552. Municipal corporation liable at common law. 2 Dill. §§ 980, 983; 91 U. S. 552; 4 Law Rep. (App. Cas.) 263 (33 Moak R. 173). There is nothing decided in the South Carolina cases to the contrary; but

obiter dicta may be found in 2 Hill 571; 2 Nott & McC. 537; 12 Rich. 82; 14 S. C. 290. Obiter is not controlling. 102 U. S. 307; 15 S. C. 372. See Dill. Mun. Corp., § 957, note 1. Fowle v. Alexandria has been virtually overruled in 91 U. S. 552. It was the duty of the city to keep their streets in

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repair. 2 Bay *65. But the city is at least liable for an injury caused by the direct act of the agents of the corporation in making the street unsafe—for misfeasance. 2 Dill. Mun. Corp. § 1024; 122 Mass. 358.

Mr. G. D. Bryan, contra.

October 25th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This action was brought to recover damages for injuries sustained by the plaintiff, occasioned, as was alleged, by a defect in one of the streets of the city of Charleston. The defense was—First. That, in the absence of a statute making a municipal corporation liable to an action for damages so occasioned, such an action could not be maintained. Second. That the place where the damages were sustained was not one of the streets of the city which it was required to keep in repair. Third. That the plaintiff, being engaged at the time the injury was sustained in a violation of law, by taking a pleasure ride on Sunday, could not maintain the action.

The issues of law and fact were referred to a referee, who found all the issues in favor of the plaintiff, and fixed the damages at $990. To this report exceptions were filed, which need not be specifically stated here; and the Circuit judge, who heard the case upon the report and exceptions, not being satisfied with the sufficiency of the evidence as to the question, whether the place where the injury was sustained was such a public street as the defendant was bound to keep in repair, recommitted the report to the referee "for such further testimony as plaintiff may offer on said question."

From this order both parties have appealed; but as we think the whole will be concluded by the proper solution of the question raised by the defendants' first ground of defense, it is unnecessary to state the various exceptions of the parties. That question is, whether a municipal corporation, charged by its charter with the duty of keeping in proper repair the streets or public highways within the corporate limits, is liable to a civil action for damages at the suit of an

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individual who has sustained *an injury, either in person or property, by reason of a failure on the part of the corporation to perform such duty in the absence of a statute imposing such liability. This question has been the subject of no little conflict of discussion in the courts of this country; but we think it has been settled in this State adversely to the claim of the plaintiff. As far back as 1820, it was decided in the case of Young v. Commissioners, 2 Nott & McC. 537, that the board of commissioners of roads was not liable to such an action; and the authority of that case was subsequently recognized in White v. City Council, 2 Hill 575, decided in 1835, and again in McKenzie v. Chovin, 1 McMull. 222, decided in 1841. The same principle was recognized and reaffirmed in Coleman v. Chester, 14 S. C. 291, and in Black v. City of Columbia, 19 S. C. 412 [45 Am. Rep. 785].

The true theory upon which these cases rest is that a municipal corporation is a mere governmental agency established for public purposes, and stands upon a very different footing from that of private corporations organized for private gain, or for the special benefit of the corporators. As characterized by Marshall, C. J., in Fowle v. Alexandria, 3 Pet. 398 [7 L. Ed. 719], it is "a legislative corporation, established as part of the government of the country;" and by Chancellor Harper, in White v. City Council, supra, as "the agent of the legislature for the purposes of government." This distinction is fully recognized in Main v. Railroad Co., 12 Rich. 82 [75 Am. Dec. 725]. A municipal corporation, thus being a part of the government of the State, is not liable to a civil action by an individual for any damages which he may sustain by reason of its failure to perform any of the public duties imposed upon it, unless the legislature sees fit to provide by statute for such right of action; and as it is conceded that there is no statute giving any such right of action in this case, we do not think that the action can be maintained. Although we are satisfied that the law is thus firmly settled by the authorities in this State, yet, in deference to the earnest and able argument submitted in behalf of the plaintiff, we have been induced to examine the question in the light of the authorities elsewhere.

First, it is contended that the rule in this State rests ultimately upon the case of Young v. Commissioners, supra, in which the

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*question was as to the liability of a board of commissioners of roads, which was at most only a quasi-corporation, and that the rule is different as to a municipal corporation proper. It is not to be denied that such a distinction has been recognized and established by many cases in other States. See 2 Dill. Mun. Corp., ch. XXIII., where the authorities are fully stated; but, as is said in section 785 of that valuable work, it is difficult to see the ground for such distinction; and we find it not only difficult, but absolutely impossible to perceive any good reason why a person who sustains an injury by reason of a defect in a highway just beyond the corporate limits of a city or town has

no right of action against the public authorities charged with the duty of keeping such highway in repair, while such person would have a right of action if the injury he sustained had been received within the corporate limits of such city or town.

The duty of establishing and keeping in repair the public highways, whether within or without the corporate limits of a city or town, is a public duty, and whether such duty is imposed upon one set of public officers or another cannot make any difference in this respect. The character of the duty imposed in both cases is the same, the result to the injured party, of a failure to perform such duty, is the same, and we are unable to see why the liability should not be the same. The public, generally, as well as the individuals composing the public, have the same, and perhaps a greater interest in having the public highways outside as well as those within the limits of incorporated cities or towns kept in good repair; for if an injury should be sustained in a remote or unfrequented part of the public highway, the consequence might be much more serious than if the same injury were sustained within the corporate limits of a city or town where relief could readily be obtained. It will not do to say, as was intimated by Earle, J., in McKenzie v. Chovin, supra, that this distinction rests upon the fact that a municipal corporation has a corporate fund while these quasi-corporations, like boards of commissioners of roads, had no such fund: for such was not the fact. These boards had the same if not greater powers of taxation that municipal corporations usually have, besides other sources of revenue

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arising from licenses and fines *for the violations of the law in reference to retailing spirituous liquors. And, as Judge Dillon says, in sections 761, 762 and 785, the distinction is recognized even where these quasi-corporations are invested with the taxing power.

Inasmuch, therefore, as we are unable to discover any good reason for this distinction between the liability of these quasi-corporations and that of municipal corporations proper, and as no such distinction has ever been recognized in this State, we are unwilling now to recognize it, notwithstanding the fact that it is well established in many of the States, though, in at least two, the doctrine has been pushed to its logical conclusion, and quasi-corporations, as well as municipal corporations proper, have been held liable to such an action.

The cases principally relied upon by the counsel for the plaintiff are Barnes v. District of Columbia, 91 U. S. 540 [23 L. Ed. 440], and Bathurst v. McPherson, 4 Law Rep. (App. Cas.) 256 (33 Moak Eng. Rep. 173,) decided by the judicial committee of the privy council. In the former the decision was by a divided court—a bare majority; and it is quite manifest, from an examination of the case, that the question now under consideration was not so fully considered as its importance demands. The question which seems to have engrossed the minds of the court was whether the municipal corporation could be made liable for the negligence of the board of public works, inasmuch as the members of that board were appointed by the president of the United States and not by the municipal corporation; and the opinion is mainly devoted to the discussion of the question, whether the fact that these officers received their appointment from the president, and not from the municipal corporation, would relieve the corporation from liability; and from the conclusion reached upon this question, two of the justices dissented, while two others dissented generally. The point which we now have under consideration was dismissed with the single remark that the authorities establishing the doctrine that a municipal corporation is liable to a civil action for its mere negligence "are so numerous and so well considered that the law must be deemed to be settled in accordance with them," followed by a long list of cases, many of which do

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not at all sustain the doctrine for *which they are cited, as is most fully and clearly shown in the elaborate opinion of Gray, C. J., in the case of Hill v. City of Boston, 122 Mass. 344 (23 Am. Rep. 332), where he comments at length upon the case of Barnes v. District of Columbia, and the cases cited to sustain it.

But more than this; although the learned justice who delivered the opinion in Barnes v. District of Columbia expressly recognizes the distinction hereinbefore mentioned between the liability of quasi-corporations and municipal corporations proper, as so well established that it cannot be disturbed, which distinction, however, he seems to think is not founded upon any sound principle, yet among the cases cited by him to establish the liability of a municipal corporation, are several from those States where the doctrine has been carried to its logical conclusion, and no distinction between the liability of municipal corporations proper and quasi-corporations is recognized.

In Bathurst v. McPherson, the court seems to rest its decision mainly upon the ground that the defect in the highway which caused the injury complained of in that case, was the result of an act of the corporation, and declined to decide the general question whether the corporation was bound to keep all the roads in the municipality in good repair, and therefore liable for an injury sustained by reason of any defect in such roads. It is true, that in this respect the case we are considering is like the case of Bathurst v. McPherson, for here as well as there the

corporation had originally constructed the drain which caused the injury complained of, by being allowed to get out of repair. But we have not been able to find any other case in which such a distinction has been adverted to, and we see no reason why a corporation should be any more liable for an injury caused by a defect in a street at a point where the corporation had previously constructed a drain, than it would be for an injury sustained by a defect at any other point on such street.

It is true that there are cases in which a distinction is drawn between cases of misfeasance and non-feasance—a distinction, however, which is repudiated in Bathurst v. McPherson—in which it has been held that while a corporation might not be liable for mere non-feasance, in neglecting to perform

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its duty *in keeping streets in repair, yet it would be liable for positive misfeasance, as for placing an obstruction in the street or cutting a ditch across it and leaving it open, by reason of which an individual sustains an injury. But the same obligation rests upon the corporation to keep every part of its streets in repair, as to keep a drain or bridge previously constructed by it in proper repair; and whether an injury is sustained at one point or the other cannot possibly, upon any sound principle, make any difference as to the rule of liability.

But again, this case of Bathurst v. McPherson seems also to be based upon this idea, that because a corporation is liable to an indictment for not keeping its streets or highways in repair, it is therefore liable to a civil action for damages at the suit of an individual who has sustained an injury by reason of a defect in one of its streets. This doctrine certainly cannot be sustained in this country, as it would entirely overthrow what is conceded to be the well-settled rule here as to the distinction between the liability of a quasi-corporation and that of a municipal corporation proper; and we know of no case in this country where it has been recognized. But even granting to the case of Bathurst v. McPherson all that has been claimed for it, as establishing a doctrine contrary to that which we have adopted, we cannot regard it as sufficient to warrant us in overthrowing the well-settled rule in this State, sustained, as we believe it to be, by reason as well as by high authority.

Our view is fully sustained by decisions in Massachusetts and Michigan, two amongst the ablest courts in the Union. Hill v. City of Boston, 122 Mass. 344 (23 Am. Rep. 332), recognized and affirmed in French v. City of Boston, 129 Mass. 592 (37 Am. Rep. 393); Detroit v. Blackeby, 21 Mich. 84 (4 Am. Rep. 450), recognized and affirmed in McCutcheon v. Homer, 43 Mich. 483 (38 Am. Rep. 212). In these two cases of Detroit v. Blackeby and Hill v. City of Boston, the question is so fully and ably discussed, and the authorities, both English and American, are so fully and satisfactorily reviewed that it would be a work of supererogation to attempt to add anything to what is there so well said.

It appears also, from the course of legisla-

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tion in this State, *that the view which we have adopted has apparently been assumed by the legislature to be the correct one and acted upon as such. Soon after the adoption of the present constitution, the legislature passed an act constituting each county in the State a body politic and corporate, (act of 1868, 14 Stat. 134,) and yet they deemed it necessary to provide specially by statute that any person sustaining an injury by reason of a defect or want of repair in a highway should have an action for damages against the county, (act of 1871, 14 Stat. 669,) and this special remedy by statute has been retained in all the subsequent legislation upon the subject. Now it must be assumed that the legislature was aware of the law as settled in this State, that the board of commissioners of roads, the officials previously charged with the duty of keeping the public highways in repair, were not liable to a civil action for damages sustained by an individual by reason of the neglect of this duty, and if they had supposed that the several counties in this State, who, through their agents, the county commissioners, are now charged with this duty, would become liable to such an action by reason of the fact that they had been erected into corporations proper, there would have been no necessity for passing an act providing specially for such liability.

Under the views herein presented it is clear that the action cannot, under any state of the facts, be maintained, and the other questions presented cannot arise.

The judgment of this court is that the order appealed from be reversed and that the complaint be dismissed.

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20 S. C. 123

MILLER v. NEWELL.

(April Term, 1883.)

[1. *Specific Performance* ⇐76.]

The Court of Equity could not decree specific performance of an agreement between the plaintiff in a slander case and his attorneys, that he would pay to them a part of his recovery out of the verdict when obtained, or a portion of the verdict itself.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 211; Dec. Dig. ⇐76.]

[2. *Attorney and Client* ⇐190.]

If, in such case, the verdict, when obtained, was satisfied through collusion between plaintiff and defendant to the injury of plaintiff's attorneys, the court would not order the satis-

faction to be vacated, as specific performance of such agreement between plaintiff and his attorneys could not be decreed.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 412–417; Dec. Dig. ⟸ 190.]

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[3. *Judgment* ⟸898.]

*A proceeding by rule, on the motion of plaintiff's attorneys, to require the defendant in such slander case to show cause why a satisfaction of the verdict should not be vacated, is in the nature of a bill for specific performance and cannot be entertained.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1715; Dec. Dig. ⟸898.]

[4. *Attorney and Client* ⟸190.]

The attorneys, as creditors of the plaintiff, could not proceed against the defendant for an alleged fraud in the satisfaction, until they had exhausted their legal remedies against their debtor.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 412–417; Dec. Dig. ⟸ 190.]

[5. *Assignments* ⟸24.]

A chose in action arising out of tort strictly personal, as slander, is not assignable. After verdict in slander, but before judgment entered thereon and while appeal is pending, the claim for damages continues to be a chose in action.

[Ed. Note.—Cited in Simmons v. Reid, 31 S. C. 391, 392, 9 S. E. 1058, 17 Am. St. Rep. 36; Ex parte Hiers, 67 S. C. 114, 45 S. E. 146, 100 Am. St. Rep. 713.

For other cases, see Assignments, Cent. Dig. § 43; Dec. Dig. ⟸24.]

[6. *Assignments* ⟸34.]

An assignment may be made by parol, but doubted whether the mere declaration "I do assign," in the absence of the subject-matter, constitutes an assignment.

[Ed. Note.—Cited in Sullivan v. Latimer, 38 S. C. 165, 170, 17 S. E. 701.

For other cases, see Assignments, Cent. Dig. § 67; Dec. Dig. ⟸34.]

[7. *Attorney and Client* ⟸190.]

The facts and circumstances of this case did not give defendant knowledge of the plaintiff's intended fraud upon his attorneys, nor were they sufficient notice to put defendant upon the inquiry. The findings of fact by the Circuit judge on the return to the rule, not concurred in. McGowan, A. J., dissenting.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 412–417; Dec. Dig. ⟸ 190.]

[8. *Appeal and Error* ⟸1012.]

[When circumstances are offset by the positive testimony of a witness, which, in the opinion of the appellate court, outweighs such circumstances, and renders the appellate court unable to concur with the finding of the circuit judge, his judgment will be reversed.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3990; Dec. Dig. ⟸1012.]

[9. *Attorney and Client* ⟸189.]

[A person has a right to settle an action for personal injury without his attorney's consent, and where he does so it ends the controversy, and the suit must be dismissed.]

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 407; Dec. Dig. ⟸189.]

Before Cothran, J., Anderson, October, 1882.

The order of the Circuit judge, discharging the rule in this case, was as follows:

This is proceeding by rule upon the defendant to show cause why the entry of satisfaction on the sheriff's book of a certain execution in favor of the plaintiff against the defendant, for the sum of $2,000, should not be held to be satisfaction only pro tanto—that is to say, to the extent of $1,000, the sum actually paid, besides costs; and the sheriff required to enforce the execution for the balance thereof against the defendant for and on behalf of the plaintiff's attorneys in said cause. The respondent (defendant) made return to the rule, and upon this and certain affidavits in support of it, and upon affidavits submitted in behalf of the actors, the cause came on to be heard by the court at the Fall Term, 1882, for Anderson county.

The following brief history is deemed necessary for a proper understanding of the questions involved: The main cause, which was an action for slander, was tried at the October Term, 1881, of the court, and resulted in a verdict of $2,000 for the plaintiff. The defendant's counsel moved upon the minutes of the presiding judge for a new

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trial, which was argued and refused *during that term of the court, to which refusal the defendant, by his counsel, excepted. Within ten days the defendant's counsel served upon the plaintiff's counsel their notice and grounds of appeal, addressed only to the plaintiff's counsel—no copy of which was served upon the presiding judge within thirty days from the service of that notice, to wit, on November 22d. By means of the intervention and efforts of "mutual friends," and with the aid of the senior counsel of the defendant, who prepared the papers, but who had no further participation in the matter or knowledge of the negotiations, the defendant and the plaintiff effected a settlement of the controversy between them by the former paying to the latter the sum of $1,000, in full discharge and satisfaction of the said verdict. It was agreed at the time, and by all the parties to this settlement, and by those who were present, excepting J. B. Watson, who did not so understand it, as he says, that this settlement was to be kept secret from that day, Tuesday, November 22d, until Saturday, November 26th. On the day last mentioned, the defendant's counsel served upon the plaintiff's counsel a written notice, stating that the matter in controversy between plaintiff and defendant had been adjusted and settled by them; that no judgment or execution should be entered upon said verdict, or any portion of it, and that the whole case should be discontinued.

On November 30th the counsel for the plaintiff procured an order from the clerk of the Supreme Court dismissing the appeal in the cause, for failure on the part of the ap-

pellant to serve the presiding judge with notice of the appeal and grounds, and for failure to file the return with the clerk of the Supreme Court within the time required by law. On December 2d, judgment was entered up by plaintiff's counsel upon the verdict and execution lodged with the sheriff; and on January 9th following, the defendant, by advice of his counsel, paid to the sheriff the taxed costs of the case, and produced the plaintiff's receipt, purporting to be in full satisfaction of his entire claim, which was duly entered on the execution, or upon the execution book of the sheriff. In the meantime—that is to say, between November 22d and 26th, 1881, the plaintiff Miller fled from the State, and has not since returned. At

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the next term of the court the actors *herein applied for and obtained the rule which, with the return thereto and the various affidavits in the cause, are now under consideration.

The issues involved are both difficult and delicate, but they may be justly determined by answering correctly the three following questions: 1. Was there any appeal pending in the cause on November 22d, 1881? 2. Was there such an assignment by the plaintiff to Orr, Wells & Allen of one-half of the recovery of $2,000; or such an agreement to pay them that sum out of the recovery, as to give them an enforceable lien for the same? 3. Was there such actual notice given to the defendant of this assignment or agreement; or did he have such knowledge of facts concerning it as should have put a reasonable man upon inquiry, whereby, in disregarding the one or failing to follow up the other, he has become legally liable for actively or negligently causing the actors here to lose their debt?

First—as to the appeal pending. After some possible contrariety of decision in the batch of cases reported in 12 S. C. R., beginning with Rogers & Nash, p. 559, and Sullivan & Speights, p. 561, and Lake & Moore, p. 563, with the case of Coleman v. Heller, 13 S. C. 491, the true rule seems to be adducible from the case last cited, and is, that the first section of the act of 1878, 16 Stat. 698, was only meant to cover the case where no exceptions were taken at the time. If they were so taken, then service of copy of exceptions under the act was unnecessary. Did the defendant at the time except to the rulings of the presiding judge? To make objections sufficient to sustain an appeal, it is not necessary that the word exceptions should be used; the better practice undoubtedly is, to give the court information at the time the party excepts, and have it noted on the record, so that there can be no misunderstanding about it; but it has been held that when it appears from the record that the judge was apprised of the intention to rely on the propositions advanced by way of exception, that is sufficient to constitute an exception, though there is no formal request to note an exception. Many cases cited. Continuing, the court says: "Here the propositions by way of exception were positive and unmistakable.

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* * * We think it appears from the *record that the judge was apprised of the intention to rely on the propositions advanced by way of exception, and that is sufficient to constitute an exception, although there was no formal request to note an exception." The motion to dismiss the appeal was refused.

Here no exception by the defendant's counsel appears upon the record nor upon the calendar, where the notice of motion on the minutes is entered; but it is admitted that the motion was made, that it was refused, and that the defendant's counsel excepted. The grounds of exception, as afterward served upon plaintiff's counsel, but not upon the presiding judge, are, in substance, as follows: 1. For excessive damages. 2. For admitting incompetent testimony. 3. For excluding explanatory testimony. 4. For a variance between the allegata and probata. 5. For refusing to grant a non-suit. True, it does not satisfactorily appear that these propositions were "advanced by way of exception," at the time the motion was made and refused. It is more probable that they were enlarged when afterwards formulated and served upon the plaintiff's attorneys within ten days after the refusal of the motion.

The question, however, as to the appeal pending in the cause is in my opinion, incidental and collateral, and only material to the inquiry here, as furnishing reasonable inducement to the alleged compromise. Its only value is in aid of motive, and the belief of the fact by the defendant's counsel, as shown by his affidavit, and the deposition of J. C. Milford, that pending the negotiations the defendant, Newell, said he would not give $1,400 to compromise—"that he would take the case to the Supreme Court first,"—satisfy me that both counsel and client believed that the appeal was pending, and whether it was technically so in fact or not was not material.

Second. As to the assignment and lien, and first as to the lien. An attorney's lien, as now generally recognized, is of two kinds: The one a general lien upon the papers in his hands belonging to his client, which is a mere right to retain until his bill is paid; all deeds, vouchers, &c., upon which, or in connection with which, he has rendered professional services, or made disbursements in the cause. It confers no active right; it is

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passive, *enabling the attorney to hold for whatever may be due to him, and although dismissed from the cause, if without fault on his part, he may retain the papers in his possession until his professional services and disbursements are paid and refunded. In re Paschal, 10 Wall. 483 [19 L. Ed. 992]; Ex parte Nesbit, 2 Sch. & Lef. 279; Ex parte

Sterling, 16 Ves. 258; Cross on Lien, p. 216, ch. XV., passim.

The other kind of lien is that which an attorney has upon a judgment recorded or money payable thereon, or upon a fund in court. This is not merely passive, but authorizes the taking of active steps. It did not exist at common law. In 1 Douglass 104, it is said by Lord Mansfield not to be very ancient. It is founded upon the first rule of ex æquo et bono, and is invoked by the courts for the protection of attorneys, as its own officers, by taking care that a "party should not run away with the fruits of the cause, without satisfying the legal demands of the attorney by whose industry and, in many cases, by whose expense those fruits are obtained." Read v. Dupper, 6 T. R. 361. It is true that Lord Kenyon in this case makes the validity of the payment depend upon the bona fides with which it was made—that is to say, upon the absence of notice or knowledge on the defendant's part of the claim of the plaintiff's attorney; and this, I take it, is the main inquiry in this case, which will be considered hereafter.

This lien, from its very nature, is equitable, and not legal. It is bottomed upon the equitable consideration that by the attorney's skill and labor the judgment has been recovered, which being within the control of the court, and the parties to it within its jurisdiction, the court will see that no injustice is done to its own officers. The very recent New York decisions sustain this doctrine to its utmost limits, under the provisions of the new code (1879), which have extended this lien to any deserved or agreed compensation, to be recovered upon a quantum meruit, or by enforcing the express agreement. I do not understand by the provisions of our code that such lien extends beyond the taxable costs and disbursements, and the rule laid down in Scharlock v. Oland, 1 Rich. 207, is still the law in this State.

Was there a contract of assignment be-

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tween the plaintiff, *Miller, and his attorneys of one-half the damages recovered by the verdict, or a mere agreement by which they should have from him one-half of the same upon its recovery? Whichever it was, it rests altogether in parol, and, in the view which I take of the case, it is not as vital a question as counsel seemed to regard it in the argument. If it was an assignment by the plaintiff, without the knowledge of the fact by the defendant, or of such facts in relation to it as should have put him upon inquiry, and he, in good faith, satisfied the plaintiff's demand, he would be entitled to the protection of the court, except as to the matter of costs and disbursements.

If it was an agreement by which the plaintiff was to pay his attorneys one-half of the verdict, and the defendant had no knowledge of such agreement, or of such facts in relation to it as should have put him upon inquiry, and he, in good faith, satisfied the plaintiff's demand, he would in like manner be entitled to the protection of the court except as to the matter of costs and disbursements. But under the principle laid down in the case of Lowry v. Pinson, 2 Bail. 324, if the payment was made to the plaintiff, with knowledge either of the assignment or agreement, and the defendant thereby intentionally enabled the plaintiff to defeat the claim of his attorneys, such payment cannot be sanctioned by the court beyond the number of dollars actually paid, and as an attempt to satisfy the whole demand it is vain and futile. The law upholds assignments of and agreements in relation to personal property by parol. Bulkley v. Howell, 1 Nott. & McC., 249; Briggs v. Dorr, 19 Johns. 95.

The proof, however, satisfies me that this was an assignment. The deposition of John E. Allen, an honorable counselor, is distinct and positive upon this point. He says (paragraph IV. of his affidavit), "that said plaintiff, after the said notice of appeal, assigned by parol one-half of said verdict to his said attorneys for their compensation in said trial," &c. He was one of the active parties to the contract of assignment—the other party to it, Miller, has run away with the fruits of the cause; and although others have alluded in their depositions to this matter as an agreement, repeating the alleged declara-

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tions of the *plaintiff, Miller, I am constrained to hold that there was an assignment of one-half of the verdict, and not a mere agreement to pay that sum.

I have now to consider the last and most important inquiry in the case: Did the defendant have knowledge of the assigned claim of these parties, or knowledge of such facts in relation to it as should have put them upon inquiry? After a careful review of the testimony, and the circumstances of this transaction, I am constrained to hold, in the language of Mr. Justice Bradley in In re Paschal, 10 Wall. 495 [19 L. Ed. 992], "that the defendant could not safely settle with the plaintiff, without paying" this claim. I am much impressed by the nature of this transaction, and the circumstances attending it—the long and bitter controversy between the parties, their hostile attitude towards each other, the protracted negotiations by "mutual friends," chief amongst whom was J. C. Milford, evidently more the friend of the defendant than of the plaintiff; his reluctant appearance before the master, being brought up by subpœna; his gingerly deposition; the proof by Walters that defendant asked him to see the plaintiff, and ascertain if the matter could be compromised and settled, that he wanted Miller to get the benefit of what was paid in the compromise; could arrange it without going to town, &c. What possible benefit was contemplated here,

save to the prejudice or injury of another? Why give the benefit of what was paid to Miller? They were more than at arms-length; they were not in speaking distance of each other; they were enemies. The strange coincidence, too, of paying to Miller exactly the amount that he was entitled to under the assignment; and, more than all, the four days of secrecy imposed—secrecy so significant of the end accomplished, so readily acquiesced in, and so faithfully observed. Secrecy, from the time of Lord Coke, who denounced it as 'a mark of fraud,' down to the present day, is that detestable thing which courts of justice despise. Secrecy is a badge of fraud, because it tends to deceive creditors, and is not in the course in which honest men ordinarily transact business. Dona clandestina sunt suspiciosa. The secrecy which constitutes a badge of fraud, is not a mere want of notoriety, but a concealment, or an attempted concealment." Big. Fraud 81.

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*From these considerations, I hold that this transaction was fraudulent, and my conclusion may be well stated in the words of the learned judge who delivered the opinion of the court in the justly celebrated case of Lowry v. Pinson, supra: "There is perhaps no principle of more universal application than that fraud avoids all contracts between parties themselves if one imposes on the other, and between them and third parties where they conspire to defraud others. And cases might arise where they could as readily be effected, where a full and fair price is paid. One rich in lands, houses, or other permanent property, resolves not to pay his debts, and another, knowing this, treats with him, and purchases his whole estate at a fair and full price, and thus enables him to fly from the claims of his creditors. Now, although the purchaser has gained no advantage, he has enabled the debtor to evade the payment of his debts, and the effect upon the creditor is precisely the same as if nothing had been paid." The case at bar is stronger, for the defendant, Newell, would gain an advantage in being discharged from the payment of one-half of the verdict against him, and has enabled the plaintiff, Miller, to fly from the just claim of his creditors.

The conclusion thus attained, might find just and valuable support in considering the relation between the defendant and J. C. Milford, the mutual friend or agent, through whose active intervention, at the request of the defendant, those negotiations were carried on and consummated. Milford deposes that Miller said to him (in the very midst of the negotiations), that "he had agreed to give his attorneys a certain per cent. of the amount recovered, and if it was known that he was going to make a compromise, his lawyers would not let him make the compromise." "It is not essential that notice be given to the party himself, but notice to his counsel, solicitor or agent is sufficient, whether given in the same or in another transaction, provided there be adequate reasons to conclude that the facts continued in remembrance." Ad. Eq. 157. Can it be conceived that this matter, which was the very gist of the settlement, and the direct cause of, and reason for, the imposition of the desire of secrecy, should not have continued in "the remembrance of the

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*agent," even if they were not in fact communicated to the principal. I hold not.

It is, therefore, ordered, adjudged and decreed: First. That the rule herein be and the same is hereby made absolute. Second. That the alleged satisfaction or receipt given by W. B. Miller, the plaintiff, to Newton J. Newell, the defendant, and entered in the sheriff's book as satisfaction of said judgment and execution be and the same is hereby held to be satisfaction only pro tanto; and that the sheriff for Anderson county do enforce the said execution against the said defendant for the balance due thereon, according to the force, form and effect of said judgment and execution for, and in behalf of, the plaintiff's attorneys in the said cause, who are the actors in this proceeding.

From this judgment, the defendant appealed.

Messrs. Murray & Murray, for appellant.

Messrs. J. L. Tribble and Joseph N. Brown, contra.

October 25th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, Miller, brought action against the defendant, Newell, for slander, and recovered a verdict for $2,000. The defendant moved upon the minutes of the court for a new trial, which being refused, defendant excepted, and, within ten days after the rising of the court, served upon plaintiff's counsel notice of his intention to appeal, also his grounds of appeal. No copy of this notice and grounds of appeal was served on the presiding judge.

The verdict was obtained at the October Term of the court at Anderson in 1881. A short time after the notice of appeal had been served, to wit, on November 22d, 1881, the parties, plaintiff and defendant, at the instance of and through mutual friends, as it is said, effected a settlement of the controversy between them by the defendant paying to plaintiff $1,000 in full discharge and satisfaction of the verdict, which sum being paid, a receipt and discharge under seal was executed by the plaintiff, in which it

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*was stated to be in full of all claim against the defendant, except defendant's costs; and further, that no judgment or execution upon the verdict for $2,000, or any part thereof, should be entered.

On November 26th, notice of this settle-

ment was served by defendant's counsel upon the plaintiff's counsel. On November 30th, which was after the settlement, plaintiff's counsel procured an order from the clerk of the Supreme dismissing the appeal for failure on the part of the appellant to serve the judge with the notice and grounds of appeal within the required time. On December 2d, 1881, plaintiff's counsel entered judgment upon the verdict and lodged execution with the sheriff. Within a few days thereafter the defendant paid the tax costs of the case, and produced plaintiff's receipt in full of the verdict, which receipt was duly entered on the execution. In the meantime the plaintiff had fled the State, as is stated, and has not since returned.

At the next term of the court the plaintiff's attorneys upon affidavits applied for a rule against the defendant to show cause why the entry of satisfaction, which had been made on the execution by virtue of plaintiff's receipt and discharge, should not be held as satisfaction only to the extent of the amount paid, to wit, $1,000 and the costs, and the sheriff be required to enforce the execution for the balance thereof. This rule was applied for on the ground, as appeared in the affidavit of one of plaintiff's counsel, that said plaintiff, when he employed his counsel, in addition to a retaining fee promised as further compensation to assign one-half of the recovery in the case to them, and that after the verdict and notice of appeal the plaintiff had, by parol, assigned one-half of said verdict to said attorneys for past services in said case, and also for additional services to be rendered in the appeal; that these facts were known to the defendant, or at least that he had sufficient information to put him on the inquiry, yet, notwithstanding this, that he procured his attorney, J. S. Murray, Esq., to draw up the agreement and discharge, and had it consummated in fraud of the rights of said attorneys.

In answer to the rule, the defendant, Newell, denied unqualifiedly the charges upon which the rule had been issued—denied all knowledge of the alleged agreement as to the

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fees of plaint*iff's counsel or the assignment of the verdict, and repudiated the charge that it was his purpose in making the settlement to defraud said counsel. On the contrary, that knowing no one in the transaction but the plaintiff, he made the settlement because he had the right to do so, as he thought, and because he believed it was the best thing for him under the circumstances.

The rule and answer with the affidavits for and against were heard by Judge Cothran, at the October Term, 1882, who, regarding the following to be the issues involved, discussed and passed judgment thereon: "1. Was there any appeal pending in the cause on November 22d, 1881? 2. Was there such an assignment by the plaintiff to Orr, Wells & Allen of one-half of the recovery of $2,000; or such an agreement to pay that sum out of the recovery as to give them an enforceable lien for the same? 3. Was there such actual notice given to the defendant of this assignment or agreement; or did he have such knowledge of facts concerning it as should have put a reasonable man upon inquiry, whereby, in disregarding the one or failing to follow the other, he has become legally liable for actively or negligently causing the actors to lose their debt?"

As to the first question, to wit, the pendency of the appeal at the time the settlement was made of the verdict, his Honor reached the conclusion that both counsel and client believed that the appeal was pending, and whether it was technically so, in fact, was not material. This appeal does not involve the correctness of this conclusion, so that this question may be dismissed from our consideration. As to the other two questions, his Honor found that an assignment of the verdict had been made by plaintiff to his attorneys before the settlement; that the defendant had knowledge thereof, and that the transaction was fraudulent. He therefore made the rule absolute.

The defendant has appealed upon the following grounds:

1. "Because his Honor erred in holding that the right of recovery in this case, which was grounded on a tort, could, in law, be assigned before judgment entered and during an appeal to the Supreme Court.

2. "Because his Honor erred in holding

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that a verdict pend*ing an appeal to the Supreme Court, upon which no judgment had entered, could be assigned by parol alone.

3. "Because his Honor erred in holding that an agreement to pay the plaintiff's attorneys a part of the recovery gave them an enforceable lien.

4. "Because his Honor erred in decreeing that there was an assignment for half of the verdict, when the proof shows that if there was an assignment it was conditioned to secure services of counsel in the pending litigation in the Supreme Court, and being for these services, which were not rendered, was certainly invalid for a part of the sum pretended to be assigned.

5. "Because his Honor erred in holding that Newell's secrecy for four days as to a fact which the law did not require to be published, was a fraud, and at the same time holding that the plaintiff's failure to make known his assignment, which the law required to be made known or recorded to bind the parties, was valid and gave them an enforceable lien.

6. "Because his Honor erred in holding J. C. Milford to be an agent of Newell.

7. "Because his Honor erred in holding that Newell had notice when it is nowhere proved by the testimony.

8. "Because his Honor erred in holding that Newell had such notice as to make him responsible.

9. "Because his Honor erred in holding that the settlement in this case was attended with such suspicious circumstances as to charge Newell with fraud.

10. "Because his Honor erred in holding that J. C. Milford was a reluctant witness, when there is not a scintilla of proof as to such fact.

11. "Because his Honor erred in holding that Newell would gain an advantage in the compromise, thereby deciding against Newell without any hearing of the case pending in the Supreme Court at the time the compromise was made."

The Circuit judge bases his judgment upon two legal propositions, under one or both of which he thought the facts brought the case. These propositions are—First. If there was an assignment by the plaintiff without the knowledge of the defendant, or of such facts in relation to it as should have put him upon

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*inquiry, and he, in good faith, satisfied the plaintiff's demand, then he should be protected by the court, except as to the matter of costs. Second. If there was an agreement by which the plaintiff was to pay his attorneys one-half of the verdict, and the defendant had no knowledge of such agreement, or of such facts in relation to it as should have put upon him upon inquiry, and he, in good faith, satisfied the plaintiff's demand, he would, in like manner, be entitled to the protection of the court, except as to the matter of costs and disbursements. The converse of both propositions being that if the defendant had the knowledge, &c., he should not be protected.

No doubt both of these propositions are sound. They are not only founded in natural justice, but they are fully sustained by authority. The question is, do the facts of this case bring it under either one of them; and, if so, can the actors invoke their application in this proceeding of a rule to show cause?

On this point we will take up the second proposition first. Suppose that there was an agreement, and nothing more than an agreement, between Miller and his attorneys that they should be paid one-half of the recovery in the slander case, either out of the verdict when collected, or that the verdict should be assigned to them to that extent, and Miller, at the close of the case, had refused to comply, what would have been the remedy for the counsel? Could they have gone into the Court of Equity for a specific enforcement? We think not, as this agreement was not one of a character which entitles parties to specific performance. It was not an agreement in reference to land, nor in reference to a jewel, an heir-loom or family relic, or anything else having an artificial value on account of which the old Court of Equity would decree specific performance. Nor was it an agreement the breach of which could not be compensated in damages. The only remedy in reach of the counsel would have been an action for breach of contract.

Now, admit that there was collusion between Miller and Newell to breach this contract to the injury of the attorneys by marking the verdict satisfied on the payment of the $1,000, which was paid. This would be a fraud, and a gross one; but would this fraud give the attorneys the right to go into

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equity to *have the entry of satisfaction vacated so that they might ask a specific performance of the agreement? Certainly not, if, after having vacated the entry, the case was found to be one in which the court could not decree a specific performance. It would be idle to declare the entry of satisfaction a nullity when the court could proceed no further. The verdict would still be Miller's, and the court would have no power to decree that the attorneys should be paid out of it, or that one-half thereof should be assigned to them, because attorneys in this State have no enforceable lien for their fees resting alone in contract. Scharlock v. Oland, 1 Rich. 207. Courts do not sit simply to adjudge acts fraudulent. They are not public censors organized simply to censure vice and to mark immorality, but it is their end in part to afford relief and redress to the consequences of such acts. Where, then, such relief is sought as the court can give for a fraudulent act, then the court can take cognizance. But where the court can give no relief, however fraudulent the act may be, the court is without jurisdiction.

Now, this rule, so far as it proceeds upon the alleged agreement of Miller that his counsel should be paid out of the verdict, or that one-half of it should be assigned to them, is in the nature of a bill for specific performance against Miller by his attorneys, and yet Miller is no party. Such a proceeding, as we have seen, could not have been entertained in equity by bill against Miller himself, and, consequently, we think, could not be entertained here by rule.

It may be contended, however, that while this is true, yet that the attorneys were creditors of Miller, and this collusion between him and Newell was a fraud intended to delay and hinder them in the collection of their debt, and under the rule of Lowry v. Pinson, 2 Bail. 324 [23 Am. Dec. 140], and numerous other cases to the same point, that the settlement of this verdict should be set aside. The principle is well established, that where a debtor disposes of his property, even for a valuable and full consideration, yet for the purpose of defeating, delaying or hindering one or more of his creditors, the act of disposition is fraudulent, because not bona fide, and may be vacated in behalf of the credi-

tor; but before this can be done there are
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certain steps for the creditor to take. *He must have his claim against the debtor adjudicated and established, and he must then exhaust the other property of the debtor. A debtor has a right to dispose of a portion of his property so that he leaves enough for his creditors. The act is not fraudulent unless it results in injury to some one. Where a debtor disposes of his property, a creditor, who feels that he has been injured, after establishing his demand to judgment and failing to find other property of the debtor sufficient to satisfy his debt, may then move to set aside the conveyance which, in his judgment, is fraudulent, but not before.

Now, here, Miller, in effect, transferred to Newell a portion of his claim of $2,000, supposing it to be a valid claim, which he had a right to do, but not to the prejudice of his creditors. The court will not, however, assume that one man is the creditor of another, or that he has been prejudiced by the transfer of property by the alleged debtor. These facts must be proved. In other words, the creditor must obtain judgment on his claim, and show in some way that all of the other property of the debtor has been exhausted, and that it is necessary for him to resort to the property thus disposed of, so that his claim may be paid. These facts did not appear in this case, and we are of opinion, therefore, that the second proposition of law mentioned above could not be invoked for the actors in the rule.

Next, there is no doubt, as we have already said, of the correctness of the first proposition. But did the facts of the case make it applicable? Was there a valid assignment, and did the defendant have knowledge of this assignment, or of facts sufficient to put him upon inquiry? These involve both questions of fact and of law. As to what occurred, I mean the facts as proved, there is no dispute, especially in reference to the assignment. The testimony on that subject appears in the affidavit of Mr. Allen, one of Miller's attorneys. He states that when the attorneys were employed, Miller promised, "as a further compensation beyond the retaining fee, to assign to them one-half of the recovery," and also, that after the verdict and notice of appeal Miller did assign by parol one-half of said verdict to said attorneys. He does not state how this assign-
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ment was made, except *that it was by parol, but whether there was any delivery of the verdict, actual or symbolical, does not appear.

Now assuming that these facts occurred as stated by Mr. Allen, the questions of law arise, could this verdict in its then shape, being a verdict for damages in an action of tort to the character of Miller, with an appeal pending, be made the subject of assignment? and, if so, whether a statement by a witness that it had been "assigned by parol," without stating the circumstances of delivery, actual or symbolical, is sufficient evidence of an assignment? It will not be necessary to trace the law of assignments of choses in action back to its original source, or to discuss the various modifications and enlargements of this doctrine, which have subsequently taken place under the demands of commerce and trade. It is sufficient to say that nearly all choses in action founded on contract may be assigned, whether they be notes negotiable or unnegotiable—bonds, judgments, decrees, or evidenced in any other way, and they may be assigned either in writing without seal or under seal or by verbal parol. But it is not necessary to pursue this discussion, as the matter involved here is not a chose in action arising on contract. On the contrary it is a chose in action arising in tort. It may be called a chose in action, as those terms taken in their broadest latitude comprehend not only a demand arising on contract, but also a wrong or injury done to person or property. People v. Tioga C. P., 19 Wend. 75.

Can choses in action on torts be assigned? Torts, in their effects, may be divided into two classes, to wit: those which affect injuriously the estate, real or personal, of a party, and those which cause injuries strictly personal; those which survive to the administrator and those which die with the party injured. It appears that those which affect the estate may be assigned, but those of a personal character cannot. Neither can a contract, in which the personal acts and qualities of one of the contracting parties form a material ingredient, in general be assigned. 2 Chit. Cont. 1364. In reference to torts, Mr. Chitty says: "A distinction has, however, been taken between different classes of torts—those which cause injuries strictly personal being regarded as furnishing no assignable claim for damages; while the con-
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*trary is held as to those from which special loss has arisen to the estate of the assignor." Gardner v. Adams, 12 Wend. 297; 2 Story Eq. Jur., § 1040, g; Comegys v. Vasse, 1 Pet. 193 [7 L. Ed. 108]; People v. Tioga C. P., 19 Wend. 75; McKee v. Judd, 2 Kernan 625–6.

Now was the matter involved here a chose in action arising in tort of a strictly personal character? It was an action at the beginning for slander. This was certainly of a personal nature entirely and strictly, and it arose in a tort. Has its character changed in the progress of the suit? Has it passed beyond the condition of a chose in action, and become an adjudicated right to so much money—evidenced by a judgment, which in some sense might be regarded as a contract and therefore assignable. It is very certain that no judgment had been en-

tered, when the alleged assignment was made. But had Miller the right to enter an unalterable judgment at that time? Had the amount of his damages become an established and an accomplished fact? This must depend upon the further fact, was the appeal pending? The Circuit judge did not pass upon this question definitely. He seemed, however, to be under the impression that it was pending. In this we concur. We think that Coleman v. Heller, 13 S. C. 491, is conclusive of the question. Under this case the appeal was pending, and such being the case the rights of the parties had not been determined. The matter was still a chose in action arising on tort of a strictly personal character and therefore not assignable.

We find in Bliss Code Pl., § 38, the following: "That not even in equity was an assignment allowed of a right of action arising from a mere personal wrong, as libel, slander and injuries to the person. The injury must be to the estate, otherwise there is nothing assigned. A mere personal wrong will entitle the sufferer to redress, but his right to redress is not deemed property so as to survive." Again, at section 44, he says: "A judgment, upon whatever founded, is everywhere regarded as a debt which does not abate by death, and which is transferable like an ordinary contract. But the character of the demand is not changed until judgment, and an action based on a cause of action which would not survive will abate by death during any step of the proceeding, and the demand cannot be assigned after verdict

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*merely," citing Crouch v. Gridley, 6 Hill (N. Y.) 250; Charles, in re, 14 East 197; Kellogg v. Schuyler, 2 Den. 73.

We might stop here, as this disposes of the case. It would be more satisfactory, however, to discuss the other questions. Was there a legal assignment of the verdict?—admitting it to be assignable. The only testimony upon this subject is found in the affidavit of Mr. Allen. He says, that after the notice of appeal the plaintiff "assigned by parol." We have already seen that an assignment may be made by parol, that it need not be in writing. But it is not certain that a mere verbal declaration that "I do assign," without more and without the matter assigned being present and without delivery, will amount to an assignment. Mr. Chitty says: "That it is now established that no particular form is necessary in equity to constitute an assignment of a debt or chose in action; any order, writing or act which makes an appropriation of a fund, amounts to an equitable assignment of that fund. An assignment of a debt may be made by parol as well as by deed. And where an assignment has been executed by a delivery of the evidence of the contract, no writing is necessary to its validity. If the case is such that an actual delivery cannot be made, a symbolical delivery seems to be sufficient. An equitable assignment of a judgment may be made by parol; and a delivery of the execution is a sufficient symbolical delivery of the judgment on which it issued." 2 Chit. Cont. 1365–6. Mr. Allen, however, says that there was an assignment, and although he does not detail the circumstances or state the manner in which it took place, the Circuit judge was perhaps warranted in inferring that the requisite formalities were observed.

Next, was this assignment brought home to Newell, or was he in possession of such facts as should have put him on the inquiry? There is no dispute or controversy as to what the different witnesses testified, and the question at issue must be determined by inferences drawn from the testimony given. There is no positive testimony that Newell was ever distinctly informed of the assignment before or up to the compromise. The facts from which it is said this knowledge must be inferred are three: 1. Walters, one of the witnesses, said that Newell asked him

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to *see the plaintiff and ascertain if the matter could be compromised; that he wanted Miller to get the benefit of what was paid in the compromise. 2. That when the settlement took place Miller stated that he desired the compromise kept secret until the Saturday following, three days; and 3. That Milford, one of the parties negotiating the compromise, was informed by Miller that the reason he wanted the matter kept secret was that he had paid Captain Allen about $200, and had agreed to give his attorneys a certain per cent. of the amount recovered, and if it was known that he was going to make a compromise, his lawyer would not let him make it.

Now according to the testimony no one knew of the fact of the assignment but Miller and Mr. Allen. Even Mr. Tribble, one of Miller's attorneys, does not appear to have known it, because he states that some time about November 1st, 1881, (this was after the verdict,) Miller informed him that Messrs. Orr, Wells & Allen were to be paid for their services out of the judgment, that this was the agreement with them." He does not state that anything was said about the assignment. So it appears that no one positively knew of the fact of the assignment but Miller and Mr. Allen; or rather, it does not appear from the testimony that any except these two knew of it. There was certainly no notice given to Newell or to his attorneys. Under these circumstances can it be legitimately inferred from the facts stated above that Newell had the information? We think not.

The matter that excites some suspicion was the fact that the compromise was to be kept secret. That proposition, however, came from Miller. Newell does not seem

to have been at all concerned whether it was to be kept secret three days or not. Miller desired it, and Newell made no objection.

But it is said that Milford knew it, and that he was the agent or friend of Newell. It does not satisfactorily appear that Milford was the agent of Newell. He did bear a message in the first instance to Miller from Newell to know if he, Miller, would compromise. Miller refused and the matter was dropped. Afterwards, in conversation with Miller, he said he would compromise for $1,400. This Milford reported to Newell,

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who de*clined it, but said he would give $1,000. This Miller agreed to take, saying that he would take it provided it was kept secret until Saturday, or at least he is certain that this was said the day the compromise took place; and during this conversation Miller gave the reason why he wanted the matter kept secret. Milford does not say that he informed Newell of this conversation. We do not see such agency here as that Newell was bound to know all that Milford knew. Newell had not constituted Milford his agent to compromise the case, but in reply to propositions from Miller of $1,400, he returned a message that he would give $1,000, and received one in reply, that it would be accepted.

These facts, without regard to the opposing testimony, seem to us altogether insufficient to warrant the inference that Newell knew of the assignment, nor were they enough to put him on the inquiry. The first duty of the assignee, after the assignment was executed, was to give notice to the debtor, if he desired to cut off any dealings between said debtor and the assignor; but here there was no notice, nor was there any indorsement made on the verdict or the judgment by which Newell could have obtained notice. The fact that Miller wished to keep the settlement secret for three days was hardly sufficient to make Newell infer that Miller was attempting to cheat and defraud his attorneys. The character of Miller had just been vindicated by the country to the cost of Newell, and no doubt he was unwilling to interfere with that character further.

While these facts seem to be insufficient in themselves to support the inference drawn by the Circuit judge when considered alone, this insufficiency is much stronger when they are considered in connection with the opposing testimony, to wit, the affidavit of Newell. He denies most positively and emphatically that he knew anything whatever of the arrangement made by Miller to pay his attorney's fee, or that there was any collusion between himself and Miller to defraud said attorneys, and states that he did not know that Miller owed said attorneys anything. Newell stands unimpeached before the court. True, he was a party and his testimony was in his own favor, but this is not sufficient to destroy the credit of a man whose character is unimpeachable. With this positive testimony of Newell, met

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only *by the circumstances which we have already discussed, we are unable to concur with the Circuit judge in his finding of fact as to this point.

No doubt the attorneys of Miller rendered valuable service to him. No doubt they are entitled to the compensation which they demand, and no doubt their client has perpetrated upon them a gross and most ungrateful fraud; and while our sympathies and feelings, so far as we are entitled to indulge sympathy as individuals, are all with the attorneys in this case, yet as a court, solemnly adjudicating the rights of parties, we must be governed by the law and the facts as we understand them.

It is the judgment of this court that the judgment of the Circuit judge be reversed, and that the rule should be discharged.

Mr. Justice McIVER concurred.

Mr. Justice McGOWAN. I incline to think that there was enough to put Newell on the inquiry as to the intended fraud, but in other respects concur.

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BLAKELY & COPELAND v. FRAZIER.

(April Term, 1883.)

[1. *Appeal and Error* ⇐999.]

This court cannot consider exceptions alleging error in the findings of fact by a jury in a law case, as it has appellate jurisdiction in chancery cases only.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3913; Dec. Dig. ⇐999.]

[2. *Evidence* ⇐383.]

An account-sales of cotton is not evidence of the correctness of the items composing it, but may be submitted to the jury as containing the debt in an itemized form, subject to its further proof by the admissions, conduct or acts of the defendant in connection therewith or otherwise.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1669; Dec. Dig. ⇐383.]

[3. *Evidence* ⇐119.]

Where a factor shipped the cotton of a planter through cotton sellers, who demanded reclamation on account of overdrafts by the planter, and it was submitted to arbitration to determine who should pay this reclamation in the first instance, and the award was that it should be primarily paid by the factor, who accordingly paid it—in action afterwards brought by the factor against the planter to recover the amount of the reclamation so paid, the award is not proof of the overdrafts, but the plaintiff may introduce it in evidence as a part of the history of the transaction, and as

a basis for evidence of the acts and conduct of the defendant in reference thereto.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 303; Dec. Dig. ⟸119.]

[4. *Appeal and Error* ⟸977.]

It not certainly appearing that the verdict was reached in disregard of the judge's instructions, his order refusing a new trial not disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3865; Dec. Dig. ⟸977.]

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[5. *Factors* ⟸66.]

*Where action is brought by a factor to recover money paid for defendant at his request on account of overdrafts upon cotton shipped by him to Liverpool, the trial judge did not err in refusing to charge "that there could be no proof of overdrafts by defendant without proof that the cotton was duly sold, its price," &c., as, under the pleadings, the indebtedness might be established by the acknowledgments of the defendant.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 96–103; Dec. Dig. ⟸66.]

[6. *Parties* ⟸54.]

New parties cannot be brought in until, under the order of the court, the summons has been amended.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 85; Dec. Dig. ⟸54.]

[7. *Parties* ⟸53.]

When leave has been obtained to amend either the summons or complaint, one or both, the order granting the leave must be strictly complied with, or the step taken will be a nullity.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 84; Dec. Dig. ⟸53.]

[8. *Executors and Administrators* ⟸14.]

The Court of Probate cannot appoint an executor; its grant of letters testamentary to one not nominated in the will is a nullity, and should be utterly disregarded by the courts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 31; Dec. Dig. ⟸14.]

[9. *Executors and Administrators* ⟸14.]

A testator appointed "A. my executor, and in case of his death or refusal to qualify" he appointed "B. and C. joint executors of this will." A. qualified, and, while still alive and acting, the Court of Probate issued letters testamentary to B. *Held*, that the Court of Probate had no jurisdiction to appoint B. executor, and that he was not a co-executor with A.

[Ed. Note.—Cited in Martin v. Fowler, 51 S. C. 172, 28 S. E. 312.

For other cases, see Executors and Administrators, Cent. Dig. §§ 29–31, 42; Dec. Dig. ⟸14.]

[10. *Limitation of Actions* ⟸119.]

[Since a probate court has no power to appoint an executor in addition to the one named in the will, its appointee, made co-executor by the order of appointment, is not a necessary party to an action against the estate, so that if the executor under the will is properly served within the period of limitation, the action is not barred because such appointee was not served until after its expiration.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 532; Dec. Dig. ⟸119.]

Before Wallace, J., Edgefield, March, 1882.

A very full statement of all the facts of this case will be found in the report of the first appeal, 11 S. C. 122. See, too, 15 S. C. 615. To the statement here made in the opinion of the court, it will be proper to add only that portion of Marshall Frazier's will nominating his executors, and the requests to charge made by defendants and refused by the presiding judge, and forming the grounds of their exceptions, numbers 6–12.

The extract from the will is as follows:

"Fifth. I appoint my son, William H. Frazier, my executor, to carry out the provisions of this, my last will and testament, and in the event of his death or refusal to qualify, I appoint my son-in-law, Sheppard Spencer, of Alabama, and my son-in-law, William A. Sanders, joint executors of this will."

The requests to charge were as follows:

"That plaintiffs must prove that they sold the cotton, when they sold it, and the prices for which they sold it, and the expenses of shipment and sale in Liverpool, England,

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where it *is alleged in the pleadings that it was sold." His Honor did not charge this request, but marked on the margin—"Cannot be charged without qualification."

"That there can be no proof of an overdraft by Frazier on his cotton until it is shown by proof that the cotton was duly sold, and what it brought, and that the charges made for expenses and advances upon the same must be proved to have been actually paid, and that they were reasonable and proper charges against the same." His Honor did not charge this request, but marked it on the margin—"Refused for same reason."

"That plaintiffs must prove each and every item charged and claimed by them against Marshall Frazier for advances to him on his cotton, and for all charges for the shipment of the same, both in Columbia, Charleston, New York and Liverpool, to show that he made any overdraft on his cotton." His Honor did not charge this request, but wrote on the margin—"Refused; cannot be charged without qualifications."

"That plaintiffs must prove that they advanced the $990.82 charged by them in their account rendered to Frazier, or that they paid out the same for him; and they must also prove for what it was paid, so as to show that it was a reasonable and proper charge against him." His Honor did not charge this request but wrote on the margin—"Refused for the above reason."

"That the charges in the account rendered Frazier of $429.52 and $267.67 entered as charges of Marshall, Beach & Co. on seventy-two bales cotton, and thirty-seven bales cotton, must be proved by plaintiffs, and that plaintiffs must prove for what purposes said charges were made, so that it can be ascertained that said charges were reasonable and just and legal." His Honor did not charge

this request, but marked on the margin—"Refused for same reason."

"That plaintiffs must prove that the drafts of Solomon Root & Co., referred to in the accounts rendered Frazier must be proved by the plaintiffs, and that it must be proved that they were paid." His Honor did not charge this request, nor mark it refused.

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*"That the drafts of Solomon Root & Co. were not Frazier's drafts if actually drawn and paid, and that they are not proper charges against him." His Honor did not charge this request, nor mark it refused.

The appeal was heard on December 11th, 1882, and being ordered for re-argument on the question of the statute of limitations, was again heard May 21st, 1883.

Messrs. A. J. Norris, L. F. Youmans and Pringle T. Youmans, for appellants.

Messrs. J. P. Carroll, J. C. Sheppard and Pope & Haskell, contra.

November 12th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In August, 1871, the plaintiffs, respondents, instituted the action below against William H. Frazier, one of the defendants, as executor of Marshall Frazier, deceased, demanding judgment for the sum of $5,099, with interest thereon from December 10th, 1866, less $120, admitted by plaintiffs to be due the said Frazier, said amount being due them, as alleged, for so much paid by them to Marshall, Beach & Co., of Charleston, on account of an overdraft of the said Frazier on a lot of 212 bales of cotton, shipped by the said plaintiffs for the said Frazier, through Marshall, Beach & Co., to Liverpool. The defendant Frazier answered the complaint denying the indebtedness of the estate, and also suggested that W. A. Sanders had qualified as one of the executors of Marshall Frazier. This answer seems to have been put in in November, 1871.

In March, 1872, the plaintiffs obtained an order "That they have leave to amend their summons and complaint by adding the name of William A. Sanders, one of the executors of Marshall Frazier, deceased, as a defendant to the action." It appears that no action was taken under this order, or at least there is nothing in the brief showing action. In

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October, 1873, a second *order was passed by Judge Carpenter, "That the case be withdrawn from the jury, and that plaintiffs have leave to amend their complaint within thirty days by making as a party defendant, William A. Sanders, as co-executor of William H. Frazier, of the last will and testament of Marshall Frazier, with apt words to charge him." January 14th, 1874, the summons and complaint, as amended, were served on W. A. Sanders, and on W. H. Frazier on March 27th, 1874. To this amended complaint, Frazier and Sanders answered separately; Frazier submitting, in addition to his former answer, that the complaint of plaintiffs had not been amended within the thirty days allowed in his order, and the said amended complaint and summons had not been served on the said William A. Sanders as required by law; and he claimed the benefit of this non-compliance. Sanders, in his answer, denied the debt, plead the statute of limitations, and, also, that the amended complaint and summons had not been served on him in the manner as required by law, or within the time specified in the order.

The case was heard at the May Term, 1876, of the court of Richland county, with verdict for the plaintiffs. A new trial, however, was granted on appeal to the Supreme Court. 11 S. C. 122. It was then transferred to Edgefield county, where the defendants resided, and in 1879 it came up for trial before Judge Wallace, who, upon motion of the defendants, ordered a non-suit. This order was set aside by the Supreme Court and a new trial granted (15 S. C. 615); which trial was had at the March Term of the court, 1882, for Edgefield. The jury found a verdict in favor of the plaintiffs for the sum of $5,000; and the present appeal is from the judgment entered upon this verdict.

The appeal is based upon fourteen exceptions; but, as is usual where exceptions are so numerous, many of them rest upon the same alleged error presented in a different form. The first involves nothing more than a question of fact, and, as the case below was a jury case, we do not understand how it could be relied on here as a ground of appeal, in view of the emphatic provision of the constitution, that in such cases the jurisdiction of the court is limited to the correction of er-

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rors of law, and *also the often-repeated announcement of this court that it has no appellate jurisdiction except in cases of chancery.

The second charges error to his Honor in permitting "the account of sales submitted by the plaintiffs to go before the jury without any proof as to the charges and statements contained therein." It is stated in the brief, that his Honor, in allowing this account of sales to go to the jury, said that "it was not to be regarded as evidence in itself, but was allowed to go to the jury, like a note or other paper requiring proof, to give opportunity to prove them;" and further, "that if the declarations, acts and conduct of Marshall Frazier, connected with the account of sales referred to and the reclamation made upon him by Beach, Root & Co., were such as to have induced a reasonable man to believe that he (M. Frazier) recognized such an account-sales as correct, and if the plaintiffs, Blakely and Copeland, acting in good faith and under such belief, were induced thereby to pay such reclamation, then it would be competent for

the jury to regard said account-sales as proved, at least as against M. Frazier and the defendants, his executors." This account of sales, admitted under these circumstances, we think, was properly admitted. The judge seems to have fully explained to the jury that the introduction of the account was not intended as evidence of the items embraced therein, but as containing the debt in an itemized form, subject to proof, by the admission, conduct or acts of Marshall Frazier in connection therewith, or otherwise. Thus explained, there can be no valid objection to its admission.

The third exception alleges error, "because his Honor permitted the 'award' to go to the jury it having been heretofore decided in this case to be incompetent evidence to prove the overdraft by Frazier on his lot of cotton." It is not necessary now to construe the former opinion of this court on the subject of this award; but admitting that the appellants' interpretation of it is correct, to wit, that the award in itself was incompetent to prove the overdraft by Frazier on his lot of cotton, yet this would not exclude the award entirely from the case. This award was a part of the history of the case. It was one of the facts by which the plaintiffs became connected with the transaction, and the case could not be understood well without its in-

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troduction. *It does not appear that it was introduced by the plaintiffs, or was admitted by the court as competent evidence in itself, of the fact that Marshall Frazier had overdrawn to that extent on his cotton; but as a part of the transaction in which the plaintiffs had paid the money, which they were claiming, and also as a basis upon which to found the introduction of evidence of the acts and conduct of Marshall Frazier in reference thereto. We see no error in its admission.

The fourth and fifth complain, that the verdict of the jury is not in accordance with the charge of the judge in regard to the value of gold and exchange, and as to the amount which Frazier was entitled to in U. S. currency on that account as the proceeds of his cotton, and that such being the fact, his Honor should have set aside the verdict and granted a new trial as moved for by appellant. The Circuit judge does not state fully the reasons of his refusal to grant the new trial. He does state, however, that it appeared to his satisfaction, that the evidence was sufficient to sustain the verdict, and that there was not proper ground for the new trial; and, therefore, he refused the motion. The verdict was for a good deal less than the amount claimed. How the jury reached the verdict of $5,000, is not for this court to inquire. It may possibly have been capricious and unsupported by the evidence. If so this was a matter to be corrected on the motion for a new trial. It does not appear that it was reached by a disregard of the legal propositions charged by the judge in the matter, which constitutes the foundation of these exceptions, and, therefore, said exceptions are untenable.

The sixth, seventh, eighth, ninth, tenth, eleventh and twelfth exceptions involve alleged errors of omission in refusing to charge as requested therein. These requests seem to have been intended to intensify the legal principle, that it was necessary for the plaintiffs to prove the correctness of their demand, and that this could only be done in a certain way. The sixth exception is an illustration, in which his Honor was requested to charge, "that there could be no proof of an overdraft by Frazier on his cotton until it was shown by proof that the cotton was duly sold, and what it brought, and that all charges made

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upon it for ex*penses must be proved to have been actually made, and that they were reasonable and proper charges against the same."

The plaintiffs' cause of action was founded upon an allegation that they had paid for Marshall Frazier, and at his special instance and request, a certain sum of money, on account of an overdraft of his on a lot of 212 bales of cotton consigned through Messrs. Marshall, Beach & Co., to Liverpool. The judge charged, in general terms, that to entitle the plaintiffs to recover, they must prove their demand. He did not undertake to specify the different links so to speak, in the chain of proof; nor would he have been warranted in doing so. Nor was he required to confine the plaintiffs to one mode or channel of proof. Suppose it had been possible for the plaintiffs to prove that Marshall Frazier had admitted in terms that he was indebted to them in the sum mentioned, and for the consideration mentioned. In such case it would not have been necessary for plaintiffs to have gone into the items demanded by the defendants. All that would have been necessary, would be proof simply of the general admission, and the defendants upon such admission would have been liable, whether the different items embraced in the account were correct or not. If the plaintiffs, at the instance and request of Marshall Frazier, paid a sum in gross for said Frazier, which he at the time recognized as a valid claim against him, it would be a very hard rule against the plaintiffs to require of them in a suit against Frazier, to prove that the debt in all its items was really a valid debt; and that Frazier had made no mistake in acknowledging it. We think the judge's charge was sufficiently comprehensive on this point, and that he was not bound to charge as requested in these different requests.

The thirteenth exception need not be considered, as it is on appeal from the facts.

The fourteenth, which is the last, presents the only difficult question in the case, to wit, whether the action was barred by the statute of limitations? It was on account of this

that a re-argument of the case was ordered for the last term of this court. The argument upon which the statute is invoked by the defendants is as follows: It is said that there

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were two executors of *the will of Marshall Frazier and that no action could be regarded as having commenced against the estate, until process had been issued against both; that the estate was one, and that the two executors represented that unity, and, therefore, process had to issue against both before the estate could be said to be sued. This is the principle of law for which the appellants contend, which no doubt is correct. Hopkins v. Admrs. McPherson, 2 Bay 194.

Then it is contended, as matters of fact, that while process was issued in time against W. L. Frazier, one of the executors, to save the statute, yet that the other executor was not made a party until long after the statute had run out, and that inasmuch as the estate was not sued until both executors were impleaded, that the statute could be invoked for the benefit of the estate, when the second executor was brought in.

There is no dispute as to the facts. It is admitted that the action was not barred when W. L. Frazier was sued, and it is also admitted, that the statutory period had elapsed, when the process was lodged for Sanders. The facts of the case, bearing upon the question of the statute, are as follows: The right of action against the estate of Marshall Frazier accrued to the plaintiffs on December 10th, 1866. Frazier died August 5th, 1870. Had he lived, the statute would have been completed as a bar on December 10th, 1870. Summons was lodged against defendant Frazier, as executor, August 25th, 1871, but not served until November 6th, 1871. At the time the summons was lodged giving the plaintiffs the benefit of the nine months after the death of Marshall Frazier the action was brought in time; as adding the nine months the time did not expire until September 10th, 1871, whereas the summons against the defendant Frazier, as executor, was lodged, as we have said, August 25th, 1871. Frazier having suggested that Sanders was also executor, the plaintiffs obtained leave from Judge Melton, March 2d, 1872, to amend their summons and complaint by adding the name of Sanders, one of the executors, as defendant to the action. At that time the statute had run out and if the estate was not already sued, the statute was a bar. Nothing seems to have been done under this order. On Oc-

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tober 25th, 1873, after the case had *gone to the jury, it was withdrawn, and Judge Carpenter, presiding, gave leave to the plaintiffs to amend their complaint within thirty days by making William A. Sanders, as co-executor, a party defendant with apt words to charge him. The complaint was thus amended November 22d, 1873, which, with summons against both Frazier and Sanders, as executors, was lodged in sheriff's office in Edgefield county, January 7th, 1874, and in sheriff's office Greenville, March 24th, 1874, and served on Sanders, January 14th, 1874, and Frazier, March 27th, 1874.

Now the first question which arises upon these facts is, Has Sanders ever been made a party to the action commenced originally against W. L. Frazier? The appellants contend: First. That new parties cannot be brought in until, under the order of the court, the summons has been amended; and, Second. That when leave has been obtained to amend either the summons or complaint, one or both, the order granting the leave must be strictly complied with or the step taken will be a nullity. These two propositions seem to be sustained by the authorities cited and relied on by the appellants. They embrace matters of practice under the code, and we think appellants' construction is supported by the following cases and authorities: 2 Wait Pr. 504; Follower v. Laughlin, 12 Abb. 105; Walkenshaw v. Perzel, 32 How. Pr. 310; 5 Rob. 648; 7 Rob. 606; 1 Wait Pr. 490; 2 Wait Pr. 508–9; Kelly v. Downing, 2 Brev. 302.

Now, in March, 1872, the plaintiffs obtained leave to amend their summons and complaint, but no action was taken under this order, and it expired. Nearly two years after this, to wit, on October 25th, 1873, they obtained a second order granting leave to amend the complaint within thirty days, but this order was not complied with strictly, the plaintiffs not having lodged for service any paper until January 7th, 1874—more than thirty days, as allowed by the order. The defendants, in their answer, set up this non-compliance and claimed the benefit thereof. In other words, they substantially raised the question of jurisdiction over the defendant Sanders on the ground that he was not properly in court; and they have continued to claim that benefit throughout, and have pressed their right to it on this

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appeal. A *question of jurisdiction may be raised at any time, and being raised, the court must pass upon it.

We think, upon the authorities cited, that appellants' position must be sustained, and that Sanders has never been legally made a party defendant to the original action; and, therefore, so far as he is concerned, the judgment below must be reversed. What effect will this have as to W. L. Frazier? This must depend upon the fact whether Sanders was a necessary party. If not, it is admitted that the action as against W. L. Frazier was within time, and the plea of the statute, therefore, could have no avail. Now, was Sanders a necessary party? This must be answered by determining whether Sanders was one of the executors of Marshall Frazier. The object of plaintiffs' action was to re-

cover a claim on the estate of said Marshall Frazier; and no one but the legal representative of said estate was a necessary party defendant.

The question whether Sanders was one of the executors of Marshall Frazier, it is true, has been much complicated in the progress of the case. We learn from the evidence that the Probate Court of Edgefield county granted letters testamentary to him in 1871; that afterwards, to wit, April, 1875, on petition of the plaintiffs, these letters were revoked; and upon appeal to the Circuit Court a consent order was passed by Judge Carpenter November 19th, 1875, reversing this revocation. We do not know upon what ground the parties consented to the order of Judge Carpenter. It may have been upon the ground that the plaintiffs had no legal right to institute proceedings by petition or otherwise before the Probate Court to revoke Sanders' letters; that they were strangers, and had no cause of action in that regard, and, consequently, could have no status in court on the subject; or it may have been upon some other ground. We do not know; but whatever may have been the ground, we do not see that this should preclude this court from examining the question whether the Probate Court exceeded its jurisdiction in granting letters testamentary to Sanders.

While it is established as a general doctrine that the judgment of a court of record, or at least of a court of general jurisdiction, is to be held binding until vacated by

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a proper proceeding *to that end, yet this does not legitimize a judgment which is patently outside of the jurisdiction of the court pronouncing it. Moore v. Smith, 11 Rich. 569 [73 Am. Dec. 122]. Now, jurisdiction involves two elements—the subject-matter and the parties. If either of these elements are wanting the judgment is null and void, and may be disregarded wherever met with. No doubt the Probate Court has "jurisdiction in matters testamentary and of administration;" and no doubt this includes the appointment of administrators in case of intestacy, and the granting of letters testamentary in cases of testacy. But this jurisdiction is not unlimited in either case as to the appointment of administrators; the power conferred is subject to the limitation made by the law, that the appointment should be made in a certain order. The judge of Probate has no power to step beyond or outside of this order in opposition to the wish of the parties entitled; and the appointment of a stranger to the estate over the widow, the children, the next of kin, or creditors, would be beyond his jurisdiction, and therefore null. It may be that in such case of intestacy the appointment should be revoked by a direct proceeding.

So, too, the Probate Court has jurisdiction to grant letters testamentary; but this is not an unlimited power. He has no authority or jurisdiction to nominate and appoint an executor. This power belongs alone to the testator. The Probate Court has power to clothe the executor appointed by the will with legal authority to act; but to allow him to disregard the nomination in the will, and upon his own motion to make a new appointment, would be monstrous; and wherever he attempts to do such a thing, it should be utterly disregarded as an unwarranted assumption of power. Perry v. St. Joseph and Western R. R. Co., 29 Kan. 420, and the cases there cited; Ford v. Travis, MS. Dec., Court of Appeal of S. C.; Griffith v. Frazier, 8 Cranch 9 [3 L. Ed. 471]. Under these principles, we think that the Probate judge in Edgefield transcended his jurisdiction when he attempted to grant letters to Sanders. The will need not be recited here; it will be found in the brief. But it is perfectly apparent from the terms of the will that Sanders had no right whatever to the letters granted, and that he has really been appointed executor of Marshall

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Frazier—not by Frazier him*self, but by the Probate judge. And no one will contend that because the Probate judge has jurisdiction in matters testamentary and of administration, that he also has jurisdiction to appoint executors other than those nominated in the will.

This brings us to the conclusion that Sanders was not a necessary party to the action below; and further, that the estate of Marshall Frazier was in court when the summons was lodged for service upon W. L. Frazier, as executor thereof. And such being the fact, the statute of limitations was properly overruled. See this case, 11 S. C. 122.

It is the judgment of this court that the judgment below be affirmed as to W. L. Frazier, executor; and that the case be dismissed as to Sanders, who, in our judgment, is not only an unnecessary but an improper party.

A petition for rehearing was filed in this case, but the court, by its order of December 8th, 1883, refused to grant a rehearing.

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20 S. C. 156

McKAY v. BEARD.

(April Term, 1883.)

[1. *Corporations* ⇐10.]

After the legislature has duly chartered a corporation, which is composed of only two persons, and the corporation has entered upon the work for which it was established, appointed an agent, expended large sums of money and done acts which are lawful only by virtue of

its charter, it is too late to say that such corporation had never accepted the charter or been organized as such, even though it does not appear that there was ever any formal organization by a meeting of the corporators and an election of the usual officers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 42; Dec. Dig. ⟸10.]

[2. *Corporations* ⟸56.]

Where an agreement was entered into by two persons constituting a corporation, that each was to contribute one-half of the expense incurred in carrying on the work, the profits of which were to be divided equally between them, but no debts to strangers were to be contracted without the consent of both corporators, it did not constitute the by-laws of the company, but a contract under which one would be personally liable for half of the excess furnished by the other under such agreement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 152; Dec. Dig. ⟸56.]

[3. *Corporations* ⟸592.]

The refusal of one of the parties to be any longer bound by such agreement, did not work a dissolution of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2373–2375, 2378, 2379, 2381, 2390, 2401; Dec. Dig. ⟸592.]

[4. *Corporations* ⟸592.]

For necessary work done for the corporation by one of the corporators after the abrogation of this agreement, the corporation itself would

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be liable, *but not its members individually; and for the payment of such indebtedness, the property and franchises of the company should be sold, and not simply the interest therein of the other corporator.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2373; Dec. Dig. ⟸592.]

[5. *Corporations* ⟸189.]

The corporation as such, should be a party to this action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706–722; Dec. Dig. ⟸189.]

Before Kershaw, J., Kershaw, September, 1882.

Action by J. W. McKay against W. J. Beard, commenced June 8th, 1881. The opinion states the case, but it will be proper to add to that statement a copy of a notice published once a week for three weeks, commencing May 20th, 1880, in the "Darlington News," as defendants, in their argument, laid stress upon this notice. It was in testimony that the defendant assented to the publication. The notice was as follows:

Legal Notice.—For the information of all interested, we would state that although W. J. Beard has sold and conveyed to the undersigned, J. W. McKay, one-half interest in the "Lynch's Creek Navigation Company," yet said company has not been formally organized; neither is there any copartnership existing between the said Beard & McKay; consequently neither of said parties, their agents, clerks, or any one else, has any right or authority to make or assume any contracts or liabilities in the name, for the use, or on account of said Lynch's Creek Navigation Company, without the approval in writing of each of the said parties. J. W. McKay.

By the consent and approval of W. J. Beard.

The Circuit decree was as follows, omitting its statement of facts:

In the complaint it is alleged that the company was never organized under the charter, and this is admitted by the answer; but as this allegation and admission can amount to no more than a legal deduction from the acts of the parties, the court must look into the facts and declare whether or not that was a proper deduction, and determine whether, as matter of law, the company did not go into operation under the act, in order properly to determine the rights of the parties resulting

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from the actual law *of the case, rather than from the relations which they supposed to exist between them.

There was no formal act of organization, but the agreement between the parties to do the work required of them by the charter, in order to secure the privileges granted, which were highly valuable (if the enterprise should succeed) and very unusual and important, may have had the effect of an organization of the company, whether or not it was so intended. If there was no corporation in existence, every step taken by the parties to deepen the channel of the creek, blasting, digging the soil, cutting out the timber, &c., to remove the obstacles to navigation, was a trespass against the riparian proprietors without warrant of law.

I must consider that those acts were done under the charter, and by virtue of the authority therein conferred. It seems to be well settled that "if the persons or association to whom a grant of corporate privileges is tendered, proceed to act under it, this is an acceptance of the charter, and the contract between the State and the corporators is complete, and the doing of acts by persons acting in the usual way of corporate agents, and which would not be consistent except upon the theory of acceptance, would be evidence of it." So, likewise, the exercise of powers granted by an amendment of a charter of a corporation is evidence of an acceptance of the amendment by a corporation. And when a charter, or amended charter, is once accepted, no subsequent withdrawal of the corporators therefrom, can affect the obligations imposed thereby. Field Corp., §§ 29, 30, 32.

But we are not left to inference from the acts of the parties under the charter; for the deed assigning one-half interest in the company to the plaintiff, makes it manifest that these parties dealt with it as an existing corporation. The defendant in said deed conveys one-half interest "in the property, rights and franchises which were granted to me, and such other persons as I may associate with me, my or our successors as a body, corporate and politic, by the name and style

of The Lynch's Creek Navigation Company, together with all the powers, rights and privileges connected therewith and incident thereto, and I do hereby associate the said John W. McKay with me as a member of said company, with one-half interest therein from

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and after the date *of these presents, free and clear from any and all incumbrance whatsoever." The plaintiff had no rights under this deed, but as a member of the company and upon his acceptance thereof he became a corporator with the defendant, and the law of their relation as such attached to them. The agreement they entered into was entirely consistent with this view of the subject, and necessary and proper under the charter.

Regarding them as corporators, it will follow that the defendant is not liable personally for any expenditures or work done under the charter not authorized, or consented to, by him as he would have been had they been copartners. The money expended on the work is to be considered as having been contributed to the capital stock of the company, for stock is the money or capital invested in the business of a corporation. Whenever payments are required to be made to the stock of a company, if the charter is silent, it must be authorized by a majority of stockholders or the members will not be responsible for their proportions thereof. "No act can be directly done by a corporation, except through the voice or vote of its members, who, in this respect, by a fiction of the law, are supposed to represent the ideal and fictitious corporate body of which they are members." Field Corp., § 184.

The expenditures up to April 18th, 1881, appear to have been made with the consent of both parties, and having been therefore duly authorized, the defendant is liable for his share of the same. And it is understood that his liability to that extent is not denied. But the expenditures upon the work after that time were made by the plaintiff without the consent of the defendant. The work appears to have been not only proper, but necessary in order to secure the privileges granted by the charter and to render the enterprise profitable. Under these circumstances, while the defendant cannot be held personally liable for his share of those expenditures, yet it would be inequitable to permit him to enjoy equally with the plaintiff the benefit derived from them by the corporation, and at the same time relieve him from all liability. They constitute an equitable charge upon his interest in the company, and that interest will be appropriated to re-imburse the plaintiff for those expenditures to the extent of defend-

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*ant's proportion thereof, but beyond this plaintiff can have no relief against defendant in this regard.

It is, therefore, ordered, adjudged and decreed, that the defendant pay the plaintiff the sum of $926.69, and that plaintiff have leave to enter a judgment therefor, and to enforce the same by execution; that the interest of the defendant in The Lynch's Creek Navigation Company, being one-half thereof, be sold by the master. * * * That out of the proceeds of such sale, he do pay the costs and disbursements of both parties herein, to be adjusted by the clerk, first deducting the costs and expenses of sale; next, that he pay plaintiff from the remainder of the proceeds of said sale the sum of $3,605.44, with interest from the date of this decree; next, that he do pay from said proceeds of sale, if any remain, the sum of $926.69 upon the judgment hereinbefore authorized to be entered against the defendant, and if any balance remain, that he pay the same to the defendant. That if the plaintiff become the purchaser of said interest of defendant, the master do take his receipt for so much of the purchase-money as may be payable to him under this decree, the plaintiff paying the remainder in cash.

Messrs. Kennedy & Nelson and W. H. R. Workman, for appellant.

Messrs. J. T. Hay and T. H. Clarke, contra.

November 2d, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. On March 1st, 1878, the legislature granted a charter to "William J. Beard and such other persons as he may associate with him, their successors and assigns," who were constituted a body politic and corporate by the name and style of "The Lynch's Creek Navigation Company." 16 Stat. 382. The object of said company was to improve the navigation of said creek by clearing out obstructions and to carry on a general transportation business on its waters.

Some time in October, 1879, the said Beard, the defendant in this action, by a formal deed

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sold and conveyed to the plaintiff *a one-half interest in the franchises and property of said corporation, and associated the plaintiff with him as one of the corporators. On the same day the plaintiff and defendant entered into a special verbal agreement, by which each was to contribute one-half of the expenses incurred in carrying on the work, the profits of which were to be divided equally between them; but no debts to outside persons were to be contracted without the consent of both of said parties. It does not appear that any formal organization of the company was ever effected by the election of officers, adoption of by-laws, &c., as is usually done by incorporated companies; but they appointed one E. H. McNeill agent and treasurer, who kept the books and credited each of the said parties with the money and supplies furnished by them respectively for the pur-

pose of carrying on the work, and no debts to outsiders seem to have been contracted.

The business was carried on in this loose way until some time in April, 1881, when, the defendant becoming dissatisfied, the special agreement hereinbefore referred to was abrogated, but no steps were taken by either party towards a formal dissolution of the corporation or winding up its affairs. On the contrary, the business was still carried on up to the time of the commencement of this action and afterwards, McNeill continuing to act as agent and treasurer, keeping an account of the receipts and disbursements. It appears that up to April, 1881, when the special agreement was terminated, the defendant was indebted to the plaintiff under that agreement in the sum of $926.69, and that the balance due for money and supplies furnished by the plaintiff after that time and up to August 21st, 1882, when the last report of the master was made, after allowing all credits for freights received and correcting certain obvious errors in the calculation of the freight on staves transported for Webb & Davis, and for Commander, was $7,-210.88, for one-half of which it is claimed that defendant is liable.

The Circuit judge held that, while there was no formal organization of the company, yet the conduct of the corporators, in going to work under their charter, and especially the terms of the deed by which the defend-

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ant associated the plaintiff with him *as a member of the company, amounted to an acceptance of the charter, and was a sufficient organization of the company to constitute the relation of corporators between them, and that the special agreement by which the work was to be done at the joint expense of said parties, each being liable for one-half thereof, was entirely consistent with such relation. He, therefore, held that the defendant was personally liable to the plaintiff for the said sum of $926.69; but that for all expenditures made after the termination of the special agreement, he could not be made personally liable, and that one-half of such expenditures, to wit, the sum of $3,-605.44, was an equitable charge upon the share of the defendant in the company, to the payment of which such share should be subjected. Accordingly, he rendered judgment against the defendant personally for the said sum of $926.69, and ordered that the interest of the defendant in said company be sold, and the proceeds applied, first, to the payment of the costs of these proceedings, as well as the expenses of such sale; next, to the payment of the said sum of $3,-605.44 to the plaintiff; next, to the payment of the aforesaid judgment for $926.69; and that any balance that may remain should be paid to the defendant.

From this judgment defendant appeals upon the following grounds:

1. "His Honor erred in his finding that a corporation was organized between plaintiff and defendant under the charter granted defendant.

2. "If his Honor is correct in his conclusion that a corporation was formed, then he should have found that the agreement between them constituted the only rules or by-laws by which they were to be governed.

3. "His Honor erred in not finding that, by this agreement, when defendant dissented from a further continuance of the work on said creek after April, 1881, it was a dissolution of said corporation, and all work done by plaintiff subsequent to that date was done at plaintiff's own risk; and defendant's share in said franchise is not chargeable therefor.

4. "His Honor erred in giving personal judgment against defendant for the sum of

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$960 (?)—amount found to be due *April, 1881. It should have been made an absolute and not contingent charge on defendant's share on final settlement between them.

5. "His honor erred in not ordering a sale of the shares of both parties instead of defendant's share alone.

6. "His Honor erred in not decreeing, in order that an equitable settlement might be effected, that the enhanced value of the said stream for navigable purposes, if any, between April, 1881, and the date of the charge made by plaintiff for the work put on it subsequent to that time, be ascertained, and the share of defendant for such enhanced value, together with amount due plaintiff up to April, 1881, be deducted from the sale of the entire property, and the balance of amount realized from the sale should be divided equally between them."

The first ground of appeal is, we think, sufficiently answered by the reasoning employed and the authority cited by the Circuit judge, to which, however, we may add a reference to Ang. & A. Corp., § 83. After a corporation, duly constituted by act of the legislature, which corporation is composed of only two persons, has entered upon the work for which the corporation was established, appointed an agent, expended large sums of money on such work, and done acts which it would not have been lawful to do but for the charter granted by the legislature, it is too late to say that such corporation had never accepted the charter, or been organized as such, even though it does not appear that there was ever any formal organization by a meeting of the corporators and an election of the usual officers.

The second and fourth grounds of appeal, which may be considered together, rest upon a misconception of the scope and effect of the special agreement entered into by the parties after the plaintiff had been, by the formal deed of the defendant, admitted as a member of the company, which the act of

legislature had declared should be a body politic and corporate by the name and style of "The Lynch's Creek Navigation Company." The corporation thus created having no cash capital, it was necessary that the money required to carry on the work should be obtained in some way. This could have been done either by borrowing it on the credit of the corporation from some third

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person or *from the individual corporators. The former mode was not, and perhaps could not have been pursued, as the corporation, having no cash capital and no property, except its franchises, would not be likely to have any credit. Hence, the other mode was resorted to; and the special agreement was entered into whereby the work was to be carried on at the joint expense of the parties, each being liable for one-half of such expense. This amounted, practically, to the same thing as if the money necessary to carry on the work had been borrowed from a third person on the individual credit of the parties, and their joint note had been given for the amount borrowed, each being liable as between themselves for one-half thereof.

This, it seems to us, is the true view of the scope and effect of the special agreement; and we are unable to see how it can be regarded as constituting the by-laws of the corporation. There is nothing whatever in the nature of the agreement, or in any of the evidence offered, which shows that such agreement was ever designed to constitute the by-laws of the corporation; but, on the contrary, we think it plain that the sole purpose of the agreement was to raise the means necessary to carry on the work without contracting any liabilities to outsiders. This being so, the effect of the agreement was the same as if the parties had given their joint note to a third person for the amount furnished by him to carry on the work, upon which each of the said parties, as between themselves, should be liable for one-half. Now, if such note had been given, and the whole amount of it had been paid by the plaintiff, could it, for a moment, be questioned that the defendant would be personally liable to the plaintiff for one-half of the amount so paid? And, in our judgment, there is as little doubt that he is personally liable to the plaintiff for one-half of the excess furnished by plaintiff under the special agreement for the purpose of carrying on the work. The second and fourth grounds of appeal cannot, therefore, be sustained.

It is very difficult for us to understand, with our view of the scope and effect of the special agreement, how it can be contended that when such special agreement was abrogated by the refusal of the defendant to be any longer bound by its terms, a dissolu-

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*tion of the corporation was thereby effected. As we have seen, the agreement was a matter outside the corporation and altogether a private and personal arrangement between the plaintiff and the defendant; and therefore, even if a corporation could be dissolved in this way, we do not see how the abrogation of such an agreement could possibly have any effect whatever upon the corporation as such, except, perhaps, by crippling its means of carrying on the work for which it was constituted; and, as the event has proved, even that effect was not experienced. We are unable to see, therefore, how the third ground of appeal can be sustained.

The sixth ground of appeal is manifestly based upon the theory that the corporation was never actually established, and that the parties stood toward each other in the relation of tenants in common, and, hence, a rule supposed to be applicable to that relation is sought to be applied here. But, as we have seen, this is an entire misconception of the relations of the parties, and, hence, there is no basis upon which to rest this ground of appeal.

The fifth ground of appeal presents greater difficulties. After the abrogation of the special agreement in April, 1881, the corporation was thrown upon its own resources; and if the work was to be continued, as it should have been under the charter, it must have been carried on upon the credit of the corporation. The amount furnished by the plaintiff after that time for carrying on the work, as the corporation in good faith was bound to do, constituted a debt of the corporation for which neither of the corporators could be held individually liable, and the plaintiff's claim, therefore, was against the corporation as such, and not against the defendant individually, or against his interest in the company. It seems to us, therefore, that for the payment of such claim, the whole property and franchises of the corporation, or so much thereof as might be necessary for the purpose, should have been ordered to be sold, and not merely the interest of one of the corporators. For, besides the fact that an undivided interest in property of this kind would not be likely to bring its full value at a public sale, the debt which has rendered the sale necessary is, as we have seen, the debt of the corporation, and not of the individual member whose interest has been ordered to be sold, and, hence, for the enforce-

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ment of *the payment of such debt the property of the corporation should be sold.

The rights and interest of the plaintiff can be and should be fully protected by providing, as the Circuit judge did provide, that if the plaintiff becomes the purchaser the master shall take as cash his receipt for so much of the purchase-money as he may be entitled to under the decree that shall be made, he paying in cash a sufficient amount to satisfy the costs of these proceedings and the

expenses of the sale. The proceeds of the sale should be applied, first, to the payment of such costs and expenses; next, to the payment of the amount due to plaintiff for money and supplies furnished to carry on the work since the abrogation of the special agreement in April, 1881, and the balance, if any, be equally divided between the plaintiff and defendant, the share of the defendant in such balance to be subjected to the payment of the personal judgment against him for $926.69 hereinabove mentioned.

It may be that the work has been continued since the last report of the master, and that the corporation has incurred further liabilities to the plaintiff, and has received further income from the transportation of freight and passengers, and that it may be proper to have a further reference to adjust these matters; but as the case must go back to the Circuit Court, we do not decide anything on these points, but leave them for that court to determine.

Although all persons interested in the corporation are now before the court, yet they are parties only as individuals; and under the view which we have taken it will be proper, in order to have the record technically correct, that the corporation as such should be made a formal party. Leave is therefore granted to the plaintiff to amend accordingly.

The judgment of this court is that the judgment of the Circuit Court, except as modified herein, be affirmed, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

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*DIAL v. TAPPAN.

(April Term, 1883.)

[1. *Executors and Administrators* ⇐444.]

An averment in the complaint that the plaintiff had been appointed by the Probate Court administrator with the will annexed, included an averment of the proper probate of the will, and of all else that was necessary to warrant such an appointment.

[Ed. Note.—Cited in Jerkowski v. Marco & Lewenthal, 56 S. C. 246, 251, 34 S. E. 386; Heyward v. Williams, 57 S. C. 239, 35 S. E. 503.

For other cases, see Executors and Administrators, Cent. Dig. § 1815; Dec. Dig. ⇐444.]

[2. *Executors and Administrators* ⇐443.]

Where the complaint alleged the execution and delivery of a bond and mortgage by a citizen of this State covering lands here, the death of the mortgagee, and plaintiff's appointment as administrator, it substantially alleges that plaintiff is the owner and holder of the instruments sued on.

[Ed. Note.—Cited in Suber v. Chandler, 28 S. C. 385, 6 S. E. 155.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1798–1811, 1823–1830, 1842–1845, 1848; Dec. Dig. ⇐443.]

[3. *Executors and Administrators* ⇐444.]

Where the allegations of the complaint show that the plaintiff is the owner and holder of the bond and mortgage in suit, not in his own right but in his capacity as administrator, the complaint will not be held bad on demurrer for a failure to state that the plaintiff sues as administrator.

[Ed. Note.—Cited in Mickle v. Congaree Construction Co., 41 S. C. 398, 19 S. E. 725; Cauthen v. Green & Hines, 80 S. C. 435, 61 S. E. 957.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1813–1817, 1837–1841; Dec. Dig. ⇐444.]

[4. *Executors and Administrators* ⇐524.]

A citizen of Massachusetts having died at his home possessed of a bond due by a citizen of this State, secured by mortgage of lands here situated, the administrator appointed in this State is the proper and only party to bring action here for the recovery of the debt.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2337; Dec. Dig. ⇐524.]

[5. *Costs* ⇐197.]

The Circuit judge may direct the master to tax the costs in a chancery case, although it is the clerk's duty to insert the costs and disbursements in the final judgment.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 752–755; Dec. Dig. ⇐197.]

[6. *Mortgages* ⇐489.]

In action for foreclosure, if the amount of the debt is not disputed, the court may order the defendant, to pay the sum ascertained at a future reference to be due, and upon his failure so to do that the land be sold.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1425; Dec. Dig. ⇐489.]

[This case is also cited in Elliott v. Pollitzer, 24 S. C. 85, without specific application.]

Before Cothran, J., Richland, October, 1881, and Witherspoon, J., July, 1882.

Action by George L. Dial, administrator of Asa Burke, against Henry L. Tappan, commenced June 6th, 1881. The opinion states the case.

The order of Judge Cothran overruling the demurrer was as follows:

It appears that these parties, in the same relation of plaintiff and defendants, and upon the same causes of action, have heretofore been in this court and in the Supreme Court. See 14 S. C. 573 [37 Am. Rep. 737], and also Ex parte Dial, 14 S. C. 584. At the conclusion of the opinion of the court in the case last referred to, Simpson, C. J., says: "We may be permitted to say, that while the

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question *is not properly before us for adjudication, yet we have looked into the petition and we are unable to discover any sufficient reason for a change of the opinion already pronounced; that administration in this State is necessary to enable the party to foreclose the mortgage set forth in the complaint, and that we see no insuperable difficulty in the way of foreclosing the same after the will of Asa Burke, deceased, shall have been admitted to probate and letters of

administration, with the will annexed, shall have been properly granted in this State."

The plaintiff, inspired perhaps by this suggestion, has renewed his suits, and now claiming to be properly qualified by the grant of letters of administration from the proper office, presents himself as rectus in curia. To each of his complaints, however, the defendants have interposed a demurrer upon several of the grounds recognized by the code of procedure, as appropriate for such form of defense. The legal effect of a demurrer is to admit the truth of every statement well pleaded in the complaint or answer, as the case may be. Amongst other allegations of these complaints is an averment of the indebtedness of the defendants in the manner set forth and stated therein. The admission of the demurrer then is of indebtedness on the part of the defendants to some one having the right to demand and have payment. I can conceive of no other right that a debtor has who acknowledges his debt, than to require of the court to see to it that he pay to the rightful claimant and to no other.

Howsoever beautiful may be the divine precept of forgiving our debtors their debts, courts of justice have never adopted it as a rule of action, but rather that of the exacting servant to whom a thousand talents had been forgiven by his master, and who straightway went out and seized by the throat a fellow-servant who owed him 100 pence, saying unto him, "Pay me that thou owest." The indebtedness of the defendants upon the several causes set forth in the complaints being conceded to Asa Burke in his life-time, shall they be required to pay the same to the plaintiff, who claims to be his legal representative?

Adopting the order in which the learned counsel for the defendants presented his argument upon the several demurrers, I shall consider as his first objection—the failure of

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the plaintiff to *sue as administrator. This hyper-technical objection has been recognized in some of the New York decisions as a good ground of demurrer, but more recent (and I think more rational) decisions hold that the defect is cured if it can be gathered from the averments of the complaint that the plaintiff sues in the capacity of administrator.

The plaintiff's complaints certainly exhibit a conspicuous absence of the most ordinary averments, such as (1) that as administrator he is the owner and holder, &c.; (2) that the deceased died possessed of the choses in action; and (3) to whom the money claimed and sued for is now due. Extraordinary omissions. It is averred, however, that the evidences of debt herein were delivered to the plaintiff's testator in his life-time, and that the plaintiff is the duly appointed and qualified administrator of the will of the said Asa Burke, and in the peculiar circumstances of this case I shall give to this appointment and qualification the largest possible legal operation, even to the extent of holding that these cover this multitude of extraordinary omissions.

The second objection is to the plaintiff's legal capacity to sue; (1.) Because it does not appear that the estate of the testator in the said bonds and mortgages passed to the plaintiff; (2.) Because it has not been alleged that the said will has been admitted to probate.

These bonds being secured by mortgages of real estate in South Carolina, even if they have been specifically bequeathed to citizens of Massachustts, as has been suggested in argument, the legatees as such could not maintain their suits for foreclosure here, but would be compelled to come into the court for that purpose, through the Probate Court, as the plaintiff here has done. If this be true, and I take it to be undeniable, it is impossible for the defendants, after payment of their acknowledged indebtedness, to be again vexed upon the same causes of action, and this I hold to be the extent to which this court is bound to protect them.

As to the failure to allege probate of the will—the averment in the complaints is that the plaintiff, on May 11th, 1881, was duly appointed administrator, with the will annexed, of Asa Burke, deceased, by the Probate judge of Richland county.

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*The Court of Probate is a constitutional court of record, "with jurisdiction in all matters testamentary and of administration," and when its proper officer, upon application made to him, grants letters of administration and the grantee qualifies and appears as such administrator in this court, it is but the exercise of common comity to presume that all of that officer's acts in this regard have been properly performed. "Omnia presumuntur rite." Upson v. Horn, 3 Strobh. 111 [49 Am. Dec. 633].

In the case of Abrams v. Moseley, the defendant demurred to the complaint upon the ground that it did not appear from the complaint that the will in question had been admitted to probate in this State. The court say: "To sustain the demurrer would be an assumption that probate of the will has not been made in South Carolina, which would be equivalent to holding that the plaintiffs are obliged to set out in their complaint every element of proof necessary to sustain it. This would not be in accordance with any rule of pleadings with which we are familiar." Demurrer was overruled. 7 S. C. 151.

It is ordered, adjudged and decreed, that the demurrers to the said complaints be and the same are hereby overruled, and that the defendants have thirty days from the filing and notice of this judgment or decree within which to file their answers to the said complaints; and upon their failure to do so within the time prescribed, that the plaintiff

have leave to apply for such orders as he may be advised are necessary to obtain the relief sought in the several complaints herein.

To this decision the defendants excepted as follows:

1. Because his Honor erred in deciding that the complaint contained facts sufficient to constitute a cause of action on the part of the plaintiff as administrator of Asa Burke, deceased. Whereas his Honor should have sustained the demurrer, on the ground that "under the peculiar circumstances of this case," such "a multitude of extraordinary omissions" furnish the strongest reason for adhering to the established principles of pleading, first that the complaint must show the capacity in which the plaintiff brings his action, and, secondly, that in such capacity he is the real party in interest.

2. Because his Honor erred in deciding

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that, to sustain this *action, it was not necessary for the plaintiff to aver in the complaint that the will of the testator had been admitted to probate.

The decree of Judge Witherspoon was as follows:

The history of a former suit on the bond and mortgage embraced in this suit will be found in the case of Dial v. Gary, 14 S. C. 573 [37 Am. Rep. 737], and Ex parte Dial, reported in 14 S. C. 584.

There being no question that the testator, Asa Burke, died in Massachusetts, leaving a will in which no executor was appointed, and that the defendant, the obligor and mortgagor, resides in Richland county, South Carolina, it would appear clear that the Probate judge of Richland county, South Carolina, had jurisdiction to admit to probate the will of Asa Burke, deceased, and to grant letters of administration, with the will annexed, upon his estate. Const., Art. IV., § 20. That the Probate judge of Richland county did exercise this jurisdiction is apparent from the records of the Probate Court and the testimony of the Probate judge introduced on the trial.

The letters of administration produced in evidence establish the representative character in which plaintiff sues. See Belden v. Meeker, 47 N. Y. 310. The bond and mortgage must be regarded and dealt with as assets to be administered in South Carolina, where the debtor resides. This debt can only be enforced and collected by the administrator, with the will annexed, in South Carolina. In Ex parte Dial, 14 S. C. 587, the court say: "That administration in this State is necessary to enable the party to foreclose the mortgage set forth in the complaint, and that we see no insuperable difficulty in the way of foreclosing the same after the will of Asa Burke, deceased, shall have been admitted to probate, and letters of administration, with the will annexed, shall have been properly granted in this State."

I find as matters of fact—

1. That on February 19th, 1873, the defendant, Henry L. Tappan, then and now a resident of Richland county, South Carolina, executed and delivered his bond to Asa Burke, conditioned to pay $2,500 one year thereafter, with interest at ten per cent. per annum. * * *

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*4. That Asa Burke died in Massachusetts in 1879, where he then resided, leaving a last will and testament, in which he did not nominate an executor: that letters of administration, with the will annexed, were duly granted by the Probate Court of Suffolk county, Massachusetts, to Philip Sowden.

5. That an exemplification of the will of Asa Burke was admitted to probate in the Probate Court of Richland county, South Carolina, on March 26th, 1881, and that letters of administration upon the estate of Asa Burke, with the will annexed, were duly granted by the Probate Court for Richland county, South Carolina, on May 11th, 1881, to the plaintiff.

I find as matter of law—

1. That the above entitled action is properly instituted by plaintiff, and that plaintiff is entitled to judgment of foreclosure.

It is therefore ordered, adjudged and decreed, that the plaintiff do recover of defendant the balance of the principal and interest due on the bond sued upon, and that it be referred to N. B. Barnwell, master for Richland county, to ascertain the balance of principal and interest due upon the bond sued upon in the above entitled action, and that he do tax the costs and disbursements in the above entitled action; that the said master shall give the plaintiff's and defendant's counsel five days' notice prior to his ascertaining the balance of principal and interest due by the defendant, as well as the taxation of costs herein directed.

It is further ordered, adjudged and decreed, that unless the defendant, on or before January 1st, 1883, shall pay to the plaintiff the sum of money to be ascertained by the master as also the costs and disbursements to be taxed by the master as hereinbefore directed, that the mortgaged premises, or so much thereof, &c.

It is further ordered, adjudged and decreed, that plaintiff have leave to enter up judgment and issue execution against the defendant for any balance that may remain due by defendant to plaintiff after the application of the proceeds of the sale of the mortgaged premises as herein directed.

Defendant filed eight exceptions to this decree, but only the following were urged on the appeal:

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*3. That his Honor, the Circuit judge, erred in holding "that this action is properly instituted by the plaintiff;" whereas, he should have held that the plaintiff had no

right, title or interest in the bond and mortgage, the subject-matter of the suit, and that he was not the real party in interest.

4. That his Honor, the Circuit judge, erred in holding "that the plaintiff is entitled to a judgment of foreclosure."

7. That his Honor, the Circuit judge, erred in directing the master "to tax the costs and disbursements in said action."

8. That his Honor, the Circuit judge, erred in adjudging "that unless the defendant, on or before January 1st, 1883, pay to the plaintiff the sum of money to be ascertained by the master, as also the costs and disbursements to be taxed by the master as hereinbefore directed; that the mortgaged premises, or so much thereof as may be sufficient to raise the amount ascertained to be due by the defendant to the plaintiff for principal, interest and costs, and disbursements, be sold at public auction at the court house at Columbia, county of Richland, by the master of Richland county, on the first Monday in February, 1883."

[For subsequent opinions, see 24 S. C. 572; 27 S. C. 171, 3 S. E. 84.]

Messrs. Melton, Clark & Muller, for appellant.

Messrs. R. A. Lynch and L. F. Youmans, contra.

November 2d, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The defendant, a citizen of Richland county, in this State, on February 19th, 1873, executed and delivered his bond to Asa Burke, a citizen of Massachusetts, conditioned to pay $2,500, and on the same day executed a mortgage to Burke of certain real estate in the city of Columbia to secure the payment of said bond. Burke afterwards, to wit, in 1879, died testate in Suffolk county, Massachusetts, the place of his residence. In October, 1879, letters of administration with the will annexed were granted to one Philip Sowden, by the Probate Court of Suffolk county, Massachusetts. In May, 1881, the plaintiff, a citizen of Richland county, obtained letters of administration with the will annexed on

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said estate from the Pro*bate Court of said county, and in June thereafter instituted the above entitled action to foreclose the mortgage aforesaid.

The defendant demurred to the complaint: First. That plaintiff had no legal capacity to sue, because it does not appear that the estate of the testator in the said bond and mortgage passed to the plaintiff, and because it is not alleged that the said will has been admitted to probate. Second. That the complaint does not state facts sufficient to constitute a cause of action. This demurrer was heard by Judge Cothran, who overruled it, giving leave at the same time to the defendant to answer over. In due time the answer was put in, the defendant, however, filing exceptions to the decree overruling the demurrer. The case was finally heard by Judge Witherspoon, who pronounced judgment in favor of the plaintiff. To that judgment several exceptions were filed, and now the appeal comes up upon these exceptions, and the exceptions to the decree of Judge Cothran, which decree the appellant seeks to review, with the final judgment of Judge Witherspoon.

The first matter before us, therefore, in order, is the decree of Judge Cothran. The defendant excepts to this decree upon but one ground—or rather his exceptions may be condensed into one—as they present substantially but one question, which is, Does the complaint state facts sufficient to constitute a cause of action? the specifications being, that the complaint failed to aver, that the suit was brought by the plaintiff "as," or in the capacity of administrator; also, that the deceased died possessed of the chose in action; also, that the plaintiff as administrator was the owner and holder thereof; also, to whom the money claimed or sued for, was due; also, that the will of the testator had been admitted to probate. It is apparent that the complaint was not framed with that precision and minute accuracy which perhaps the old form of pleadings required, and which it would be best to observe even under the new, so as to prevent delay, prolonged litigation and technical controversies, yet, under the liberal spirit of the code, which looks more to substance than to mere form, we think that the decree overruling the demurrer was free from error.

Taking up the alleged defects to the com-

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plaint in the inverse *order in which they are presented, the first to be considered is, the objection that there was no averment that the will of the testator had been admitted to probate. The averment on this subject was, that the plaintiff had been appointed administrator with the will annexed, by the Probate Court of Richland county. This we think includes an averment of all that was necessary to warrant the Probate judge to make this appointment; and no authority need be cited to the point, that Probate judge could not have granted the letters prior to the probate of the will before him. All that was necessary to entitle the plaintiff to exercise and be clothed with the rights and powers of administrator, was a legal appointment as such by the Probate judge. Of course the officer making the appointment had to be a Probate judge, and the will had to be proved before him, and the appointment could not have been made without these prerequisites. But, as well said by Judge Cothran, the Court of Probate is a constitutional court of record having jurisdiction especially as to the appointment of admin-

istrators, and when an appointment is alleged in the complaint, and admitted in the demurrer, the maxim omnia presumuntur rite applies. Upson v. Horn, 3 Strobh. 111 [49 Am. Dec. 633]; Abrams v. Moseley, 7 S. C. 151. This applies when there is nothing to show that the Probate judge has transcended his jurisdiction.

Next, it is objected that the complaint did not allege that plaintiff was the owner and holder of the bond, or to whom the money was to go when collected. The complaint did allege, however, that the bond and mortgage had been executed and delivered to the testator in his life-time; that said testator was now dead; that plaintiff was his administrator; and he prayed judgment of foreclosure, and that the proceeds of sale be applied to this bond. Upon the principle that where a certain status exists at one time, this is presumed to continue, until the contrary appears, the averments, that the bond and mortgage were executed and delivered to the testator in his life-time; that said testator was now dead; that these papers were executed by a citizen of this State covering real property in this State, and that the plaintiff had been appointed administrator in this State, carried with them prima facie the legal conclusion, that such administrator was the legal owner and holder thereof. Legal

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con*clusions are not expected to be alleged. In fact it is bad pleading to aver such conclusions. All that the complaint need contain is an allegation of the necessary facts leading to the conclusion. It is true, that it was essential to the maintenance of plaintiff's action, that he should be the legal owner and holder of the papers sued on, and, therefore, he should have alleged facts showing that he was such owner. This we think he has substantially done. Mr. Bliss says: "That an allegation that a bill or note is payable to or indorsed to the plaintiff, implies that he is the owner and holder, which need not be alleged." Citing Farmers and Mechanics Bank v. Wadsworth, 24 N. Y. 547. And further, "If the facts stated imply title, and he is still not the party in interest, it is matter of defense." Bliss Code Pl., § 176.

It is next objected that plaintiff did not sue as, or in the capacity of administrator. In the case of Bird v. Cotton, 57 Mo. 568, the learned judge who delivered the opinion said: "The capacity in which the plaintiff sued was not as clearly stated as should have been. But the petition styled the plaintiff as executor, stated that the note was made payable to their testator, averred his death, and then brought their letters into court and made profert of them. All these facts taken together showed unmistakably the capacity in which the plaintiff sued, and their right to sue, and enables any person to know what was intended." So we say here. "No form of words is absolutely essential to show the plaintiff's authority. The pleading is not demurrable if the facts appear substantially, or even obscurely, provided it appear. But the true way is to allege directly the death of the decedent, that letters of administration upon the estate, or testamentary, as the case may be, were issued to the plaintiff upon a day named and by a court named, and that he is still acting as such administrator or executor." Bliss, § 265.

No doubt it is necessary that the character in which the plaintiff sues should appear in the complaint, but it seems that so this appears substantially in the body of the complaint, or in the complaint taken as a whole, this will be sufficient. True, the defendant should not be taken by surprise. He has the

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right *too to know, whether he is called upon by the proper party, but it would be trifling with justice to permit a party to evade the payment of a just debt on the alleged ground, that his creditor has not stated in terms that he is the owner and holder of the note sued on, when all the allegations in the complaint show that he is such owner and holder; especially as the court no doubt will entertain a motion to make the complaint more precise where the defendant is doubtful on the subject.

The exceptions to Judge Witherspoon's decree raise two questions. 1. Has the plaintiff Dial in his representative character any title to, or interest in the bond in question? And 2. Whether the Circuit judge erred in directing the master to tax the costs and disbursements, and in adjudging a sale of the property, unless on or before January 1st, 1883, the defendant paid the debt as well as the costs and disbursements to be taxed by the master. We have no hesitation in affirming the ruling of the Circuit judge as to the first question. The testator died at his home in Massachusetts. At the time of his death he held this bond and mortgage on the defendant, at that time and since a resident of this State. The plaintiff has administered in this State with the will annexed. We hold that whosoever may be the real parties in interest as to said bond and mortgage, yet that this administrator may sue thereon. In fact the debt could not be collected in the courts of this State without administration. Ordinarily, it is true, that the real parties in interest must sue. But this does not apply to executors, administrators or trustees of an express trust. In every administration there are parties behind the administrator, who are more interested than he—creditors, distributees and legatees in case of will—and to require all these to be made parties in every suit by the administrator, besides destroying the symmetry and logic of the law in such cases, would also occasion interminable difficulties and delays in the settlement of estates.

As to the matter of taxing the costs and disbursements by the master under the order of the court, this presents some difficulty but we think the exception should be overruled. The act of assembly creating the of-

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fice of master for Richland county, 16 *Stat. 609, invests the master with all the powers, &c., which formerly belonged to masters and commissioners in equity under the act of 1840, not inconsistent with the code. Now the sixth section of the act of 1840, provided, that masters in equity shall attend the sittings of the Court of Equity, &c., "and they shall also, without order, tax the costs of any suit in said court upon application of any party thereto, after due notice to the adverse party." The act creating the master for Richland was approved March 22d, 1878. At that time there was nothing in the code inconsistent with the above provision of the act of 1840.

It is true the code then provided by section 337 (old), that the clerk should insert in the judgment the costs and disbursements; and this section is still retained since the fee bill has been amended, or rather substituted, by a new one by the act of 1880, (17 Stat. 303,) but it is nowhere stated that the costs and disbursements shall be taxed by the clerk exclusively. The clerk is to insert in the entry of judgment, on application of the prevailing party, upon five days' notice, &c., the sum of the allowances for costs as provided in the code, the necessary disbursements, &c., and the clerk alone can insert in the judgment these costs; but there is nothing inconsistent with this duty of the clerk that the Circuit judge in an equity cause should, preparatory to an insertion into the judgment of the costs in such a cause, order the officer of the court created to aid the court in such cases, to estimate the costs and disbursements. In chancery cases the court has control of the question of costs. Code, § 323. Before judgment is entered for the costs the clerk would still have to insert them under the law prescribing his duty in that respect. All that can be said of the taxing by the master is, that it might be regarded as unnecessary work.

The point which is impliedly raised in the eighth ground of appeal cannot be sustained under the circumstances of this case. It is quite true that in actions for foreclosure, the proper course is to ascertain the amount due on the mortgage debt, either by a reference to the master, or other recognized "proper mode," before an order of sale is made, so that the defendant may have an opportunity of contesting the amount so ascertained.

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*But in this case no issue was made in the pleading as to the amount due on the bond secured by the mortgage. The defendant did not deny his liability to some one for said amount; the Circuit judge might, therefore, without a reference to the master, have ascertained the amount; but regarding it doubtless as a mere matter of arithmetical calculation, he simply directed the master to make such calculation instead of making it himself, as he might have done. It is not like the case of Childs v. Frazee [15 S. C. 612] MS. Dec. No. 843, filed March 24th, 1880, where there was a failure to decide one of the issues made in the proceeding. We do not think, therefore, that this would furnish a sufficient ground for sending the case back, especially as it is not even now suggested that any error has been committed in making the calculation of the amount due on the mortgage debt.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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20 S. C. 179

Ex parte FISHER, Receiver.

GIBBES v. GREENVILLE AND COLUMBIA RAILROAD CO.

THE STATE, ex rel. THE ATTORNEY-GENERAL, v. SAME.

(April Term, 1883.)

[1. *Pledges* ⊂⊃59.]

A corporation, S., lent $40,000 of its mortgage bonds to a corporation, G., to be used as collaterals for a note of G. in bank, and received $80,000 in mortgage bonds of G. as security for the return of such loaned bonds. Upon default in the payment of the note, the bank sold $35,000 of the S. bonds and canceled the note, turning over the other $5,000 in bonds, some coupons and a cash surplus, to the receiver of G. Afterwards S. sold the $80,000 G. bonds for a less amount than their own $35,000 bonds, sold by the bank, were worth. *Held*, that S. was the owner of the $5,000 of bonds, the coupons and the cash, and were entitled to recover them in specie from the receiver.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 137; Dec. Dig. ⊂⊃59.]

[2. *Pledges* ⊂⊃56.]

The title of the $40,000 of bonds remained in S., notwithstanding their loan and pledge, until sold by the bank, and the title then passed to the purchasers, but only of the bonds which were sold.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 152–183; Dec. Dig. ⊂⊃56.]

[3. *Pledges* ⊂⊃54.]

The bonds borrowed by G. not having been returned in a reasonable time, S. had the right to sell the bonds of G. deposited as security, and apply the proceeds to the indebtedness of G. and look to G. for the deficiency.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 133; Dec. Dig. ⊂⊃54.]

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[4. *Pledges* ⊂⊃56.]

*A pledge should properly be sold at public auction and after full notice, but when, to obtain an advantageous sale, it was sold privately for more than its value, and the owners of the pledge and all parties interested had actual no-

tice and approved the sale and participated in it, the sale is valid.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 161; Dec. Dig. ⟸56.]

[5. *Corporations* ⟸174.]

Notwithstanding the majority of stock in corporation G. was owned by corporation S., still the two companies stood towards each other as distinct persons in law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 649; Dec. Dig. ⟸174.]

Before Witherspoon, J., Richland, July, 1882.

The opinion states the case.

It appears from the brief that the $35,000 of bonds of the South Carolina Railroad Company, when sold by the bank of Charleston in December, 1878, realized $10,787.48, less $29.83 expenses of sale, thereby extinguishing the note and interest, and leaving a surplus of $174.32. The $80,000 bonds of the Greenville and Columbia Railroad Company, were sold by Mr. Fisher, receiver, in February, 1881, for $22,580. It was in testimony that on December 31st, 1875, second mortgage bonds of the South Carolina Railroad Company were worth sixty-one and a half cents on the dollar; on February 25th, 1881, seventy to seventy-five cents; and that between those dates they varied in price from twenty-five cents to $1.20. During the same time, the Greenville and Columbia Railroad Company's second mortgage bonds were not quoted, but a large quantity of them changed hands in April, 1880, at ten cents on the dollar.

The Circuit decree was as follows:

It would be well to determine in advance the issue before the court according to the pleading, and then consider the exceptions relating to the issue. The South Carolina Railroad Company, by the petition of Fisher, receiver, claims to be the owner of the bonds and coupons in controversy, and prays the order of court to have them delivered. There is no demand for the value of the bonds and coupons, or for a general accounting between the two corporations. The only issue is as to the ownership of the bonds and coupons in hands of the master. The South Carolina Railroad Company's claim to the bonds and

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coupons is *based upon a separate and independent transaction with the Greenville and Columbia Railroad Company, involving $40,000 South Carolina Railroad second mortgage bonds on the one part, and $80,000 Greenville and Columbia Railroad second mortgage bonds on the other. I conclude and hold that any other transaction between these two corporations are matters outside the pleadings, and foreign to the issue before the court. Even if an accounting had been demanded, and the equities between the two corporations could be considered, the result would be unavailing, as both corporations are understood to be insolvent.

The receiver excepts to the master's report because the order of reference did not authorize the master to report his conclusions of law and fact. The order directing the master "to take testimony and report thereon to this court," certainly contemplated the finding of facts. Even if the master was not authorized to report his conclusions of law, such conclusions are not binding upon the court; and I cannot see how the receiver has been prejudiced.

Another ground of exception is, that the master erred in holding that he was limited to this transaction in excluding testimony as to other transactions, as well as the indebtedness of the Greenville and Columbia Railroad Company to the South Carolina Railroad Company. This exception has been overruled, as it has already been decided that the only issue before the court is the transactions on December 31st, 1875, between the two corporations, involving $40,000 South Carolina Railroad bonds, and $80,000 Greenville and Columbia Railroad bonds. It does not, however, appear that the master considered himself so limited, or that he excluded any testimony offered as to other transactions between the two corporations. With all the testimony before him, the master says: "Although a great many interesting questions might arise as to how the whole matter should be adjusted so equitably as to affect unfairly interests of neither of the original parties to the transaction, I am unable to see why any of such matters should remain open for speculation or inquiry after the sale of the $80,000 of Greenville and Columbia Railroad bonds by Receiver Fisher to Messrs. Bryan, Clyde and others."

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*But it is claimed by Fisher, receiver, that in the sale of the $80,000 Greenville and Columbia Railroad bonds to Messrs. Bryan, Clyde and others, it was expressly stipulated that any controversy as to the claim of Fisher to these bonds, should be settled by due process of law, and it was well understood between all parties, that the ownership of these bonds was to be decided by the proceedings already instituted for that purpose. The petition of Fisher, receiver herein, was filed January 14th, 1881, and the memorandum of agreement and sale of the Greenville and Columbia Railroad bonds was made February 26th, 1881. The agreement of sale states that the bonds and coupons were held for account of the Greenville and Columbia Railroad or its purchasers, and that a controversy was then pending as to the South Carolina Railroad bonds and coupons in the hands of the master. Neither party was willing to concede the right of the other, and it was agreed that the court should decide the ownership of the South Carolina Railroad bonds and coupons in this proceeding, then already instituted for that purpose.

In deciding the ownership, it becomes necessary for the court to determine the effect of said sale upon the claim of the South Carolina Railroad Company to the bonds and coupons in controversy. At the time the Greenville and Columbia Railroad Company came into possession of the South Carolina Railroad bonds and coupons, Mr. Magrath was the president of both railroads. Mr. Magrath speaks of the loan of the $40,000 South Carolina Railroad bonds to the Greenville and Columbia Railroad Company, and that $80,000 Greenville and Columbia Railroad bonds were set aside and transferred to the sole control of the South Carolina Railroad Company, to be held until the South Carolina Railroad bonds were returned. These bonds were negotiable securities that pass by delivery. No time was fixed for return of the South Carolina railroad bonds, nor does it appear that the South Carolina Railroad Company ever made demand upon the Greenville and Columbia Railroad Company for its bonds. I cannot see how, under the original contract between the two corporations, the South Carolina Railroad Company can claim the bonds and coupons in controversy without returning the $80,000 Green-

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ville and Columbia Railroad bonds *held by it for the return of the South Carolina Railroad bonds. There being a claim on the one side in specie, in rem, there must be a return in specie. The South Carolina Railroad Company having exercised the right of ownership in the sale of the $80,000 Greenville and Columbia Railroad bonds, is now estopped from claiming or demanding the delivery of the bonds and coupons in the hands of the master.

It appears that the South Carolina Railroad Company realized from the sale of the $80,000 of Greenville and Columbia Railroad bonds and coupons the sum of $22,580. This appears to be a great deal more than the market value of Greenville and Columbia Railroad bonds at that time, and it is likely that the amount received induced Fisher, the receiver, to sell, leaving the effect of the sale to be decided by the court in this proceeding. I can discover nothing in the agreement of sale that can relieve the South Carolina Railroad Company of its obligation to return the $80,000 Greenville and Columbia Railroad bonds before it can demand the return and delivery of its own bonds.

I find as a matter of fact, that on February 26th, 1881, John H. Fisher, receiver, sold to Messrs. Bryan, Clyde and others, $80,000 Greenville and Columbia Railroad Company's second mortgage bonds and coupons held by the South Carolina Railroad Company for the return of $40,000 of its second mortgage bonds, loaned the Greenville and Columbia Railroad Company December 31st, 1875.

I find as matter of law—

1. That by the sale of the $80,000 Greenville and Columbia Railroad Company's bonds and coupons, the South Carolina Railroad Company forfeited its right to the return of the South Carolina Railroad Company's bonds and coupons in hands of master, and is now estopped from claiming the same.

2. That the South Carolina Railroad bonds and coupons and cash in hands of the master, are assets to be applied to the mortgage debts due by the Greenville and Columbia Railroad Company according to priority.

It is ordered and adjudged that the exceptions of John H. Fisher, receiver, to the mas-

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ter's report, filed April 22d, 1882, *be overruled, and that said report be confirmed. It is further ordered that the petition of John H. Fisher, receiver herein, be dismissed with costs.

The petitioner appealed, but it is not necessary to state his exceptions.

Messrs. Mitchell & Smith and Melton, Clark & Muller, for appellant.

Messrs. Conner & Cheves, contra.

November 6th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. On December 31st, 1875, the Greenville and Columbia Railroad Company borrowed from the South Carolina Railroad Company eighty of its second mortgage bonds of the face value of $40,000, and to secure the return of this loan the Greenville and Columbia Railroad Company transferred to the South Carolina Railroad Company $80,000, face value, of its second mortgage bonds. This transaction was not evidenced by any formal written agreement, bond or other obligation; and its terms are only to be found in two letters—one of W. J. Magrath, who was at the time president of both companies, dated December 31st, 1875, addressed to J. H. Wilson, treasurer of the South Carolina Railroad Company, and the other, of C. H. Manson, acting treasurer of the Greenville and Columbia Railroad Company, dated January 1st, 1876, likewise addressed to said Wilson.

In the letter of Magrath, he says: "In consideration of the loan this day made by the South Carolina Railroad Company of forty thousand dollars of the second mortgage bonds of said company, I hereby authorize you to set aside and transfer to the sole control of the said South Carolina Railroad Company second mortgage bonds of the Greenville and Columbia Railroad Company to the amount of eighty thousand dollars out of the securities of the Greenville and Columbia Railroad now in your possession. The same to be held by you until the second mort-

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*gage bonds of the South Carolina Railroad are returned to the company." In the letter of Manson, he says: "I have yours enclosing copy of note of Greenville and Columbia Railroad Company, $20,000, at thirty days from

31st ult., given to bank of Charleston, N. B. A. for loan, net proceeds, $19,725. For security for the collateral on the above—say $40,000 South Carolina Railroad second mortgage bonds, I observe, by authority of the president, you have laid aside $80,000 of our second mortgage bonds."

The testimony leaves no doubt on our minds that the object of this transaction was to enable the Greenville and Columbia Railroad Company to use the $40,000 of the second mortgage bonds of the South Carolina Railroad Company as collateral security for a note of the Greenville and Columbia Railroad Company to the bank of Charleston for the sum of $20,000. Accordingly, they were so used; and the note of the bank having been reduced by successive payments and renewals to the sum of $10,000, and being past due and unpaid for some months, the bank, in December, 1878, sold seventy of the bonds held as collateral security for an amount which overpaid said notes by the sum of $174.32. This left in the hands of the bank, to the credit of the Greenville and Columbia Railroad Company, ten of said bonds of the face value of $5,000, detached coupons to the amount of $8,175, and the small surplus of cash above mentioned.

After James Conner became receiver of the Greenville and Columbia Railroad Company, he received from the bank these remaining bonds, coupons and cash; and being in doubt whether the same passed to the purchasers at the sale of the Greenville and Columbia Railroad, which had been previously made, or whether they belonged to the lien creditors of said company, reported all the facts to the court, when an order was passed directing them to be placed in the hands of the master, to be held by him subject to the further order of the court. Soon after, to wit, on January 14th, 1881, this petition was filed, in which Fisher, as receiver of the South Carolina Railroad Company, claimed the said bonds, coupons and cash as the property of said South Carolina Railroad Company.

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*In the meantime, however, a controversy had arisen between Fisher, as receiver, and the purchasers of the Greenville and Columbia Railroad as to the true amount of the bid of said purchasers, and while the same was pending in the Supreme Court of this State, to wit, on February 26th, 1881, an agreement was entered into whereby said controversy was settled, one of the terms of which settlement was that Fisher sold to the purchasers of said road, the said $80,000, of second mortgage bonds of the Greenville and Columbia Railroad Company, together with a large amount of other bonds of said company, of the same class, at a very full and fair price. In this agreement a stipulation was inserted that the present controversy, as to the ownership of the second mortgage bonds of the South Carolina Railroad Company, "is to be decided by the proceeding already instituted for that purpose," meaning the petition which is now under consideration.

It will be observed that the claim of the petitioner is not for a general accounting between these two corporations, but it is a claim for the specific bonds, coupons and cash which remained after the sale by the bank and the payment of the aforesaid note to the bank, as the property of the corporation of which he had been appointed receiver, which he, therefore, demands shall be delivered to him in specie. He is not suing for a debt, or for the value of property converted, but he is claiming the possession of certain specific property, of which he claims to be the rightful owner. The question, therefore, is as to the ownership of this particular property, consisting of bonds, coupons and cash, which, however, we will, for the sake of convenience, hereafter designate simply as bonds. We agree, therefore, with the Circuit judge that the various other transactions between these two companies have nothing whatever to do with the issue which we are now called upon to determine, but we cannot agree with him in the conclusion which he has reached as to the right of the petitioner to the possession of these bonds.

There can be no doubt that at one time the South Carolina Railroad Company was the owner of these bonds, and it is incumbent upon the respondents to show when and how this admitted title passed out of said com-

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pany. It certainly did not *pass when the bonds were first delivered to the Greenville and Columbia Railroad Company, for, by the express terms of the arrangement, they then passed as a loan, to be returned, and not by way of gift or sale. It is true that the purpose of the loan was to enable the borrower to use them in such a way as might necessitate the passing of the title out of the lender. But until they were so used, and the necessity for passing the title arose, the title remained in the lender. The mere fact of pledging the bonds to the bank could not pass the title out of the lender, for if the debt to the bank had been paid otherwise than by a sale of the bonds in question, unquestionably the bank would have been bound to return the bonds to the Greenville and Columbia Railroad Company, and that company would have been equally bound to return them to the South Carolina Railroad Company. That would not only be the legal effect, but it is manifestly what was intended by the parties, for it was understood by both parties at the time the bonds were borrowed, that they were borrowed for the express purpose of being pledged to the bank, and they were immediately so pledged.

Now if the effect of so pledging them was to be, or was intended to be, a transfer of the title, where would have been the necessity or propriety of the stipulation for their return? As we have said, there was a contingency upon which the title would pass,

and that was when the necessity for it arose. But until that contingency did arise, the title never was intended to pass, and did not pass out of the lender. The South Carolina Railroad Company, knowing that the bonds were borrowed for the purpose of being pledged as collateral security for a debt of the Greenville and Columbia Railroad Company to the bank, must be regarded as consenting that they should be so used; and further as authorizing the bank to take any steps that might become necessary to make the security available, by making an absolute sale of them, in part or in whole, whenever it became necessary so to do in order to effect the object for which they were loaned. The lender would, therefore, be estopped from disputing the title of the purchaser at such sale, made by its own authority, but where would be the ground upon which it could be said that the lender was estopped from claiming those of the

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*bonds which were not sold? The title to those which it was not necessary to sell to effect the purpose for which the loan was made, remained in the original owner, for, as we have seen, the mere fact of pledging the bonds to the bank did not affect the title.

It is said, however, that the petitioner is estopped from setting up a claim to the bonds in controversy by reason of the fact that he exercised the right of ownership over the $80,000 of bonds of the Greenville and Columbia Railroad Company deposited with his company as security for the return of the $40,000 of bonds loaned to the Greenville and Columbia Railroad Company, thus putting it beyond his power to return the $80,000 of bonds, which he is bound to do before he can claim the $40,000 of bonds or any part thereof; and this seems to be the ground upon which the Circuit judge rests his decree. According to our view of the matter the two companies stood towards each other in the relation of pledgeor and pledgee—the Greenville and Columbia Railroad Company being the pledgeor and the South Carolina Railroad Company being the pledgee. The former, desiring to borrow the $40,000 of bonds, pledged to the latter $80,000 of second mortgage bonds to secure the return of the loan. Now what would be the rights and duties of the parties growing out of this relation? Suppose the loan had been of money instead of bonds, certainly the pledgee would have had the right, upon the non-payment of the money borrowed to have sold the things pledged, upon proper notice, and apply the proceeds to the payment of the debt, and if such proceeds should have proved insufficient for the purpose he would have had a right of action for the balance left unpaid. It certainly could not be said that, by selling the things pledged he had forfeited his right to recover the unpaid balance. We do not see why the same principle should not apply to a pledge given to secure the return of borrowed bonds, as would apply to a pledge given to secure the return of borrowed money.

When, therefore, the Greenville and Columbia Railroad Company failed to return the borrowed bonds within a reasonable time—no specific time being fixed by the contract—and certainly when it had become unable to

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do so, it was clearly the right of *the South Carolina Railroad Company, represented by the receiver, to sell the $80,000 of bonds pledged to it, and if the proceeds of such sale proved insufficient to re-imburse it for the value of so many of the borrowed bonds, the return of which, by the sale by the bank, had been rendered impossible, then it would have the same right to recover the remaining bonds, as it would have had to recover the balance of the money loaned, if the loan had been of money instead of bonds. The title to such remaining bonds never passed out of the South Carolina Railroad Company, and we are unable to see any reason why selling the thing pledged should operate as a forfeiture of such title, for, by selling, the pledgee did no more than it had a perfect right to do, so soon as the pledgeor had failed to return the thing borrowed within the time limited for that purpose, and, certainly, so soon as the pledgeor had put it beyond its power to return much the larger portion of the bonds which it had borrowed.

The testimony fully shows that the proceeds of the sale of the $80,000 of bonds was not sufficient to pay the value of that portion of the borrowed bonds which the borrower had put it beyond its power to return, and, therefore, the pledgee has, in our judgment, a perfect right to have the proceeds of the sale of the $80,000 of bonds applied to the payment of the value of that portion of the borrowed bonds which were sold by the bank, and such proceeds not being sufficient to pay the value of said bonds at the time of the sale of the $80,000 of bonds, it has a clear right to recover the possession of the bonds in controversy.

It is true that, properly, the sale of a pledge should be made at public auction, and after full notice, whereas the sale in this case was a private one; but the testimony leaves not a shadow of doubt that the sale was a most advantageous one, and that the bonds brought a much larger price than they would have done except for the peculiar circumstances under which they were sold, and while there was, perhaps, no formal notice to the pledgeor of the time and place of the sale, it is quite manifest that all parties really interested not only knew, and approved of the sale, but actually participated in it, ei-

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ther in person or by *attorney. Under these circumstances it would be idle to expect that any court would treat the sale as invalid, simply because certain formalities were not complied with, which, if they had been com-

plied with, would, by the delays incident thereto, most likely have defeated the opportunity for making a most advantageous sale.

We are unable to see how the circumstance that the South Carolina Railroad Company was very largely interested in the stock of the Greenville and Columbia Railroad Company, much relied upon in the argument for the respondents, can affect the question. That circumstance may have had, and doubtless did have very great influence in inducing the South Carolina Railroad Company to loan its bonds to the Greenville and Columbia Railroad Company, but it cannot affect the legal relations between the two companies, growing out of this transaction. Though their interests were largely the same, yet they were not identical. They were, in law, two distinct persons, capable of contracting with each other just like any other two persons, and when they did so contract, their contract must be construed by the same legal principles which would govern in the construction of a contract between any two other persons.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for such further proceedings as may be necessary to carry into effect the views herein announced.

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McNAMEE & CO. v. HUCKABEE.

(April Term, 1883.)

[1. *Appeal and Error* ⇐653.]

After the settlement of the "Case" by the Circuit judge, leave was given by this court to appellant to file additional exceptions to the charge of the judge as settled by him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2816–2818; Dec. Dig. ⇐653.]

[2. *Appeal and Error* ⇐117.]

On the submission of a "Case" to the Circuit judge for settlement, he corrected his charge in particulars as to which no amendments had been proposed. *Held*, that no appeal lay from such settlement.

[Ed. Note.—Cited in Correll & Emonson v. Georgia Const. & Inv. Co., 35 S. C. 594, 595, 14 S. E. 65.

For other cases, see Appeal and Error, Cent. Dig. § 811; Dec. Dig. ⇐117.]

[3. *Vendor and Purchaser* ⇐231.]

A deed executed in 1857, but not recorded until December 7th, 1877, has priority over a deed to the same land executed in September, 1877, but not recorded until December 20th, 1877—more than forty days after its execution. Steele v. Mansell, 6 Rich. 437, approved.

[Ed. Note.—Cited in Bloom v. Simms, 27 S. C. 92, 3 S. E. 45; Turpin v. Sudduth, 53 S. C. 295, 310, 31 S. E. 245, 306.

For other cases, see Vendor and Purchaser, Cent. Dig. § 528; Dec. Dig. ⇐231.]

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[4. *Statutes* ⇐157.]

*The act of 1876 (16 Stat. 92) applied only to deeds executed after January 1st, 1877, and, therefore, by its repeal of all acts inconsistent with it, did not repeal the registry acts then of force so far as they provided for registration of deeds executed prior to 1877.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 225; Dec. Dig. ⇐157.]

[5. *Fraudulent Conveyances* ⇐154.]

Deeds executed under the registry act of 1876 and not recorded within forty days, are valid as against subsequent purchasers and creditors for valuable consideration without notice only from the date of record.

[Ed. Note.—Cited in King v. Fraser, 23 S. C. 570.

For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 485–492; Dec. Dig. ⇐154.]

[6. *Deeds* ⇐81.]

The registry of deeds, which were recorded between December 14th, 1876, and May 1st, 1882, without the indorsement of the county auditor, was legalized by section 1778 of the general statutes.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 214–216; Dec. Dig. ⇐81.]

[7. *Statutes* ⇐255.]

The general statutes of 1882 was not a mere compilation of pre-existing acts and joint resolutions, but a statute having the force of law as such from the time it went into operation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 336; Dec. Dig. ⇐255.]

[8. *Deeds* ⇐86.]

[Cited in National Exchange Bank v. Holman, 31 S. C. 166, 9 S. E. 824, to the point that the act which required the county auditor to put his indorsement upon every deed of real estate before it was recorded was merely directory.]

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 226; Dec. Dig. ⇐86.]

Before Aldrich, J., Aiken, September, 1882.

The opinion fully states the case.

Messrs. Henderson Bros., for appellant.

Messrs. Croft & Dunlap and W. T. Gary, contra.

November 22d, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This action was commenced March 11th, 1878, to recover possession of twenty acres of land having upon it deposits of kaoline clay. Within the lines of the tract there is a small parcel of an acre and a half which was not claimed.

The question was one of title. Both parties claimed under one Edmund Morris. The plaintiffs' claim was as follows: (1) Deed from Edmund Morris to the Southern Porcelain Manufacturing Company, bearing date May 27th, 1857. This deed was not recorded until December 7th, 1877, and then without any indorsement of the auditor of the county upon it. (2) Judgment of Harrison, assignee, against the Porcelain Manufacturing Company, lodged in Aiken county, September 10th, 1877, and also that of H. W. & J. L. Addison against the same, October 4th, 1877. Under these judgments the land was levied December 11th, 1877, and sold by the

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sheriff of Aiken county *as the property of

the said company on salesday of January, 1878, and bid off by the plaintiffs, to whom the sheriff executed a deed January 17th, 1878, which was recorded the next day.

The defendant Huckabee put in evidence a quit-claim deed for the premises from the said Edmund Morris, bearing date September 1st, 1877, which was recorded the first time, December 20th, 1877, without having the indorsement of the auditor upon it, and on the day of the trial of this case, September 21st, 1882, it was registered in the auditor's office and recorded again. The defendant Sharpton had himself made a party after the action had been commenced against Huckabee, and set up title to the premises under the statute of limitations; but he does not appeal, and it is not necessary to state particularly the nature of his claim.

The case came on for trial before Judge Aldrich and a jury. Besides the paper title of the parties above stated, it appeared that the defendant Huckabee had purchased the little parcel of an acre and a half, embraced within the lines of the twenty acres, from one Cliffe or his heirs, and his working it within the twenty acres, excited the attention of the officers of the Porcelain Company, and led to explanations. Schaub testified that, as superintendent of the company, he had, in 1875, "a conversation with defendant (Huckabee); said I understand you are digging on land of the company. He said he was not on the twenty acres, but on one and a half acres excepted; he was working on that parcel; but Huckabee was working on the twenty acres in the month of January, 1878." This witness also testified that he was superintendent of the Southern Porcelain Manufacturing Company for ten years, from 1867 to 1876; several times examined the twenty acres, which was seven or eight miles from the works of the company; bored for clay there in 1868; he got the deed from Morris and kept it in his desk until it was recorded; and never turned it over to Davies after he was elected president.

In the spring of 1877, Huckabee, by appointment, met Mr. Davies, the president, in Augusta, and proposed to refer the matter of title to Mr. Jenkins. On that occasion President Davies said that "the secretary, Schaub, had informed him that Huckabee was on the land of the company; but he had

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investi*gated, and finding no record he thought the company did not own the twenty acres." Davies had been elected president a short time before, and had not seen the papers, which, as before stated, were in possession of the secretary.

In August, 1877, John M. Cook, a civil engineer, was sent by the president to locate the land, who, taking with him Bauknight, the then superintendent of the company, went upon the land and informed Huckabee that they had come to make a survey of the twenty acres for the Porcelain Company. "Dr. Huckabee asked if they had any papers to make such survey by; and upon our saying no, Dr. H. (the defendant) refused to allow the survey to be made as a matter of business." It seems that soon after this incident, Huckabee went to Georgia, where Morris lived, and obtained from him for $40 the quit-claim deed above mentioned, of date September 1st, 1877. It also appeared that when the land was sold under the judgments against the Porcelain Company, and bought by the plaintiffs, in January, 1878, the defendant Huckabee caused public notice to be given that "he had a title to the twenty acres."

The plaintiffs presented a number of requests to charge, some of which were charged, and others refused or charged with modifications. Under the charge the jury found "for the defendant Huckabee the land in dispute." The plaintiffs appealed; but the parties, not being able to agree as to what was the charge, referred it to the judge to settle some particular point, and he reported his charge in full, embracing points upon which there had been no disagreement, as well as those specially referred to him. After the report of the charge, this court gave the appellants leave to file additional exceptions, made necessary, as was alleged, by the authentic charge as reported by the judge himself.

First. The plaintiffs' first request to charge was as follows: "That the deed from Morris to the Southern Porcelain Company [covering the land in dispute] being older than, and having been recorded before the deed from Morris to Huckabee, though recorded after the date of said last deed, takes priority in law over the same, which was recorded after the statutory time; and,

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*thence, that the plaintiffs have a better title to the said land than the defendant Huckabee, and must recover as against him." The judge charged: "This is good law if the deed to the company was recorded; but that is the very question of law submitted. Was it recorded? The requisites of the law were not complied with, and although the paper may have been placed in the record book, it is no record unless the prerequisites have been observed."

Second. The plaintiffs' second request to charge was "that the judgments under which Sheriff Holley sold the land in dispute to the plaintiffs, having become liens upon the said land before the deed of Morris to Huckabee was recorded, no subsequent laches of the Porcelain Company could defeat the lien of said judgments; and said sale transferred a title to the plaintiffs paramount to the title of the defendant Huckabee." The judge charged: "Admit this to be so; then the question for you is, Did the purchaser have notice of Huckabee's claim on the day of

sale through Mr. Jordan? This becomes important in considering the question of notice. In addition, if the company's deed was not recorded, then there was no lien. If the deed of the company is not genuine, that is an end of the case. Did President Davies, by word or deed, induce or encourage the defendant to buy? If he did, defendant's title cannot now be disputed. Was the keeping of the deed so long from the record a fraud on the defendant?"

The plaintiffs' exceptions to the charge as settled, were: "1. That his Honor erred in modifying the first request to charge preferred by the plaintiffs by adding thereto. [See statement of charge, ante.] 2. That his Honor erred in modifying the second request preferred by plaintiffs by adding thereto, &c. [See statement of charge, ante.] 3. That his Honor erred in submitting to the jury this question: 'Was the keeping of the deed so long from the recording office a fraud on the defendant?' whereas, it is submitted that the non-recording of the deed cannot be termed fraud under the circumstances of this case. 4. That his Honor erred in settling his charge in this, that though the attorneys admitted that his Honor charged the plaintiffs' first request without qualification as stated

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in the *settlement, and refused to charge their second request in toto, yet his Honor, in settling the case, settles the same differently; whereas, said questions were not submitted to him for settlement."

In reference to the last ground of appeal, we need only say that we know of no authority for an appeal from the settlement of a case by the judge who heard it. The alleged error is certainly not one of law, of which we have cognizance. There must be some final arbiter, and an end of controversy. The judge who heard the cause must be supposed to know better than any one else what he charged. Rule 47 of the Circuit Court prescribes the manner in which a case shall be settled. The appellant must propose a case or exceptions, and serve a copy upon the opposite party. "And the party served may, within ten days thereafter, propose amendments thereto and serve a copy upon the party proposing the case, who may then, within four days thereafter, serve the opposite party with a notice that the case or exceptions with the proposed amendments will be submitted at a time and place to be specified in the notice to the judge or referee before whom the case was tried for settlement. The judge or referee shall thereupon correct and settle the case as he shall deem to consist with the truth of the facts." Shand's Manual 75.

These words would seem to give a more absolute discretion to the judge than is given by those in the corresponding rule (41) of the New York courts, which are as follows: "The judge or referee shall thereupon correct and settle the case according to the facts." And yet it has been held in that State that "a judge has the right to see that his charge, so far as it is necessary to be inserted in a case, is correctly presented, even though the parties have agreed upon it." Root v. King, 6 Cow. 569; Wait Anno. Code 842. We can only consider the charge as reported by the judge himself in settling the case.

As to the modification of the first request to charge. There is no subject upon which our law has been more confused and obscure than that of registry, both as to the effect of omission to record and of recording within the time as well as after the time prescribed by law. See the case of Steele v.

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Mansell, decided in *the late Court of Errors by all the judges and chancellors of the State, 6 Rich. 437. As we understand it, that case finally settled that the old colonial registry act of 1698 and the forty-fifth section of the county court act of 1785 must be construed together, and that their joint operation produced three results: First. That a deed of land never recorded was not thereby absolutely void; but as between the parties was still good. Second. That if registered within the time prescribed by law, the registry had reference back to the date of the deed which took effect from its date; and, Third. That if registered after the time prescribed by law, it did not have reference back to the date of the deed, but took effect and was notice to all the world only from the date of its actual registry. See Barnwell v. Porteus, 2 Hill Eq. 219; Leger v. Doyle, 11 Rich. 118 [70 Am. Dec. 240]; Belk v. Massey, 11 Rich. 618; Youngblood v. Keadle, 1 Strobh. 121.

It is true that the act of 1843. "To amend the law in relation to recording mortgages," &c., contained no provision as to the effect of recording after the time required by law, but left absolute and unqualified the general enactment "That no mortgage of real estate shall be valid so as to affect the rights of subsequent creditors or purchasers for valuable consideration without notice, unless the same shall be recorded in the office of register mesne conveyances of the district wherein such real estate lies, within sixty days from the execution thereof." 11 Stat. 256. As might have been expected this act has received interpretation in accordance with its terms, making no provision for the registry after the time prescribed. See McKnight v. Gordon, 13 Rich. Eq. 223 [94 Am. Dec. 164], Williams v. Beard, 1 S. C. 322. Both of these were cases of mortgages. In the first the property was personalty and in the latter real estate. In that of McKnight v. Gordon, Justice Inglis pronounced a very full and carefully considered opinion, in the

course of which he said: "But the positive rule of law established by this statute precludes the mortgagee, who has omitted to put his mortgage on record within the time limited, from interposing the estate which he acquired by it, in bar or derogation of the estate or claim for which one who is within the terms of its protection has paid."

But neither the act of 1843, nor its inter-

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pretation applies to *this case, which is in reference to absolute conveyances. That act dealt with the registration of mortgages only, and as we suppose is now absorbed into and repealed by the general registration act, passed December, 1876, of which we will speak hereafter. The case of Steele v. Mansell and those following it, cited above, were all in reference to absolute conveyances of land decided after the passage of the act of 1843, and with full knowledge of it. In delivering the judgment of the Court of Errors in Steele v. Mansell, Judge Wardlaw said: "Our registry law, before the act of 1843 concerning mortgages, was lamentably obscure and deficient, and that act has afforded no remedy in respect to absolute conveyances."

Taking then the law as to absolute conveyances to be as settled by Steele v. Mansell, and the other cases following it down to 1858, let us apply it to the paper title in this case, without at present any reference to the mutual allegations of actual notice.

The deed of Morris to the Porcelain Company was the oldest, having been executed in 1857, while that to Huckabee was not executed until 1877. The first was good against Morris without recording, but, as it was not recorded within the time limited, its operation as to third parties was in abeyance until registry, which was December 7th, 1877. But before that time, September 1st, 1877, Huckabee procured his deed from Morris, and if he had recorded it within the time limited (which was then forty days under act of 1876) he would have acquired priority over the deed of the company. It so happened, however, that he also was in default, and did not record his deed until December 20th, 1877, after the time limited by law; and applying the same rule to this deed, that was applied to the other, giving each vitality from its registry, the deed to the company had priority by thirteen days, this being recorded on the 7th and that on the 20th of December, execution of the second deed before the registry of the first, and recording after and out of time, being equivalent to execution after the first and recording within time as in Steele v. Mansell.

The exact point here ruled has never, so far as we know, arisen in the State before, but it seems to us to follow from the principles settled. The case of Steele v. Mansell

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differs from this *only in one particular; in that the second deed was executed after the first had been recorded, while in this it was made before, but not recorded until after and also after the time limited. The case which comes nearest to this, is that of Leger v. Doyle, supra. In that case the second deed was executed after the first deed was recorded, as in Steele v. Mansell, but the second deed was that of a sheriff under a sale which was made before the first deed was recorded. That comes very nearly to this case, and in delivering the judgment of the court Judge Wardlaw made a remark arguendo, which covers this case precisely. He said: "If the plaintiff (junior) had paid her bid, by giving her receipt to the sheriff or otherwise, and had taken the conveyance from him on the day of sale (before first deed was recorded), she could not have been hurt by the registration within six months thereafter, of any conveyance not executed within six months next preceding, provided the conveyance to herself had been duly recorded within six months." This was doubtless upon the principle announced by Judge Evans in the case of Barnwell v. Porteus, supra, as follows: "It is manifest that neither the plaintiff nor Rose has complied with the act of 1785, and but for the act of 1698, the unrecorded mortgage (senior) would take precedent of Rose's deed (junior); but as Rose has recorded his deed he has acquired a preference in pursuance of the act of 1698, * * * by which 'that sale, conveyance or mortgage of lands which shall be first recorded in the register's office,' &c., shall be taken, deemed, adjudged, allowed of and held to be the first sale, conveyance or mortgage, and be good, firm and substantial in all courts of judicature within South Carolina," &c.

The Circuit judge took this view, which was embodied in the first request to charge, but he made a modification. He said when the first request was read, "this is good law, if the deed to the company was recorded. But that is the very question of law submitted. Was it recorded? The requisites of the law are not complied with, and although the paper may have been placed in the record book, it is no record unless the prerequisites have been observed." Was this error? The question is, Was there wanting any indispensable prerequisite when the deed to the company was placed in the record book, on De-

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cember 7th, 1877? It does *not clearly appear to what prerequisites reference was made by the judge. There is no doubt that the deed was not recorded within the time prescribed by law, but, as we have seen, that was not necessary to its validity from the date of registry. We hear nothing of any lack of proof as to its execution or probate.

It was, however, insisted at the bar that the deed was not legally admitted to record for the want of two prerequisites: First. That at the time it was spread upon the books of record, there was in force no law that authorized its registry; that the whole law of registration had been changed by the act of 1876, 16 Stat. 92, (re-enacted as section 1776 of the new general statutes,) which repealed all former laws upon the subject of registration. The view seems to be, that the act of 1876 does not provide for the registry of any deed in existence at the time it was passed, and yet repeals all other laws upon the subject, leaving the recording of such deeds entirely unprovided for. We cannot adopt this construction. The act of 1876, so far as it touches the point in question, is as follows: "That all deeds of land delivered or executed on and after January 1st, 1877, shall be valid so as to affect from the time of such delivery or execution the right of subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days from the time of such delivery or execution," and went on to declare, "that all acts and parts of acts inconsistent with this act be and the same are hereby repealed."

This act, by its very terms, only relates to the registry of deeds executed after January, 1877, and as the deed to the Porcelain Company was executed long before that time, it is clear that its registry was not provided for by the act; but it is not at all clear that the act repealed generally all other laws on the subject. On the contrary, the repeal was expressly limited to such as were "inconsistent with it." The laws then in force providing for the registry of deeds executed before January, 1877, were not inconsistent with it, but by its very terms were outside of it, and therefore not repealed by it. There is nothing in the act of 1876 which made the registry in 1877 of the deed to the company executed in 1857 illegal and void. We may say in passing, however, that the deed from Morris to Huck-

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abee, *having been executed after January 1st, 1877, did fall within the provisions of the act of 1876, and the proviso thereof, which, in harmony with the principles announced in Steele v. Mansell, provides "that the above-mentioned deeds or instruments of writing, if recorded subsequent to the expiration of the said forty days, shall be valid, to affect the rights of subsequent creditors and purchasers for valuable consideration without notice, only from the date of such record," &c.

Second. But it is further contended that the deed to the company was placed in the record by the register in violation of this duty, because he did so before requiring the indorsement of the county auditor upon it, and therefore the registry was without authority and void. It is true, that at the time of the registry (1877), there was in the auditor's act a provision in these words, "And provided further, that each county auditor shall keep a record of all sales or conveyances of real property made in his county, in which he shall enter, in columns, the names of the purchaser and seller, the quantity of land conveyed, the location and price of the same, and therefrom correct the county duplicates annually; and, for the purpose of carrying out this provision, the clerks of court, &c., are required to have the indorsements of the county auditor on each and every deed of conveyance for real property that the same is on record in his office, before the same can be placed on record in the office of said clerk of court or register of mesne conveyances." There may be some doubt whether this provision was intended to embrace the registry of deeds executed before but recorded after its adoption; but, passing this, it is suggested that, rightly construed, it did not create a new and indispensable prerequisite to recording, so as to make registry without the auditor's indorsement absolutely void, but was rather directory—like the act of 1799, directing jury lists to be made out from the tax returns once in every three years in reference to which it was held that the requirement was purely directory to public officers in the discharge of their duty; and if the requirement was disregarded and the act was nevertheless done, such act was not thereby rendered void. State v. Massey, 2 Hill 379.

It is further urged that, as the provision

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does not appear in *the act upon the subject of recording, but in that prescribing the duties of the county auditor, the manifest purpose of it, as the provision itself declares, was merely to assist the auditor in getting property correctly on the lists for the purposes of taxation. The argument is not without some force. The indorsement of the auditor has, so far as we can see, no connection with or effect upon the registry itself. But this is a new question, and as we do not think it necessarily involved in the decision of the case, we make no ruling upon it.

We find in the General Statutes, § 1778, among the requirements as to registry, another provision in these words: "All conveyances of real estate which have been recorded by the clerks of court and registers of mesne conveyances of the several counties since the fourteenth day of December, 1876, without the indorsement of the auditor of the county, are hereby declared to be as valid and binding, to all intents and purposes, as if the said conveyance had been indorsed by the auditor of the county thereon." This provision, as it reads, clearly dispenses with the

necessity of the auditor's indorsement and legalizes the registry of all deeds without such indorsements, during the period from December 14th, 1876, to May 1st, 1882, when the general statutes went into operation; and that period includes the time of the registration of the deed to the company as well as of that to Huckabee.

It is, however, objected to this view, that the general statutes are only a codification of acts and joint resolutions previously passed; that the provision under consideration was only in another form the joint resolution upon the same subject previously passed by the legislature and approved June 9th, 1877, (16 Stat. 321,) and that therefore it must be construed, in respect to time, as if it had been passed at the date of the resolution (1877), and so construed does not cover the registry of deeds after June of that year. We do not feel authorized to make any such limitation as to time. The general statutes are more than a mere compilation of previous laws. They were passed by the legislature and approved by the governor in accordance with the requirements of the constitution as to the enactment of laws, and have the force of law then enacted. We can neither repeal

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*nor amend the provision nor fix a day for its operation different from that on which it became law. Its terms make no reference to the joint resolution or the date of its passage, but are general, and, speaking from the day the general statutes went into operation, cover the whole period back to "since 1876," the time indicated. We do not think that the registry of the deed from Morris to the Porcelain Company in December, 1877, was made void by the absence of the indorsement upon it of the county auditor for the time being.

The result is, no prerequisite to registry being wanting, that the paper record of the parties indicates priorities as follows: (1.) Judgment of Harrison, assignee, against the Southern Porcelain Manufacturing Company, September 10th, 1877. (2.) Deed of the said company from Morris, December 7th, 1877. (3.) Deed of Huckabee from Morris, December 20th, 1877. And (4.) Deed of the sheriff to the plaintiffs, R. McNamee, &c., purchasers under judgment of Harrison, assignee, and others, January 17th, 1878.

The case must go back for a new trial, and, as the point ruled will necessarily affect more or less the other questions in the case, we think it better that they should not be discussed at this time. Both parties should have an opportunity to have them considered without prejudice in reference to the conclusions herein announced.

The judgment of this court is that the judgment of the Circuit Court be set aside and the case remanded for a new trial.

20 S. C. 202

DINGLE v. MITCHELL.

(April Term, 1883.)

[1. *Trial* ⟸105.]

If copy-deeds are received in evidence without objection, they become competent testimony in the cause, and proof of loss of the originals is dispensed with.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 265; Dec. Dig. ⟸105.]

[2. *Adverse Possession* ⟸115.]

There being evidence of possession for more than twenty years by those through whom the plaintiff claims title to the land in dispute, and also evidence of plaintiff's title from a source under whom defendant also claimed, the judge correctly refused defendant's motion for nonsuit.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 314, 691–701; Dec. Dig. ⟸115.]

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[3. *Slaves* ⟸14.]

*Under the acts of assembly legalizing the marriage of slaves, and declaring their issue legitimate, property of such former slaves passed, as in other cases, according to the statute of distributions; and a wife and child are preferred to sisters and their children.

[Ed. Note.—Cited in Clement v. Riley, 33 S. C. 80, 11 S. E. 699.

For other cases, see Slaves, Cent. Dig. § 60; Dec. Dig. ⟸14.]

[4. *Slaves* ⟸25.]

Such acts affected the marriage of a free person of color with a slave, and their issue, to the same extent as where both parties were slaves.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 115; Dec. Dig. ⟸25.]

[5. *Slaves* ⟸3.]

There was no error in charging the jury that if a free man of color purchased his slave-wife with a purpose of making her free, and she afterwards enjoyed freedom for twenty years, the jury might presume that the husband had taken her out of this State, and thereby accomplished her freedom.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 11; Dec. Dig. ⟸3.]

[6. *Trial* ⟸194.]

The charge in this case held not to be a charge upon the facts within the inhibition of the State constitution.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439–441, 446–454, 456–466; Dec. Dig. ⟸194.]

Before Pressley, J., Charleston, November, 1882.

This was an action by G. W. Dingle against David Mitchell, for the recovery of a house and lot in the city of Charleston. The opinion states the case, but as the case turned upon the alleged slavery of Mary Ann Conerway, the testimony upon this point, as found in the brief, is added. George H. Walter, witness for plaintiff, testified that "Mary Ann was free, I know; * * * knew her from childhood; always thought her free; does not know that her husband bought her." H. T. Graddick, for plaintiff, testified: "Have known her since the war; * * * do not know whether Mary Ann Conerway was a slave or not; always took her to be free."

Diana Murley, for defendant, testified that she was a sister-in-law of Scipio Stewart; "knew Mary Ann Conerway long before she was married; Mary Ann was a slave; she belonged to Mrs. Dibble; Scipio Stewart bought her."

The testimony also showed that Mary Ann lived upon the premises with her husband, Scipio, and after his death, continuously to her death, except possibly during the period of the war. There was no suggestion in the evidence, that her husband, Scipio, had taken her out of this State at any time.

The judge's charge was as follows:

If this property was Mrs. Conerway's, the plaintiff has a good title; if it was not hers,

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the plaintiff has not a good title. *The first title we have is in 1847, when it was bought by Scipio Stewart. There is no proof of a grant behind him, and without it that title cannot stand. But twenty years' possession is equivalent to a grant. I charge you that although that title is in the form of a trust deed, there being no trusts declared at all, except to Scipio Stewart, it was the same as a legal title to him out and out. It is a mistake to suppose that the trustee had any title at all. The statute of uses executed the use and vested the legal title in him; so that the legal title to that property was in Scipio Stewart, the very day the deed was delivered to Wilmot Walter.

His heirs-at-law are his widow and his son, William and Mary Ann Stewart, unless she was a slave. If she was a slave, she could not inherit. If you believe that she was a slave, her son William cannot inherit either. Neither of them could inherit, and it is perfectly clear that none of these parties could inherit, the proof being that all of his brothers and sisters were slaves; so that who were his legitimate heirs does not appear before the court. Their mother, Nancy, was a slave, but she outlived William, the son of Scipio, so that there can be no claim of minorities in the question at all, Nancy, his sister, being a slave alive until after William died. They were not the heirs even if they had been free, so long as the mother lived. If Mary Ann Stewart was a slave, neither she, nor her son William, nor any of these parties here could inherit, and the property belonged to any of his next of kin who were free, unless Mary Ann Stewart acquired title by possession. If she was free at the time the property descended to her she would receive one-third, and her son William two-thirds, and when her son died that property went to her. It would not go over to any of his kin, his mother living.

Was she free? According to the law of South Carolina, if you consider it proved that she was a slave, and that she was bought by her husband, then she could not be set free in this State. But if her husband bought her for the purpose of making her free, and if she enjoyed freedom for twenty years, then the law presumes that he did such acts as legitimately made her free. That is the presumption of the law.

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If you believe that Scipio *Stewart bought his wife with the intention of her being free, and she enjoyed freedom for twenty years, the law presumes that he did all that would legitimately make her free, and he could have done so by taking her into another State. The law presumes that he did all those necessary acts after twenty years' enjoyment of freedom. If, therefore, you believe that he bought her with the intention of making her free, and that he carried out his purpose to make her free, then she could inherit the property. If that was not his purpose, and his purpose was to hold her as a slave, then she was still a slave, and could not have inherited from him at the time of his death.

After his death, we find upon record a deed, dated 1856, under which she claims that she holds that property in her own right. That deed did not give her any right at all, but it being put upon record, it was notice to all the heirs of Scipio Stewart that she was in possession of that property, holding it adversely. That is a deed declaring that she is in possession of the property holding it as her own, and in ten years from that time, under that deed, by her possession she would have lawful title against all the heirs of Scipio Stewart, unless minorities be proved. No minorities are proved in this case, because there is no proof here who are his heirs. The parties here before you are not his heirs under the law. If the children of slaves could inherit from him, then his son was his heir. I cannot see upon what ground they can claim to be heirs, when they claim that the son, who was a slave, could not inherit, when they were slaves themselves.

I charge you then that if there was any inheritance at all, that inheritance was in the son, and when he died the mother became sole heir and came into possession of all the property, and that the putting of that deed on record, in which she claimed title in herself to the whole property, was from that time notice of adverse possession to all the world. Under that notice the property would be hers in ten years, or in 1866, and a grant would be presumed in twenty years, or 1876. In any aspect of the case, the title as it now appears before the court seems to be a perfectly clear title in Mary Ann Stewart. Either as a free person she and her son inherited from Scipio Stewart, or, that not being the case, she has title by posses-

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sion against his legiti*mate heirs whoever they may be. But the defendant alleges that there was a disability which would

prevent the statute from running. He must prove the disability. He must prove that Stewart had heirs and that they were under disability all the time that Mary Ann was in possession.

From the facts now before me it appears that at the time of her death she had a perfect title to this property. As to the claim that she was not in possession all the time, she alleges in the deed that she was in possession, and all that knew her say that was where she lived up to the time of her death. There is no proof that that possession was ever broken. It seems to me that the plaintiff has a clear title to this property; that the defendant is not in lawful and peaceable possession as alleged, and that he is a mere trespasser, and that those who claim with him stood by and saw Mary Ann Stewart in possession of it and never interfered with her claim to the property until she disposed of it in a way that they did not approve of. If it was hers, she had the right to dispose of it as she saw fit. We have no right to interfere with that. The proof is that the defendant took possession about the beginning of this year; there is no proof as to what the premises are worth as rent during that time; you will have to determine that for yourselves.

Messrs. Lee & Bowen, for appellant.

Messrs. Lord & Inglesby, contra.

November 22d, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action for a lot of land on the west side of St. Phillips street, in the city of Charleston, known as No. 125. The question was purely one of title.

The plaintiff put in evidence: 1. A copy of deed of the premises from James K. Robinson to E. Wilmot Walter in trust for Scipio Stewart, his heirs and assigns forever, bearing date April 26th, 1847. 2. Copy of a deed of marriage settlement between Mary A. Stewart, widow of Scipio, with her second husband, Peter Conerway, which, after re-

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citing that *George H. Walter, as trustee, was seized in fee of the lot, provided that he should still continue to hold the same "for the said Mary Ann, free from the control of any husband she may have, for the term of her natural life, and after her death then to her son William or his children, should he or any child of his be then living. But should he die before the said Mary Ann, then in trust for such uses and purposes as the said Mary Ann may by will or deed appoint." 3. Will of Mary Ann Conerway, December, 1881, giving her executors power to sell the lot—her son William having died before, in 1867, unmarried and without issue. 4. Deed of the executors of the will of Mary Ann to Dingle, as purchaser, April 7th, 1882.

Scipio Stewart was a free man of color, and lived with his wife, Mary Ann, who was also generally supposed to be a free person of color; but there was testimony tending to show that Mary Ann was originally a slave, and that many years ago (the precise time does not appear) she was purchased by her husband, Scipio. It is certain that as husband and wife they went into possession of the lot soon after it was purchased from Robinson, in 1847, and lived there as free persons of color until Scipio died intestate, in 1852, leaving as his widow the said Mary Ann, and her son William, who claimed the lot and occupied it until the death of Mary Ann, in 1881, William, the son, having previously died without wife or children. Mary Ann left a will, authorizing her executors to sell the lot, which they did, and at their sale the plaintiff, G. W. Dingle, became the purchaser and now claims the same through the said Mary Ann.

It seems that Scipio Stewart had sisters, who were slaves. The defendant, Mitchell, is one of the children of the sister Nancy, and he and his mother, now deceased, were both born slaves. The said Mitchell, after the death of Mary Ann, having in some way or other obtained possession of the said lot, now claims it as one of the heirs-at-law of Scipio Stewart, who died thirty years ago.

The case came on for trial before Judge Pressley, who refused a motion for non-suit, and, under his charge, the jury found for the plaintiff, Dingle. The defendant appeals to the court upon the following exceptions:

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*1. "Because his Honor erred in admitting in evidence copies of the following deeds without proof of the loss of the originals, viz.: A deed from James K. Robinson to E. Wilmot Walter in trust for Scipio Stewart. A deed from Mary Ann Stewart and Peter Conerway to George H. Walter.

2. "Because his Honor erred in not granting a non-suit on the ground that the plaintiff had not traced his title back to a grant from the State nor to a common source, as asked for by the defendant.

3. "Because his Honor erred in ruling that Mary Ann Stewart had been in possession of the premises for twenty years when there was no evidence to prove the same.

4. "Because Mary Ann Stewart, if she had title at all, acquired it as heir of Scipio Stewart, and there was no proof that she was ever married to the said Scipio Stewart, and his Honor erred in not so ruling.

5. "Because his Honor erred in refusing to charge the jury that if they believed Scipio Stewart was a free person of color and Mary Ann a slave, they could not find a verdict for the plaintiff, as a slave could not own property in his own right, nor could he hold adverse possession against the world.

6. "Because his Honor erred in refusing to charge the jury that if they believed

Scipio Stewart was a free person of color and Mary Ann a slave, William Stewart, their child, was illegitimate, and took nothing at his father's death.

7. "Because his Honor erred in refusing to charge the jury that the Legislature of this State had made no provision for the issue of a free person of color and a slave; but that the Legislature has made provision for the issue of slaves, whereby they may inherit their ancestors' property.

8. "Because the plaintiff's case was fatally defective, in that Scipio Stewart was a free person of color; Mary Ann, who claimed to be his wife, a slave, and neither Mary Ann nor her son, William, could take property under the statute of distributions of this State. That the sisters and brothers of Scipio Stewart, at his death, were his next of kin and lawful heirs, and if at the time they were laboring under a disability, and died laboring under said disability, leaving

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children, from whom the disability *was afterwards removed, they (the children of such sister or brother) became the legal heirs of such intestate, deceased, and his Honor erred in not so ruling.

9. "Because his Honor erred in charging the jury on questions of fact and giving them his opinion thereof.

10. "Because his Honor erred in charging the jury as follows: 'His (Scipio Stewart's) heirs-at-law are his widow and his son, William and Mary Ann Stewart, unless she was a slave. If she was a slave she could not inherit. If you believe that she was a slave, her son William cannot inherit either. Neither of them could inherit, and it is perfectly clear that none of these parties could inherit, the proof being that all of his brothers were slaves.' "

Exceptions 1 and 2 complain that the judge erred in not granting a non-suit; first, because there being no evidence of the loss of the originals, it was error to admit in evidence the deed from Robinson to Walter in trust for Scipio Stewart, and the marriage settlement of Mary Ann Stewart and Peter Conerway; and second, for the reason that the plaintiff did not prove a perfect title or trace it back to a common source, from which the defendant also claimed. The objection as to the proof of the deeds does not touch the merits of the case, for we suppose there can be no doubt, that the deeds were executed as they appeared recorded. The presiding judge says "the deeds were put in evidence without objection at the time." The time to object was when they were offered and taken down by the judge as in evidence. If objection had been then made, we must assume that the proof of loss would have been made. This court has held that "what proof of loss of a written paper is sufficient to permit secondary evidence of its contents is, to a large extent, a question of fact to be decided by the judge, and his discretion will not be disturbed except in very rare cases." Oliver v. Sale, 17 S. C. 587.

As to the proof of title in Mary Ann, under whom the plaintiff claimed, the rule, as announced in the case of Young v. Watson, 1 McM. 449, is that "a plaintiff can only make out a perfect title by producing a grant or by proving such a possession as will

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give *title in himself or in some one from whom he derives title." The judge held that "she (Mary Ann) must trace title to a grant, but that twenty years' adverse possession, where there are no disabilities, is equivalent to a grant from the State, and the presumption is that the grant was at the beginning of her possession." Whether there had been such possession was a fact for the jury, and we cannot, therefore, say that the judge erred in refusing the nonsuit. We might add that the plaintiff did trace title to a common source. In our view of the case, certainly both Mary Ann and the defendant claimed by descent from the same person, Scipio Stewart, who undoubtedly had the legal title under the operation of the statute of uses.

Exceptions 4, 5, 6, 7 and 8, in different forms, allege error on the part of the judge in refusing to charge as matter of law that plaintiff's title was fatally defective for the reason that Mary Ann, although purchased by her husband and living with him as his wife, continued to be, technically, a slave, and subject to all the disabilities of slavery, one of which was an inability to make a legal contract of marriage, and, as a consequence, to be either an heir herself or the mother of an heir. As the defendant suggests, suppose we assume this to be good law, the result would necessarily be that there could be no inheritance at all or title by the statute in this case, but the land would be forfeited to the State for the want of an owner. For it is undoubtedly true that the sisters of Scipio and their children, including the defendant, were also slaves and under the same disabilities.

It is replied, however, that there was a general emancipation of all slaves in 1865, and after that the legislature of the State passed certain laws legalizing the marriage of persons who were in bondage at the time they were contracted, and declaring that the issue of such marriage might inherit from their parents and from each other according to the statute of distributions (see Davenport v. Caldwell, 10 S. C. 332). Taking then the statute of distributions as fixing the canons of descent applicable to these people, it is plain that the widow and child should inherit from Scipio in preference to his sisters or their children.

But it is earnestly insisted that the aforesaid enabling acts, when properly construed, refer to and embrace only marriages entered

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*into by parties who were at the time both slaves, and were not intended to include a marriage contracted between a female slave and a man of color who was at the time free, leaving such marriage, as in this case, illegal, and the issue thereof illegitimate. We do not so understand the acts referred to. The man Scipio, being a free man, was under no disability in respect to marriage. He had the right to make a legal contract of marriage and to have legitimate children, but upon the assumption that Mary Ann was still a slave, she was under a disability which touched Scipio's marriage with her, and made his child, William, illegitimate. But this was the very result the enabling acts were intended to prevent. No such distinction as that contended for can be found in the acts themselves, and such a narrow construction would violate their whole spirit and intent.

On the contrary, the terms of these acts show that they were intended to be as general as the mischief they remedied, and to apply as well to a marriage of a female slave with a free person of color as to cases where both parties were slaves. "Cohabitation, with reputation or recognition of the parties, shall be evidence of marriage in cases criminal and civil." * * * "Every colored child heretofore born is declared to be the legitimate child of his mother and also of his colored father if he is acknowledged by such a father," &c. 13 Stat. 291. As was said in the case of Davenport v. Caldwell, supra: "This section is unquestionably retrospective, and applies to the dead as well as the living." In this view the enabling acts applied to the marriage of Mary Ann with Scipio even if she was a slave at the time, and made William the legitimate child of Scipio and capable of inheriting from him. At the death of Scipio, Mary Ann was entitled to one-third, and William, his son, to two-thirds of the lot. Upon the death of William, without wife or children, his mother inherited the whole interest, and the same passed under her will to the plaintiff.

But did Mary Ann necessarily remain a slave until the general emancipation of 1865, and under disability to take and hold property until the passage of the enabling act in 1872? Gen. Stat., § 2031. The judge charged the jury that if they believed "that Scipio Stewart bought his wife with the intention

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of her *being free, and she enjoyed freedom for twenty years, the law presumes that he did all that would, legitimately, make her free, and he could have done so by taking her into another State." Was this error? It is true that by the laws of force in this State in 1846 no slave could be emancipated in the State except by an act of the legislature. But it was held in the case of Willis v. Jolliffe, 11 Rich. Eq. 447, as late as 1860, "That there is nothing in the policy of the law of this State against a master taking his slaves to a free State and there emancipating them himself." It was not impossible, and the jury were told that if they believed that Scipio bought his wife with the intention of making her free, and she enjoyed freedom for twenty years, the law presumes that he did all that was necessary to make her free, and the presumption is that the grant was before her possession. We cannot say that this was error.

It was surely not error to leave it to the jury to decide whether the husband purchased his wife with the intention of making her a free woman. The court could not assume conclusively that he did the unnatural thing of buying his wife in order to keep her as his own property. It seems that at the very least, from 1846 to 1852, when Scipio died, Mary Ann lived with him as his wife, and thenceforward until she died, in 1881, being over thirty years, always treated and considered as a free person of color, and certainly after 1852 was in the quiet and exclusive possession of the premises in question. "After a lapse of twenty-eight years an executor's assent to a legacy of freedom to a slave was presumed." Bowers v. Newman, 2 McM. 486. "When a negro slave has been at large and acting as a freeman for more than twenty years a deed of manumission under the act of 1800 was presumed." "The court will presume whatever is necessary to give efficacy to long possession." Willingham v. Chick, 14 S. C. 103.

Considered with reference to the context, in which it was said, and without regard to the enabling act stated, we do not think the judge transcended the limit imposed by the constitution when he charged the jury as follows: "His (Scipio) heirs-at-law are his widow and his son William and Mary Ann Stewart, unless she was a slave. If she was a slave she could not inherit. If you believe she was a slave, her son William cannot

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inherit either. *Neither of them could inherit, and it is perfectly clear that none of these parties could inherit, the proof being that all of his brothers and sisters were slaves."

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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20 S. C. 213

GIBBES v. TOWN COUNCIL OF BEAUFORT.

(April Term, 1883.)

[1. *Ferries* ⟸8.]

In action by the owners of a chartered ferry against defendant for damages for establishing another ferry, there being some evidence that the second ferry was within one mile of the first, the trial judge did not err in refusing a motion for non-suit based upon the want of proof of location.

[Ed. Note.—For other cases, see Ferries, Dec. Dig. ⟸8.]

[2. *Action* ⟸35; *Penalties* ⟸16.]

Where an act covers only part of a general subject and gives additional remedies by way of penalties in a particular case for the enforcement of an old common law right, such additional remedy is not exclusive, but the common law remedy still exists.

[Ed. Note.—Cited in Kaminitsky v. Northeastern R. Co., 25 S. C. 62; Moore v. Ewbanks, 66 S. C. 376, 44 S. E. 971; Newton v. Odom, 67 S. C. 10, 45 S. E. 105.

For other cases, see Action, Cent. Dig. § 284; Dec. Dig. ⟸35; Penalties, Cent. Dig. § 13; Dec. Dig. ⟸16.]

[3. *Ferries* ⟸16.]

Quære. Where the legislature grants to a municipal corporation the usual powers and duties to make provision for the convenience and prosperity of its citizens, does a charter of a ferry granted to private individuals deprive such corporation of the right to establish a free ferry within a mile of the other, and how should the question be raised?

[Ed. Note.—For other cases, see Ferries, Cent. Dig. §§ 38–40; Dec. Dig. ⟸16.]

[4. *Municipal Corporations* ⟸747.]

A municipal corporation is not liable to be sued in an action of tort for non-feasance or misfeasance of its officers, as e. g. for establishing a ferry to the injury of one already existing, unless expressly made so liable by statute.

[Ed. Note.—Cited in Chick v. Newberry and Union Counties, 27 S. C. 425, 3 S. E. 787; Chapman v. City Council of Charleston, 28 S. C. 381, 6 S. E. 158, 13 Am. St. Rep. 681; Parks v. Greenville, 44 S. C. 172, 21 S. E. 540; Bryant v. City Council of Orangeburg, 70 S. C. 140, 49 S. E. 229; Hopkins v. Clemson Agricultural College, 77 S. C. 38, 57 S. E. 551; Irvine v. Town of Greenwood, 89 S. C. 514, 516, 72 S. E. 228, 36 L. R. A. (N. S.) 363.

For other cases, see Municipal Corporations, Cent. Dig. § 1570; Dec. Dig. ⟸747.]

Before Aldrich, J., Beaufort, October, 1882.

This was an appeal from an order refusing a motion for nonsuit. The opinion states the case.

Mr. W. J. Verdier, for appellant.

Mr. W. J. Whipper, contra.

November 22d, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. In December, 1873, the legislature rechartered the ferry

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over Beaufort river known as "White *Hall ferry, leading from the town of Beaufort to Ladies island," and vested the same in Peter Gibbes and Peter Massay. The charter prescribes certain rates of toll, but there is nothing in it which indicates that the franchise was exclusive. 15 Stat. 523.

It seems that the ferry is within the corporate limits of the town of Beaufort, and in February, 1880, nearly a year before the expiration of the said charter, the town council of Beaufort, considering that "White Hall ferry is within the corporate limits of the town, and, therefore, a public highway of great importance to the business and property of the town and entitled to receive the same attention and expenditures as other highways created for the benefit of the public, and of right ought to be free for use and convenience without toll," &c., laid a tax for supporting a free crossing called "a free ferry" at that point, and established the same, limiting it, however, to passengers. The plaintiffs, considering this a violation of their chartered right, sued the town council for damages, in the nature of an action on the case for nuisance. The answer was a general denial of the plaintiffs' right to recover.

The case came on to be heard before Judge Aldrich, who refused a motion for a non-suit, and the case being submitted to the jury, they found for the plaintiffs $272.50 damages. The town of Beaufort appeals to this court upon the following exceptions: "1. That the ferry established by the defendant being shown by the plaintiffs to have been a free ferry, it was not in violation of, or an infringement upon, the chartered rights of the plaintiffs. 2. That there being no evidence to show that the ferry established by the defendant was within one mile of the plaintiffs' ferry, the defendant's ferry was not an interference with the plaintiffs' chartered rights. 3. That the statute having prescribed a mode of redressing violations of plaintiffs' chartered rights, and having furnished a remedy, the plaintiffs were limited to that remedy and could not proceed otherwise. 4. That defendant being a municipal corporation, in the absence of a statute giving the action, the plaintiffs could not maintain their action of trespass against them.

The State, in the exercise of the right of

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eminent domain, *granted to the plaintiffs the franchise of White Hall ferry for seven years. That became a vested right—property. The utility of such a franchise lies in its exclusiveness, at least as against all unauthorized crossings within certain limits. The moment the right becomes common to all, the franchise substantially ceases to exist. Conway v. Taylor's Executor, 1 Black 623 [17 L. Ed. 191]. The question then arises, whether it was error of law on the part of the Circuit judge to refuse the motion for a non-suit; and upon that question the defendant makes the following points:

First. That the evidence was not sufficient to show that the passage, or free ferry across

Beaufort river established by the defendants and complained of by the plaintiffs, was within the space of one mile from the White Hall ferry. Section 1124 of the general statutes is in these words: "If any person or persons, living within the space of one mile of any established ferry in any part of this State, shall, for any fee, toll or reward whatsoever, transport any person, goods or cattle from one side only to the other of that river, where any established ferry shall be kept, the person taking any such fee, toll or reward shall forfeit and pay to the proprietor of the ferry next adjacent to the place where such fare was taken up, treble the value of the fee, toll or reward given, paid or promised, to be recovered by warrant, under the hand and seal of one trial justice, or be imprisoned in the county jail for a period not exceeding thirty days, any law, usage or custom to the contrary notwithstanding, provided," &c.

The terms of this act would seem to indicate that the inhibition as to a mile, relates to the residence, and not to the act of the offending party; but it is a principle of the common law, that "if a ferry is erected on a river, so near another ferry as to draw away its custom, it is a nuisance to the owner of the old one." 3 Bl. Com. 310. The rule as to the sufficiency of evidence is, that if there is any evidence of a fact, the case must go to the jury, whose province alone it is to judge of its sufficiency. It is true that the evidence as to the locus of the free ferry, was not as clear as it might have been, especially as that allegation was the very foundation of the plaintiffs' claim. But we think there was some evidence in the town council records,

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which were *in proof that the free crossing was established at or near the White Hall ferry "connecting the town of Beaufort with Ladies island." The report of the finance committee, upon which the crossing was established, so states in terms. Upon this point there was no error.

Second. The appellant further urges, that the non-suit should have been granted, on the ground that this action was not a proceeding for the penalties allowed by the statute above cited; that said statute declares the law and furnishes the remedy, and as this remedy in its nature superseded all others, the plaintiffs were bound to pursue it, and not having done so, should have been non-suited. It is true that this court has held, in reference to the agricultural lien act, that being a new law, the courts can not, for its violation, go beyond the remedy afforded by it or enforce any other. Kennedy v. Reames, 15 S. C. 548. But we do not understand that this principle applies to an act which only covers part of a general subject, and only purports to give additional remedies by way of penalties in a particular case, for the enforcement of an old common law right. Our present law giving a penalty for exacting tolls, cited above, is very nearly identical with the old act of 1741, which, as the preamble shows, was intended not to repeal the old remedy by action, but to give an additional remedy in a particular state of facts mentioned. See 9 Stat., § 9, p. 123.

This view is confirmed by the practice of the courts. This act was in force in 1818, when the case of McGowen v. Stark, was decided. That was not a proceeding for the penalties allowed by the act, but an action on the case for damages, brought by a grantee of the franchise of a ferry against the proprietor of another ferry set up without authority. No question was made as to the legality of the action, although the case was stoutly contested. The plaintiff recovered large damages, the court holding that "the owner of a ferry established by the legislature, is protected in his right by the common law; and, therefore, if another set up a ferry without public authority near to his ferry, he may maintain an action on the case for a nuisance against him." 1 Nott & M. 387 [9 Am. Dec. 712], and note. We do not

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think *that the act excluded the plaintiffs from all remedy except that afforded by it.

Third. But the defendant corporation makes still another objection: that, not being authorized by statute, the action on the case for damages as for a nuisance cannot be maintained against the town of Beaufort for the act of its officers in opening a free passage across the river within its corporate limits. It seems to us that there is force in this point. The peculiarity of the case arises from the fact that the legislature granted to individuals the franchise of a ferry, within the limits of a town, to which, in the act of incorporation, it had already given the usual municipal powers and duties, to make provision for the convenience and prosperity of its citizens. The policy of the law in granting the franchise of a ferry, is not so much to secure the tolls allowed to the grantees, as to facilitate commerce, and to provide certain and safe transit for the public; to promote and not to obstruct the general convenience; and it can hardly be supposed that the legislature intended, in chartering this ferry, to repeal by implication the municipal powers it had already given in the act of incorporation, and as to which the incorporation was merely the agent of the legislature in governing that locality.

The State, in the charter of the ferry, did not expressly grant any exclusive privilege, and if the plaintiffs are entitled to them, it must be implied simply from the nature of the grant, and cannot be inferred from the words by which the grant was made. Whilst, as we have seen, under the general law, individuals may thereby be restrained from drawing off the tolls by another unauthorized ferry within the disfranchised limits; yet it does not follow that the mere grant

of the charter amounted to such a contract with the grantees, as to prevent the State itself from granting another one to the injury of the first. See the case of Charles River Bridge v. Warren Bridge, 11 Pet. 536 [9 L. Ed. 773]; The Turnpike Company v. The State, 3 Wall. 211 [18 L. Ed. 180]. The principle announced by these cases seems to have been adopted into the statute law of the State of force at the time this charter was granted. It was provided that "no grant of a bridge, ferry or turnpike road, shall prevent the legislature from making further

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*grants of ferries, bridges or turnpike roads, within any distance of the same, whenever the convenience of the community may require such further grants. But every grant of a ferry, bridge or turnpike road shall exclude all other persons from erecting and keeping up any bridge, ferry or road which may reduce the profits of such chartered bridge, ferry or turnpike road, except for the individual use of the person erecting and keeping up such unchartered bridge, ferry or road, without the authority of the legislature expressed by the act." See Gen. Stat., 1872, ch. LXIII., § 74.

If the State itself could have established this free ferry, without impairing the obligation of any contract with the grantees, could not the municipal corporation of the town of Beaufort, as governmental agent of the State, within its limits, do the same? It has been held that, what the State constitutionally empowers a municipal corporation to do, may be considered as done by the State. Do the words in the act above cited, "authority of the legislature expressed by act," embrace the "authority" given to the town of Beaufort "expressed" in the act of incorporation? As far as we know this is a new question, and it seems to us that the proper way to have had it decided would have been by proceedings on the part of the grantees of the ferry charter for an injunction against the corporate authorities, praying that they might be enjoined from operating the free ferry established by them. Turnpike Company v. The State, 3 Wall. 211 [18 L. Ed. 180], supra.

But be that as it may, without ruling anything upon that subject, it is clear that this action for damages can not be maintained against the town of Beaufort. We regard it settled in this State, that a municipal corporation, instituted for the purpose of assisting the State in the conduct of local civil government, is not liable to be sued in an action of tort for non-feasance or misfeasance of its officers in regard to their public duties, unless expressly made so liable by statute. White v. City Council of Charleston, 2 Hill 572; Coleman v. Chester, 14 S. C. 290; Black v. City of Columbia, 19 Id. 412 [45 Am. Rep. 785]; Young v. City Council of Charleston, ante, p. 116 [47 Am. Rep. 827].

The judgment of this court is that the judgment of the Circuit court be reversed, and the complaint be dismissed.

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*RENNEKER v. SOUTH CAROLINA RAILWAY COMPANY.

(April Term, 1883.)

[1. *Carriers* ⊂⊃323.]

If plaintiff was injured through the negligence of defendant, yet plaintiff could not recover damages for such injury unless he himself observed proper care and caution under the circumstances.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1346; Dec. Dig. ⊂⊃323.]

[2. *Carriers* ⊂⊃348; *Railroads* ⊂⊃278.]

In order to fix liability for negligence upon the person at whose hands an injury has been received, the party injured must have exercised the care and caution of a prudent, reasonable man in possession of the ordinary senses and capacities of mankind. Proper care does not vary with the varying capacities or infirmities of men.

[Ed. Note.—Cited in Simms v. South Carolina Ry. Co., 27 S. C. 268, 271, 3 S. E. 301; Madden v. Port Royal & W. C. Ry. Co., 35 S. C. 381, 384, 14 S. E. 713, 28 Am. St. Rep. 855; Id., 41 S. C. 441, 454, 455, 19 S. E. 951, 20 S. E. 65; Brodie v. Carolina Midland R. Co., 46 S. C. 217, 24 S. E. 180.

For other cases, see Carriers, Cent. Dig. § 1405; Dec. Dig. ⊂⊃348; Railroads, Cent. Dig. § 891; Dec. Dig. ⊂⊃278.]

[3. *Carriers* ⊂⊃280.]

Railway companies, though held to a high degree of care, do not insure, under all circumstances, the safety of passengers or those seeking to become passengers; their liability is conditioned on the exercise by them of reasonable and proper care and caution.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085–1092, 1098–1103, 1105, 1106, 1109, 1117; Dec. Dig. ⊂⊃280.]

[This case is also cited in Whaley v. Bartlett, 42 S. C. 469, 20 S. E. 745; Wade v. Columbia Electric, etc., Co., 51 S. C. 300, 29 S. E. 233, 64 Am. St. Rep. 676, without specific application.]

Before Pressley, J., Orangeburg, October, 1882.

Action by John H. Renneker against the South Carolina Railway Company. The opinion states the case.

Messrs. J. F. Izlar and Mitchell & Smith, for appellant.

No argument contra.

November 22d, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action against the defendant corporation for damages on account of personal injuries to the plaintiff from falling off the railroad platform at Orangeburg on the night of February 8th, 1882, when he was seeking to enter the cars for Charleston; which injuries he

alleged were caused "by the negligence of the company in and about the arranging, making, procuring and keeping suitable platforms and conveniences for the ingress and egress of passengers on said road, and in and about the lighting up the said road and platform, and the said conveniences for the ingress and egress of passengers for transportation on said road," &c. The defendant answered, denying all allegations of negligence; and affirming that the fall of the plaintiff,

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and "any injury he may *have received, was not in any way caused by or due to the negligence of the defendant or any of its servants, agents or employés; but, on the contrary, that such fall, and any injury received therefrom, was wholly due to and arose entirely from the carelessness, negligence and fault of the plaintiff himself, and from no other cause whatever."

The case came on for trial before Judge Pressley and a jury. Much testimony was offered on both sides; but it is not necessary for our present purpose to do more than state the leading facts in a general way. The down train passed Orangeburg after dark; and the night was dark and drizzly. The plaintiff went to the station before the time for the arrival of the train, and waited in the telegraph office and the ladies' waiting-room. Having a thousand-mile ticket, and hearing the signal for the approach of the train, he left the waiting-room and started to walk—with the other persons about to board the train—up the outside platform, passed the express freight, in the direction of the approaching train; and, while walking with Mr. Wannamaker, fell off the platform and was injured. He was taken up and cared for before the train actually arrived. The case turned upon the questions of fact: 1. Whether the platform was properly lighted. 2. Whether the express freight was improperly allowed to incumber it, &c. 3. Whether there was contributory negligence on the part of the plaintiff in leaving the waiting-room before the proper time, or in not exercising the care required of a reasonable man in possession of all his senses.

The defendant tendered twenty different requests to charge, some of which were refused by the judge, and others charged in the whole, or with modifications; but we need only refer to such rulings as were excepted to. The jury rendered a verdict in behalf of the plaintiff for $1,500, and the company appeals to this court upon eight exceptions, of which the last is as follows: "8. Because his Honor charged: 'If plaintiff was walking along beside Mr. Wannamaker, using his senses—that is, his eyesight—and was going along with the ordinary care that a person would naturally use, and fell off by a stumble or by the passage-way being too narrow, or from want of light, or anything of that sort, then that is not lack of ordinary care,

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*because different persons have different temperaments, and one person may do a thing safely which another man cannot. One man may walk a narrow plank with perfect safety, while many others could not. The company has no right to require extraordinary care from any one;' whereas, he should have charged that the company is not bound to allow for individual temperament, but that the plaintiff was bound to exercise all the care and precaution that would be required by any ordinary, average reasonable man."

We have not found it necessary to consider any of the grounds of appeal except the last one. In the view which the court takes, that will dispose of the case. It is undoubtedly true that the action of the plaintiff rests entirely upon the alleged negligence of the company; but it is, nevertheless, incumbent on him to show that he has not been guilty of contributory negligence; that is to say, that he observed proper care under the circumstances. Even upon the assumption that the defendant was negligent, the plaintiff could not recover if he contributed to the misfortune by his own negligence or want of ordinary care and caution. "Two things must concur to support the action; an obstruction in the road on the part of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." See Butterfield v. Forrester, 11 East 62; Baltimore & P. R. R. Co. v. Jones, 95 U. S. 439 [24 L. Ed. 506], and authorities therein collected; Richardson v. W. & M. R. R. Co., 8 Rich. 126; 2 Red. Rail. 194 and notes.

The judge charged this principle correctly, but he added: "If the plaintiff was going along using his senses—that is, his eyesight—with the ordinary care that a person would naturally use, and fell off by a stumble, then that is not lack of ordinary care because different persons have different temperaments, and one person may do a thing safely, which another man cannot. One man may walk a narrow plank with perfect safety, which many others could not do. The company has no right to require extraordinary care from any one." Was this error? While the statement of fact made may be perfectly true in the abstract, we think in the connection in which it was made, it might have been misunderstood by the jury, as authorizing them

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to charge to the *negligence of the company the result of any casualty on their platform, only provided the party suffering it was at the time using his senses, good or bad.

Is there not such a thing as a pure casualty, accidental, fortuitous, and without fault on the part of any one, so far as imperfect human knowledge can discover. And besides, what is proper caution, and by what rule is it to be determined? The rule is plain and unmistakable, but its application is often exceedingly difficult and unsatisfactory.

As Mr. Pierce in his book on Railroads, at page 312, states it, "The standard of negligence is so variable and even intangible, and sentiment and caprice are so apt to disturb the verdict of juries in charges of personal injury, that the corrective function of the court in supervising verdicts in such cases is essential to the administration of justice." Does the term "ordinary caution" mean no more than the use of the senses, without any regard to the infirmities of temperament, which is defined to be mental or bodily constitution? It is certainly very vague and uncertain to make proper care vary with the varying capacities or infirmities of men. When the rights and obligation of one party are made to turn upon the proper caution of another, it would seem that there should be some common standard by which to test the fact, and we know of none practicable, other than that of a prudent, reasonable man in possession of the ordinary senses and capacities. When arrangements are made suitable and proper for such persons, nothing more should be required, and one falling below this standard, either physically or mentally, should be cautious and prudent in proportion to such defects.

Railway companies, though held to a high degree of care, do not insure the safety of passengers or those seeking to become passengers under all circumstances; their liability is conditioned on the exercise of reasonable and proper care and caution. "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or

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commission. The duty is dic*tated and measured by the exigencies of the occasion." Baltimore & P. R. R. Co. v. Jones, 95 U. S. 439 [24 L. Ed. 506]; Lake Shore & M. S. R. R. Co. v. Miller, 25 Mich. 274; Baltimore & P. R. R. Co. v. Whitacre, 35 Ohio St. 627; Pierce Rail. 345 and authorities. In the case from Michigan it was held that "absentmindedness" was not a legal excuse for failing to observe the precaution of looking and listening before crossing a railroad track.

Mr. Redfield says: "In a recent English case (Crafter v. The Met. Railway Co., 12 Jur. (N. S.) 272,) the question of the degree of caution required of passenger carriers, is carefully considered. It is here said that in determining whether evidence of negligence has been given before the jury, the court must use the ordinary experience of life and consider whether the evidence of negligence be reasonable. And in commenting on the case (which was where the plaintiff fell upon a staircase in going from the platform into the street, in consequence, as he alleged, of the stairs being rendered slippery by reason of brass upon the edge of the steps and having no hand-rail upon the top of the banisters) learned judges declare that passengers are not entitled to have every precaution to insure safety which is possible to suggest after an accident has occurred." 2 Redf. Rail. 201.

It is the judgment of this court that the judgment of the Circuit Court be set aside, and the cause remanded for a new trial.

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20 S. C. 223

NELSON & CO. v. GOOD.

(April Term, 1883.)

[1. *Fraudulent Conveyances* ⟸132, 139.]

Insolvency of the vendor of personal property, pendency of suits against him, the sale of all his property, and retention of possession of the goods sold, to all appearances as owner, constitute such strong evidence of fraud that they will be regarded as conclusive unless explained by the most satisfactory testimony, but are not presumptions of fraud irrebuttable by any evidence. Cases reviewed.

[Ed. Note.—Cited in Perkins v. Douglass, 52 S. C. 132, 29 S. E. 400; McGee v. Wells, 52 S. C. 475, 30 S. E. 602; McElwee v. Kennedy, 56 S. C. 172, 34 S. E. 86; Sloan v. Hunter, 56 S. C. 389, 34 S. E. 658, 879, 76 Am. St. Rep. 551.

For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 407, 439; Dec. Dig. ⟸132, 139.]

[2. *Fraudulent Conveyances* ⟸295.]

This court concurred with the Circuit judge in holding these badges of fraud to have been satisfactorily explained in this case.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 867-875; Dec. Dig. ⟸295.]

[3. *Fraudulent Conveyances* ⟸144.]

A debtor may legally sell his property to one of his creditors, pending suit by others, and may retain possession as bailee for hire or as agent of the vendee.

[Ed. Note.—Cited in Archer v. Long, 32 S. C. 186, 11 S. E. 86.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 423; Dec. Dig. ⟸144.]

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[4. *Fraudulent Conveyances* ⟸132.]

*Excessive compensation allowed by the vendee to such vendor, as his agent after the sale, is a circumstance to be weighed in determining the bona fides of the transaction, but is not conclusive of fraud in the sale.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 424; Dec. Dig. ⟸132.]

Before Cothran, J., Greenville, November, 1882.

This was an action by Samuel A. Nelson & Co. and William Bryce & Co., judgment creditors of Warren S. Good, against said Good and Williams Cox, to set aside a sale of a stock of goods by Good to Cox.

The master's report was as follows:

The master to whom it was referred to take the testimony in the above-entitled cause, and to report the same together with his conclusions of fact, begs leave to report

that he has held references, and from the evidence adduced and herewith filed he respectfully submits the following as his conclusions of fact, to wit:

1st. That the defendant W. S. Good was engaged in the mercantile business and purchased goods of the plaintiffs, for which he gave the notes on which judgments were obtained against him, as set forth in the complaint herein.

2d. That on December 18th, 1879, the defendant Williams Cox became surety for defendant Good on two notes, payable to the order of Butler, Clapp & Co., one of which was for $322.16 and the other for $324.14. The first became due on November 1st, 1880, and the latter on December 1st, 1880.

3d. That on February 28th, 1880, defendant Good, who knew he was insolvent, disposed of his entire stock of goods (amounting in value, at actual cost, to $531.40,) to defendant Cox to secure him against loss on account of his suretyship on said notes to Butler, Clapp & Co., and on the same day executed and delivered to defendant Cox a bill of sale to said stock of goods with an inventory of the same attached, which bill of sale and inventory were duly recorded on said date in the office of the register of mesne conveyance for the county aforesaid. That defendant Cox did not know that defendant Good was insolvent when he bought said stock of goods, and he would not have bought them had he not been surety on said notes.

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*4th. That defendant Cox never took possession of said stock of goods, but employed defendant Good, who is his son-in-law, as his agent to carry on and manage the business, and authorized him to sell said stock of goods and to buy other goods in order that he might close up the business without sacrificing the original stock, and agreed to pay defendant Good for his services a salary of $400 a year out of the proceeds of the sales of said stock of goods. That, in pursuance thereof, defendant Good remained in charge of said stock of goods, bought other goods on time as agent, sold and disposed of the same, and about the middle of April, 1881, closed out the business. That defendant Good, as agent as aforesaid, had sole charge of the business and never made any statements of the same to defendant Cox, nor did defendant Cox ever ask for or require of him a statement, and it does not appear that he took any interest in the same and knew nothing of the management thereof, nor of the profits or losses, nor of the debts incurred on account of the same, but left the whole matter to defendant Good, he, the said Cox, being a farmer, with very little business capacity and experience.

5th. That no notice was given by advertisement, or otherwise, of the change of the business, when defendant Good became the agent of defendant Cox. There was no sign then nor before over the store-house, and externally there was nothing to show that any change had been made. That on the ledger kept by defendant Good from 1876 to the time he closed out the business, as agent, as aforesaid, there is an account kept of goods purchased by defendant Cox, and various amounts of cash and cotton are placed to his credit, and there is no change in the mode of keeping said account after the stock of goods were sold to defendant Cox, from that prior to the same, nor are there any changes made in the mode of keeping said books as to the general business done before or after that time.

6th. That while defendant Good was acting as agent for defendant Cox, his clerk, Norman Good, signed two receipts dated September 7th, 1880, in the name of W. S. Good, for goods purchased on account.

7th. That on June 23d, 1880, defendant

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Good made his return *under oath to the county auditor, in which he included among other items of personal property, by and with an understanding with defendant Cox, goods, merchandise, &c., to the value of $400, and on the same day, and at the same time, defendant Cox made his return to said auditor, and did not include any goods, merchandise, &c. That on June 21st, 1881, defendant Cox made another return under oath to said auditor, in which he did not include any goods, merchandise, &c.

8th. That on December 1st, 1880, the sheriff levied on said stock of goods, and about three or four weeks prior to that date, defendant Good said that said stock of goods were worth not less than $1,500, and spoke of them as his goods.

9th. That on December 12th, 1879, defendant Good purchased from his wife the house and lot in which they lived, and paid her $500 in cash for it, which he mortgaged to Ferguson & Miller, merchants in this place, (on the same day that he executed and delivered the said bill of sale of said stock of goods to defendant Cox,) for $475, to secure to them a debt of $326, and they were to pay him the difference in money, which they have not done.

10th. That on page 481, in the day book kept by defendant Good, while in business for himself, and as agent for defendant Cox, there is an entry made of "W. S. Good, Agt., commenced business at Marietta, S. C., February 28th, 1880," which has the appearance of having been originally 1881 and having been changed to 1880, and the same entry is made on the back of said book, the date and month of which appear to have been altered, and also another entry of "W. S. Good commenced business at Marietta, S. C., April 8th, 1876," which appears to have been originally 1879. The same entries are made in

the back of said ledger, and they have not been changed.

11th. That on September 5th, 1879, defendant Good made and delivered to Johnston, Crews & Co. his two promissory notes, one for $283.88 and the other for $88.57; the first became due on November 15th, 1879, and the latter on January 15th, 1880, and on November 14th, 1879, he gave the said Johnston, Crews & Co. another promissory note for $211.22, payable sixty days after date. That no part of said notes were paid with the exception of $40, and suit was commenc-

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ed on same on March 8th, 1880, *and judgment was obtained thereon by default against defendant Good on April 27th, 1880, for $556.63.

12th. That on September 17th, 1878, defendant Good made and delivered to William C. Browning & Co. his promissory note for $165.93, payable four months after date, on which he made sundry payments, but, failing to pay the whole amount due thereon, suit was commenced against him on February 21st, 1880, and judgment was obtained by default on March 15th, 1880, for $39.98.

13th. That defendant Cox has paid the said notes, for which he became surety, to the said Butler, Clapp & Co., out of the proceeds of sales from said stock of goods, with the exception of $110 paid out of his own money, and he also gave two notes to said Butler, Clapp & Co. on February 3d, 1881, for $250 each for goods bought of them by defendant Good, as his agent, which he has paid, and he has never received anything on account thereof from the sale of said stock of goods or from defendant Good except his account for goods gotten by himself, amounting to $193.86, and therefore he lost $416.14 by being involved in said business.

14th. That defendant Cox is a man of unquestionable character and integrity, and did not intend to perpetrate any fraud upon the plaintiffs.

All of which is respectfully submitted November 15th, 1882.

S. J. Douthit, Master.

The Circuit decree was as follows:

This is a joint action by the plaintiffs above named, against the defendants, to set aside as fraudulent the sale of a stock of goods, by the first-named defendant to the latter, and to subject the same, or the value thereof, to the payment of certain executions of the plaintiffs heretofore obtained in this court against the defendant Good. The matter was referred to the master to take testimony and report his conclusions of fact to this court. Pursuant to said order the master has taken the testimony and made his report, to which exceptions have been filed on behalf of the plaintiffs and defendants. In the view which I have taken of the case, it will not be necessary to deal with these exceptions seriatim.

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*The pivotal point of the whole case is the alleged fraudulent sale of the stock of goods by Good to Cox on February 28th, 1880. It appears from the evidence taken that Good was a merchant at that time, and previously doing business at Marietta; that Cox, his father-in-law, a farmer, without knowledge of mercantile affairs, lived in the neighborhood; that Butler, Broome & Clapp, merchants in the city of New York, were creditors of the said Good, and sent one of their traveling agents to look after his indebtedness to them; that said agent and Good went together to Cox's and induced him to become surety upon Good's indebtedness to Butler, Broome & Clapp; that Cox was ignorant at the time of Good's insolvency, but afterwards, upon discovery of that fact, he procured an assignment to himself, by sale, of the entire stock of goods, the inventoried value of which, at prime cost, being about $530; that Cox's liability on account of his suretyship was about $650; that the deed of bargain and sale of the stock of goods was recorded in the register's office at Greenville on the day that it was executed. By the terms of the trade Good was to retain possession of the goods, and by the addition of other goods to be paid for by Cox, the original stock of $530 worth, it was believed, could be advantageously disposed of; the Butler, Broome & Clapp indebtedness was to be paid off as well as the bills for additional merchandise, from the proceeds of sales, and Good was to receive wages for attending to the business, at the rate of $400 per annum. The Butler, Broome & Clapp indebtedness was thus paid off, excepting the sum of $110 paid by Cox, who sustained a total loss in connection with the said mercantile business of over $400.

It is scarcely necessary to cite authorities in support of the proposition that, in the absence of a bankrupt law, a debtor in failing circumstances has the right to prefer one bona fide creditor over another. Was Cox a bona fide creditor of Good? I think there can be no doubt of this.

But it is urged by the plaintiffs' counsel that the retention of possession of the stock of goods by Good, the vendor, after the sale to Cox, was per se fraudulent. Since the statutes of Elizabeth upon this subject, and the numerous decisions of our own courts, (Smith v. Henry, 2 Bailey 118; Maples v.

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Maples, Rice *Eq. 300, and many others,) it is undeniable that, as an abstract proposition, this is true. But the relation of vendor and vendee must continue in order to bring the case within the operation of the statute. It does not forbid the vendor's becoming the agent of the vendee. In such case the vendor assumes a new character, and if the sale is for valuable and sufficient consideration,

and is, in other respects, fair, open and bona fide, it ought to be upheld.

The testimony satisfies me that the relation of principal and agent subsisted between these defendants on and after February 28th, 1880, and I do not see enough in the case, so far certainly as Cox is concerned, to impeach the validity of the sale for the want of any of these qualities. Very much was said at bar as to the manner in which Good conducted the business after the sale to Cox, and justly said, as to the loose, negligent and unskillful manner in which it was done, not to use any harsher terms. Cox's loss of over $400, and he, the preferred creditor, sufficiently attests the unskillfulness (if not the infidelity) of the agent. But the testimony fails to show that Cox must suffer the consequences of this beyond the loss which he too has sustained. The conclusion reached seems to me to be well sustained by the reasoning in the leading case of Guignard v. Aldrich, 10 Rich. Eq. 253, which, in many of its features, bears a close resemblance to the case in hand.

Wherefore, it is ordered, adjudged and decreed that the exceptions to the master's report be and they are hereby overruled; that the complaint herein be dismissed, and that the defendants have judgment against the plaintiffs for their costs.

The defendants appealed upon the following exceptions:

1. Because it is submitted that his Honor erred in holding that the defendant Good was the bona fide agent of defendant Cox from February 28th, 1880, until the business was closed, and in overruling plaintiffs' exception to the master's report to that effect.

2. Because, even if the agency of Good were admitted, it is submitted that his Honor

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erred in holding that it could so change *his character of vendor in possession as to free the sale from fraud, specially when such retention of possession was part of the original transaction and agreement.

3. Because it is submitted that his Honor erred in holding that there was a sufficient delivery of the goods to work a change of ownership.

4. Because it is submitted that his Honor erred in not holding that the fraud of Good (which is virtually admitted by the decree) rendered the whole transaction void as against creditors.

5. Because it is submitted that his Honor erred in not declaring the sale void, upon the ground, among others, that the retention of a salary by Good, to be paid him out of the stock of goods, was an interest in stock sufficient to render the transaction fraudulent.

6. Because it is submitted that his Honor erred in holding that the agreement was, that said goods were to be bought and paid for by Cox, while the testimony shows that they were to be paid for out of the proceeds of the stock.

7. Because it is submitted that his Honor erred in holding in substance that defendant Cox paid to Butler, Broome & Clapp $110 out of his own funds, while the testimony shows that Cox stood charged upon the books with a balance of $193 for goods bought by him out of the stock in controversy.

8. Because it is submitted that his Honor erred in overruling plaintiffs' exception to so much of the master's report as stated that defendant Cox had no intention "to perpetrate a fraud upon the plaintiffs," this being a question of law which the master had no right to decide.

9. Because it is submitted that the testimony and report of the master establish a clear case of a sale fraudulent and void per se.

10. Because it is submitted that, even if the transactions were capable of explanation under the decisions in this State, yet they have not been explained, and, therefore, the presumption of fraud has not been removed, and his Honor should have so decreed, and ordered the proceeds of the stock to be applied to the payment of the claims of plaintiffs.

Mr. Julius H. Heyward, for appellants.

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*I. Taking the case as stated in the decree of the Circuit Court the sale is fraudulent and void per se, and the presumption of law cannot be rebutted or explained. 3 Rep. 80; 2 T. R. 587; 1 Esp. 205; 1 Campb. 332; 1 Cranch 310; 4 McCord 294; 1 Hill 16; Rice Ch. 300; 3 S. C. 266; McMull. Eq. 27; 2 Rich. Eq. 95, and cases cited; 9 Johns. 337. II. That even if it were a case for explanation, it has not been explained. 7 Paige 163; 1 Barb. 210; 4 Cal. 289; 9 Id. 271; 1 Atk. 13; 2 Id. 600; 2 Bailey 128, 205; Bail. Eq. 187, 228; 1 Strobh. Eq. 393; 2 Mill Const. R. 125; 1 Strobh. 372; 60 Me. 165; 17 Mass. 117; 19 Pick. 9; 6 Allen 413.

Mr. J. R. Bellinger, on same side.

Messrs. George Westmoreland and C. H. Orr, contra.

November 23d, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The object of this action was to set aside a sale of a stock of goods, wares and merchandise made by the defendant Good to his co-defendant Cox, upon the ground of fraud. The circumstances relied upon by the plaintiffs, as badges of fraud, were: 1st. That Good was insolvent at the time of the sale, which was made soon after suits had been commenced against him, and embraced all of his property except that which was covered by a prior lien. 2d. That Good remained in possession of the property alleged to have been sold, and to all appearances continued business as before.

The master found, as matters of fact, that the insolvency of Good was not known to Cox at the time of the sale; that he paid full value for the goods sold; that the object of the sale was to provide for the payment of a debt upon which Cox was surety; that Cox had no intent to perpetrate a fraud in becoming the purchaser, and only bought to protect himself from liability as surety; that after the sale he employed Good as his agent to carry on the business, and that the result of the whole transaction was a loss to Cox of something over four hundred dollars. The Circuit judge concurred with the referee in

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these findings of *fact, and this is conclusive upon us, for it is manifest that there was testimony, which, if believed, would be sufficient to establish each and every one of these facts.

It is, however, earnestly contended on the part of the appellants, that these badges of fraud are conclusive evidence of the fraud charged, and are incapable of being explained or rebutted by evidence. It is not to be denied that there are authorities which seem to support this proposition, and very possibly if the question were res integra it might be regarded as the safer and better rule. But we think that the more recent cases, not only in England and in the Supreme Court of the United States, but also in this State, show that such a proposition cannot now be sustained; and that the true rule is that while these badges of fraud constitute such strong evidence that they will be regarded as conclusive, unless explained by the most satisfactory testimony, yet they do not constitute such a presumption of fraud as to be irrebuttable by any evidence. In other words, when these badges of fraud are established, and nothing more, the presumption of fraud then becomes conclusive, and no inquiry into the intention of the parties is necessary or admissible. But when satisfactory evidence is offered to explain them, it then becomes a question of fact, to be determined by that branch of the court invested with jurisdiction to determine issues of fact, whether under all the circumstances the transaction brought in question is bona fide or fraudulent.

The case of Edwards v. Harben, 2 T. R. 587, may be regarded as the leading case in support of the proposition contended for by the appellants, but it is at least open to question whether the language used in that case is not susceptible of a construction more favorable to the rule which we have stated to be the correct rule, than to the proposition contended for by appellants. The language used by Buller, J., in that case is as follows: "This has been argued by the defendants' counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance per se as makes the transaction fraudulent in point of law; that is the point which we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that in point of law

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is *fraudulent." When it is considered that there was no evidence in the case tending to explain the continued possession of the vendor, the language above quoted may well be construed as meaning that the retention of possession by the vendor, where such continued possession is not satisfactorily explained, is not merely evidence from which a jury may find fraud, but that it is conclusive.

As has been well said by the learned annotator in his notes to Twyne's Case, 3 Rep. 8, at page 10 of 1 Sm. Lead. Cas.: "The words of Buller, J., were, 'if there be nothing but an absolute conveyance, without the possession, that in point of law is fraudulent,' by which his lordship may have intended that where there was nothing, i. e., no facts whatever appearing in the case except the absolute conveyance and the non-delivery, that then the inference of fraud would be so strong that a jury ought not to resist it. But it is very different in cases where, although the conveyance is absolute and the possession has not passed, still there are surrounding circumstances which show that a fraud may not have been intended; in such cases it cannot properly be said that there is nothing but an absolute conveyance without the possession." At all events it appears from the case of Martindale v. Booth, 3 Barn. & Ad. 498, and other cases cited in the same note, that the tendency of the latter cases in England is to hold that retention of possession by the vendor is not absolutely conclusive, but only prima facie evidence of fraud, which may be rebutted by testimony satisfactorily explaining such possession.

The case which is usually cited from the Supreme Court of the United States, in support of appellants' proposition, is Hamilton v. Russell, 1 Cranch 310 [2 L. Ed. 118]. That case rests entirely upon the authority of Edwards v. Harben, supra, and is open to the same explanation, inasmuch as it does not appear that any evidence was offered tending to explain the continued possession of the vendor; and in the absence of such explanation the retention of possession would properly be considered conclusive evidence of fraud. But in addition to this, the authority of Hamilton v. Russell, as sustaining the proposition contended for, is certainly shaken, if not overthrown, by the subsequent case of Warner v. Norton, 20 How. 448 [15 L. Ed. 950], in which

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it was held that retention of *possession by the vendor of personal property is only prima facie, and not conclusive evidence of fraud, and may, therefore, be explained. The court, in speaking of the question now under consideration, uses this language: "Few questions in the law have given rise to a greater

conflict of authority than the one now under consideration. But for many years past the tendency has been, in England and in the United States, to consider the question of fraud as a fact for the jury under the instructions of the court, and the weight of authority seems to be now, in this country, favorable to this position. Where possession of goods does not accompany the deed, it is prima facie fraudulent, but open to the circumstances of the transaction which may prove an innocent purpose."

The first case in our own State upon the subject, which we have been able to find, is De Bardeleben v. Beekman, 1 Desaus. 346, where it was held that if possession does not accompany the bill of sale, and the same be not recorded, it shall be void as to creditors, though there was no doubt that the parties intended no actual fraud. But in this case it seems to have been conceded that the vendor was allowed to retain possession for his own use and benefit, which, as will be seen from the discussion in the subsequent cases, is the very reason why retention of possession by the vendor is regarded as so strong a badge of fraud. This case, therefore, which seems to have escaped notice in the subsequent decisions, lends no support to the proposition contended for by the appellants.

In Kennedy v. Ross, 2 Mill Const. R. 125, it was held that retention of possession by the vendor was sufficient proof of fraud; but in that case there was no testimony offered tending to explain the continued possession of the vendor, and there is nothing in the case which warrants the conclusion that the court meant to decide that such possession was so absolutely conclusive of fraud as to be incapable of being explained by other testimony. The case of Kid v. Mitchell, 1 Nott & McC. 334 [9 Am. Dec. 702], can scarcely be said to have decided anything upon the point we are considering, though the case seems to imply that retention of possession by the vendor is not absolutely conclusive, but only prima facie evidence of fraud. In

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Terry v. Belcher, 1 Bail. *568, the question was distinctly made and it was held that retention of possession by the vendor, after an absolute sale, is not conclusive, but only prima facie evidence that the sale was fraudulent.

In Smith v. Henry, 2 Bail. 118, the court held that the most usual badges of fraud are retention of possession by the vendor, and the sale of the whole or the most valuable part of the debtor's property pending suits against him, and that when these two badges of fraud are found together they become conclusive and render the sale fraudulent per se unless explained by the most satisfactory evidence of the absence of any fraudulent intent. It is quite true that when this case came before the Court of Appeals a second time, (1 Hill 16,) Harper, J., in delivering the opinion of the court, did use language going very far towards sustaining the view that the retention of possession by the vendor, after an absolute sale, was absolutely conclusive of fraud, and not capable of being rebutted or explained by evidence; but that such was not the intention of the court is conclusively shown by the subsequent case of Jones & Briggs v. Blake and wife, 2 Hill Eq. 629, in which the opinion of the court was delivered by the same distinguished judge, holding that the retention of possession by the vendor may be explained by satisfactory evidence that the possession was retained under a bona fide agreement for hire, or that the possession of the vendor was in any other way consistent with a bona fide sale, and was not allowed for the purpose of securing to the vendor some "advantage in relation to property, profit or pecuniary advantage."

In Anderson v. Fuller, McMull. Eq. 27 [36 Am. Dec. 290], there was no satisfactory evidence explaining the continued possession of the vendor, and hence the presumption of fraud arose. In Fulmore v. Burrows, 2 Rich. Eq. 95, the decision turned upon the fact that the evidence was not sufficient to satisfy the chancellor that there was any bona fide agreement for hire, and, therefore, the retention of possession by the vendor not being satisfactorily explained, was sufficient to establish fraud. In Pringle v. Rhame, 10 Rich. 72 [67 Am. Dec. 569], it was held that the retention of possession by the vendor after an absolute sale may be explained by

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satisfactory *evidence that the possession was retained under a bona fide agreement for hire. In that case, Withers, J., in delivering the opinion of the court, undertakes to show that the case of Smith v. Henry, as reported in 1 Hill 16, when properly understood, does not support the idea that retention of possession by the vendor is so absolutely conclusive of fraud as to be incapable of explanation by evidence.

Applying the rule deduced from the foregoing authorities to the case in hand, we see no reason for interfering with the judgment below. The Circuit judge held, and correctly held, that, in the absence of a bankrupt law, an insolvent debtor has the right to prefer one bona fide creditor to another, and, therefore, the sale to Cox, although made pending suits against the debtor, being made for the purpose of paying a bona fide debt upon which the vendee was surety, constituted no sufficient evidence of fraud.

As to the retention of possession by Good, the Circuit judge held that it was sufficiently explained by the fact which he regarded as satisfactorily proved, that such possession was held merely as the agent of Cox, and not for the benefit of Good. If, as we have seen, the retention of possession by the vendor is susceptible of explanation by satisfactory evidence that the parties had assum-

ed towards each other the relation of bailor and bailee for hire, we cannot see any reason why the fact that the parties have assumed the relation of principal and agent should not have a like affect. Indeed, after the agency has been satisfactorily proved, which, according to the findings both of the master and the Circuit judge, was done in this case, it may be doubted, under the cases of Brooks v. Penn, 2 Strobh. Eq. 113, and Lott v. DeGraffenried, 10 Rich. Eq. 346, whether it is proper to say that the vendor retained possession in this case, or whether it would not be more correct to say that the vendee, by his agent, took possession immediately upon the execution of the bill of sale.

After Cox became the owner of the goods he, of course, had a right to do with them as he pleased; and what more natural than that he, who had no experience in handling a stock of goods, should entrust them to the

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management of his son-in-law, *who had been engaged in that kind of business. For such management he, of course had a right to allow him whatever compensation he thought proper, and no one else had a right to complain. It is true that the amount allowed seemed to be greatly out of proportion to the services required of the agent, but while this was a circumstance to be weighed, and doubtless was given its due weight by the Circuit judge, in considering the question as to the bona fides of the transaction, yet it was not conclusive; and the Circuit judge having found that there was no fraud in the sale, we cannot say that there was any such error, as, under the well settled rules of this court, would warrant us in interfering with his conclusion.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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20 S. C. 237

COCHRAN v. FILLANS.

(April Term, 1883.)

[1. *Trusts* ⇐171.]

A widow residing with her child in the Island of Jersey, and being about to marry, transferred all her interest in the estate of her first husband, consisting of moneys, bonds, &c., in the hands of an administrator in South Carolina, to trustees in Jersey, without security, upon certain trusts in behalf of herself, and, after her death, in behalf of such issue as should attain their majority, or marry, &c., charged with a payment of half the income to her intended husband during life. Upon her death, leaving the said child, a minor, and her husband surviving, *held*, that the funds in South Carolina were not payable to the general guardian here of such infant, but to the trustees in Jersey under the marriage settlement.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 226; Dec. Dig. ⇐171.]

[2. *Trusts* ⇐161.]

Held, further, that the money being in this State, and the cestui que trust who may become entitled to it being an infant, the courts here cannot permit it to be paid over to the foreign trustees, until satisfied that they have given sufficient security in the Island of Jersey for its proper administration.

[Ed. Note.—Cited in Hamilton v. Levy, 41 S. C. 384, 19 S. E. 610.

For other cases, see Trusts, Cent. Dig. §§ 209–211; Dec. Dig. ⇐161.]

[3. *Trusts* ⇐171.]

Before permitting property in this State belonging to an infant to be transferred beyond the limits of the State, the court must be satisfied (1) that the guardian has been regularly appointed according to the laws of the State in which the ward resides; (2) the fitness of such guardian for the appointment; and (3) that sufficient security has been given. And the same rule applies to cases of foreign trustees of an infant cestui que trust, who has property here.

[Ed. Note.—Cited in Carr v. Bredenberg, 50 S. C. 485, 27 S. E. 925.

For other cases, see Trusts, Cent. Dig. § 226; Dec. Dig. ⇐171.]

[4. *Trusts* ⇐171.]

This principle depends, not upon the resi-

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dence of the infant in this *State, but upon the responsibility of the courts of this State for the protection of property within their jurisdiction belonging to cestuis que trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 226; Dec. Dig. ⇐171.]

Mr. Chief Justice Simpson dissented so far as the opinion required trustees to give security.

Before Kershaw, J., Charleston, June, 1881.

The opinion states the case.

Messrs. Rutledge & Young, for the guardians and Fillans.

Messrs. Mitchell & Smith, for the trustees.

November 27th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. William C. Murray died many years ago, leaving a handsome property in this State. John Clarence Cochran, the plaintiff, was his executor, and in 1865, filed a bill in Charleston for the partition and settlement of his estate. James Ancrum Murray was one of the children of the testator, and before the estate was divided, married and died intestate, leaving in the Island of Jersey, in the kingdom of Great Britian, a widow, Victoria Isabella Murray, and one child, an infant, William James Murray. John C. Cochran thereupon administered upon the estate of the intestate, James A. Murray, in South Carolina, and filed a supplemental bill, in which the property of William C. Murray was ordered to be sold, and the share of the intestate, James A., was ascertained, of which his widow was entitled to one-third, and the child, William James, to two-thirds. John Robert Davey was appointed tuteur or guardian of the infant in the Island of Jersey, where a guardian is not required to give bond and security for the

faithful discharge of his trust, but it seems that the electors, who recommend the guardian, are, in some respects, responsible for the manner in which he discharges the trust. Henry Edward Young and the said John Clarence Cochran were regularly appointed the guardians of said infant in this State, and as such gave bond for the faithful discharge of their trust.

In 1873, Mrs. Murray, the widow of James

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A., married in *the Island of Jersey a second husband, Maitland Hall Fillans, of London, and, in contemplation of the event, the parties entered into an ante-nuptial marriage settlement, which, among other things, provided that the third part of the said Victoria Isabella in the estate of her former husband, James A. Murray, should be conveyed to George White and Edward Jones, also of Jersey, as trustees, upon certain trusts, to wit: "After the death of the said Victoria Murray, in case the said Maitland Hall Fillans should survive her, to pay one-half of the net income derived from said property to him during his natural life, and subject to such life-interest of the said Maitland Hall Fillans in the half thereof, to hold all and singular the said property in trust for all the children of the said Victoria Isabella Murray, who being a son or sons, shall attain the age of twenty-one years, or being a daughter or daughters, shall attain that age or marry. In case no child, being a son, shall attain such age, or, being a daughter, shall attain such age or marry, the trustees shall stand possessed of the said property upon such trusts and for such purposes as the said Victoria Isabella Murray shall declare by her last will," &c.

In 1877 the said Victoria Isabella died in Jersey, having first executed a writing in the nature of a last will and testament, but having the attestation of only two witnesses (sufficient at the place of her domicile to dispose of personal property), whereby she undertook to execute the power reserved to her in the articles of marriage settlement, by appointing her one-third of the estate of her first husband, James A. Murray, to go to her brother, John Robert Davey, and George White, as testamentary executors, upon certain trusts for her only son, the said William James Murray, her husband, Fillans, who survived her, and her own family, the Daveys.

This paper was admitted to probate both in Jersey and in the State of South Carolina.

This action was instituted by John Clarence Cochran, as administrator with the will annexed of Mrs. Fillans, in this State, making all the claimants hereafter mentioned parties. The complaint states that the said administrator, having duly administered the estate, which is in his hands, invested in bonds, stocks, &c., amounting to about $20,-

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000, is ready and desirous of paying *out the assets and closing the estate; but he cannot do so on account of the conflicting claims interposed, and he prays for the instruction of the court as to whom the money shall be paid. First. Edward Jones and George White, of Jersey, trustees in the marriage settlement, claim that the property of Victoria Isabella Fillans, specified in the said deed, shall be transferred to them, as trustees, by appointment of the owner, without being required to give security therefor, either in Jersey or in this State. Second. Henry Edward Young, as one of the guardians of the minor, William James Murray, appointed and under bond as such general guardian in this State, claims that the plaintiff be required to pay all the funds in his hands as administrator of Mrs. Fillans, so that the same shall vest in him and in the said administrator, as guardians aforesaid, with orders to pay one-half of the income arising therefrom to the said Maitland H. Fillans, during his life, and the other half to the use of the said infant, William James Murray, in such way as the court may direct. In this prayer, Maitland H. Fillans, who is entitled to one-half the income of the property during his life, concurs and prays that the fund shall not be transferred to the trustees in Jersey. John Robert Davey, the uncle of the ward, and claiming to be his guardian by appointment and order of the Royal Court of Jersey, joins in the prayer of the trustees, and prays that the funds shall be paid to them.

The cause was referred to Master Porter, who reported that "The court is authorized and bound to protect this trust fund against accident or abuse by requiring those who claim the possession, either as guardians or trustees, to give bond and security for the faithful discharge of their trusts." Upon exceptions to this report, Judge Kershaw held that the interest of the minor, William James Murray, was contingent upon his attaining twenty-one years of age, and ordered the funds paid to the trustees in Jersey, upon their entering into bond, with approved security, to the clerk of the court for Charleston county, conditioned for the faithful discharge of their duties as such trustees.

All the parties appeal to this court. The South Carolina guardians from so much of the decree (1) "as holds that the said Murray is now entitled to no part of this fund,

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whereas he has a *vested interest in the same, subject, it is true, to be divested in case of death under age, and subject to the life-estate of Maitland Hall Fillans in the one-half thereof, is entitled to the income arising therefrom; (2) and as directs that the fund be sent without the jurisdiction of the court, without an inquiry whether this will be to the interest of the said infant; (3) and as holds that John Robert Davey has

been appointed, by proper proceedings, the guardian of the said Murray; (4) and as holds that the funds in the cause are held by the plaintiff, as administrator of James A. Murray, whereas he holds them as administrator cum testamentano nexo of Mrs. Fillans, in this State; and in all other respects that the decree be sustained."

And the trustees appeal from so much of the decree as holds as follows: 1. "That the said defendants should be required to give security before the trust funds are transferred and paid over to them, no such security having been required by the donor of the trust, and no charge of insolvency or unfitness being made or shown against the said trustee. 2. Because the Circuit judge erred in not holding that if the said defendants should give security, they should only give such sufficient security for the execution of the trust as should be required by any competent court of general equity jurisdiction in the Island of Jersey or kingdom of Great Britain, or as should be sufficient in the place of their domicile."

If these funds were now due and payable to the ward, William James Murray, there is little doubt that his general guardians would be entitled to receive them, although they had not been appointed such guardians with any reference to this particular fund. But the question goes back of that. The funds due the estate of James A. Murray, by his death, were divided into two parts—two-thirds of them belonged absolutely to the minor, William James Murray, as the only child of his father. There was no trust or limitation over upon this portion, and, as we understand it, no question is now made concerning it. The other one-third of the estate went, absolutely, under the statute of distributions, to Victoria Isabella, as widow, but before it was reduced into possession,

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she, being about to marry a second *husband, conveyed it to trustees, as stated in the articles of marriage settlement, and the contention is as to the right to the possession and control of this fund.

The plaintiff instituted this action as administrator in South Carolina, with the will annexed, of Victoria Isabella Fillans, but it must be observed, in the first place, that the fund cannot now pass under the paper in the nature of a will executed by Mrs. Fillans and called her will. At the time of her death she was a married woman, and, by the law of her domicile, incompetent to make a general will; but, if she had been competent, she could not thereby dispose of property which she had previously settled. It is true she had the right to execute a power if the circumstances existed in which the right was given; but the articles of marriage settlement had assigned the property to trustees upon such trusts as carried the whole interest, except in the single case of all her children dying before they attained the age of twenty-one years, in which event alone she had the right to appoint to new uses. "In case no child, being a son, shall attain such age, or, being a daughter, shall attain such age or marry, the trustees shall stand possessed of the said property upon such trusts and for such purposes as the said Victoria Isabella Murray shall declare by her last will."

There is one child still living, who may attain to the age of twenty-one years, and therefore her appointment to uses cannot now take effect, but the property falls under the provisions of the marriage settlement, which gives the legal estate to the trustees, who "shall stand possessed" of it under the trusts therein declared. In this view, it seems to us that the question whether the interest of William James Murray is vested or only contingent upon his attaining the age of twenty-one years, does not necessarily arise, for in either case the property cannot now be delivered to any guardian of the minor, but must be held by the trustees until he attains the age of twenty-one years, and then delivered to him as the only child of his mother; or, if he should not attain that age, then, as we suppose, be distributed according to the paper in the nature of a will executed by Mrs. Fillans, as in that case the event will have occurred in which she was authorized to appoint to uses.

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*We agree with the Circuit judge that the absolute owner in her life-time, having conveyed this property to trustees for the purpose of carrying out certain trusts in contingencies which could not be foreseen, it should be transferred to those trustees to enable them to execute the said trusts. But the trustees are in the Island of Jersey, kingdom of Great Britain, while the property is here within the jurisdiction, and certainly, in one event, is going to a minor. Under these circumstances, will the court authorize the foreign trustees to receive the property and carry it beyond the jurisdiction; and if so, upon what terms and conditions?

In practice, our courts have relaxed what seems to have been the general rule against allowing such transfer, and, regarding themselves competent to do so, have ordered funds of infants under their control—that is to say, in the hands of executors or administrators—to be paid to guardians appointed and residing in other States. But in doing so the court takes every precaution to guard against abuse and loss to the infant, and for that purpose always requires a new appointment with bond and security in the jurisdiction, or at least a recognition of the foreign appointment upon proof here to be approved by the court of these things—First, the fact of a guardian having been regularly appointed according to the laws of the State in which the ward resides; secondly, the fitness of

the guardian for the appointment; and, thirdly, whether sufficient security has been given. Ex parte Smith, 1 Hill Eq. 140; Ex parte Heard, 2 Hill Eq. 54; Ex parte Copeland, Rice Eq. 69. Judge Story, in his Conflict of Laws, § 504a, thus states the rule: "No foreign guardian can, virtute officii, exercise any right or powers or functions over the movable property of his ward which is situated in a different State or country from that in which he has obtained his letters of guardianship. But he must obtain new letters of guardianship from the local tribunals authorized to grant the same before he can exercise any rights or functions over the same," &c.

This being clearly the law as to foreign guardians, is there any reason why less should be required of foreign trustees appointed by the donor in her life-time without

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requiring *security? It is said that the donor had the right to receive this property herself without giving security, and, having that right, she could appoint another to receive it in her stead. The donor undoubtedly had that right before she executed the marriage settlement; but it must not be overlooked that she ceased to have that right the moment she executed the settlement, which introduced a new element, viz., that of a trust in behalf of an infant who cannot receive the funds until he attains the age of twenty-one years. It is this interest of the cestui que trust which, as it seems to us, makes it as much the duty of the court to secure these funds for the benefit of the infant as if the trustees had been appointed by the court in Jersey.

As Chancellor Dunkin said, in Ex parte Copeland, supra: "In the case of Morrison v. Toomer, decided recently by the Circuit Court in Charleston, it is said by the chancellor, 'the general doctrine and course of this court (equity) is well established; that it will not permit trust property to be removed out of the jurisdiction; and the trustee, who should knowingly and willingly permit this, would render himself liable to those who might be injured by his misconduct. * * * The court does sometimes permit trust property to be carried out of the jurisdiction, taking every possible precaution for the security of the cestui que trust. * * * Regarding the recent decisions on this subject as in some degree an innovation upon the practice of the court, it is not deemed expedient to extend them to cases where the reason does not manifestly exist. The application is always addressed to the sound discretion of the court. The presumption should always be against the removal of funds beyond the jurisdiction of the court; where the expediency or necessity is made clearly to appear, permission should be granted only on such terms as the nature of the case may require, or as experience may suggest to be necessary.'"

As we understand it, the practice of requiring security in such cases does not depend upon the domicile of the cestui que trust, or the manner in which his foreign guardian or trustee was appointed, but upon the view that the property being within the jurisdiction, the court is in some sense responsible for its safety, and will, therefore, not yield that control, except upon such

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*terms as will certainly secure and protect it. If Mrs. Fillans had created this same trust by will instead of by her marriage settlement, probate of the will and new administration in this State would have been necessary even for her executor to get possession here. Dial v. Gary, 14 S. C. 579 [37 Am. Rep. 737]; Patterson v. Pagan, 18 S. C. 584. We think that we cannot, according to the well-established principles of equity, authorize this fund to be carried beyond the jurisdiction without requiring security for its protection. See Ex parte Robert, 2 Strobh. Eq. 88.

But whilst the property is here, this is an English trust, to be executed by English trustees, and in behalf of persons who are resident in England, and it may be that it will be inconvenient for foreigners to give bond and security in this State for a sum so large, and particularly as it is a trust fund to be held probably for a number of years. These considerations have induced us to consider whether the purpose in view may not be accomplished by requiring that the trustees should give security in Jersey for the faithful administration of the trust. We have no right to make such an order. All that we can do is to control our own action according to the practice of this court and the well-established principles of equity. The Circuit decree is so far modified as to permit the trust fund to be paid over to the trustees whenever it shall be made to appear to the satisfaction of the Circuit Court that the trustees have given to the proper officers or court in the Island of Jersey good and sufficient security for the faithful administration of the trust declared in the deed of marriage settlement aforesaid. And in case such proof, to the satisfaction of the Circuit Court, is not offered, then that the trust funds be paid over only upon bond and security given in the county of Charleston as required by the Circuit decree.

The judgment of this court is that the judgment of the Circuit Court be modified according to the conclusions herein announced, and in all other respects be affirmed.

Mr. Justice McIVER concurred.

Mr. Chief Justice SIMPSON. I concur in this opinion of the majority, except so far as

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it requires the trustees to give bond *before

they can receive the estate in contest. If the trustees had been appointed by a foreign court, then the principle relied upon would apply, as the foreign appointment would give the trustees no rights here; but I know of no general principle or authoritative case which would warrant the court to apply this to trustees acting under a trust-deed executed between the parties in which no bond is required, unless a case is made in behalf of the cestui que trust showing danger to his interests, upon which the court might act.

Judgment modified.

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20 S. C. 246

Ex parte RAY.

(April Term, 1883.)

[1. *Homestead* ⇦12.]

The right of homestead secured by the constitution and the several acts passed in pursuance thereof, is not an estate, but is a mere right of exemption; hence, the only effect of an assignment of homestead is to ascertain and designate what particular property is covered by such exemption, so that the same cannot be applied to the payment of debts. And this the claimant, a widow, has the right to have done, upon petition to the proper officer.

[Ed. Note.—Cited in Chafee & Co. v. Rainey, 21 S. C. 19; Ex parte Brown, 37 S. C. 187, 15 S. E. 926; Bank of Columbia v. Gibbes, 54 S. C. 579, 582, 32 S. E. 690.

For other cases, see Homestead, Cent. Dig. § 12; Dec. Dig. ⇦12.]

[2. *Homestead* ⇦150.]

The homestead laws do not affect the statute of distributions. The title to property is not changed by its being designated as a homestead for the family of one deceased, but such property remains subject to division under the statute of distributions.

[Ed. Note.—Cited in Stewart v. Blalock, 45 S. C. 64, 22 S. E. 774; Ex parte Worley, 54 S. C. 213, 32 S. E. 307, 71 Am. St. Rep. 783; Beaty v. Richardson, 56 S. C. 186, 34 S. E. 73, 46 L. R. A. 517; Sloan v. Hunter, 65 S. C. 241, 43 S. E. 788; Broughton v. Broughton, 93 S. C. 29, 75 S. E. 1027.

For other cases, see Homestead, Cent. Dig. § 302; Dec. Dig. ⇦150.]

[This case is also cited in Ex parte Brown, 37 S. C. 185, 15 S. E. 926, without specific application.]

Before Fraser, J., Marion, April, 1883.

The opinion states the case.

Mr. W. W. Sellers, for appellant.

Mr. C. A. Woods, contra.

November 27th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. On January 11th, 1882, John Ray departed this life intestate,

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and on February 1st, 1882, the re*spondent, who is his widow, filed her petition before the master praying that a homestead might be assigned to her. A. L. Armfield, to whom letters of administration upon the personal estate of the intestate had been granted, filed sundry objections to the granting of the prayer of said petition, all of which were overruled by the master, who issued a commission to certain persons therein named requiring them to set apart to the petitioner a homestead out of the real estate of said John Ray, as well as personal property of the value of not more than $500. In pursuance thereof, the commissioners made their return setting apart a portion of the land as a homestead and also certain personal property specifically mentioned in said return, and valued it at an amount not exceeding $500. To this return, the administrator filed sundry exceptions, all of which were overruled by the Circuit judge, and the return of the commissioners was confirmed.

The administrator appeals "on the grounds taken before the master, mainly on the ground that the decedent, John Ray, not being in debt at the time of his death only to a small extent, compared even with his personal property, his widow is not entitled to a homestead either of the real or personal estate, as against his heirs-at-law; that it is only as against debts that homesteads are allowed." Under our recent rule we can only consider the ground of appeal, which is specifically stated, which indeed seemed to be the only ground relied upon in the argument here.

To dispose of this case it would be quite sufficient for us to say that we have no legal evidence before us as to the amount of the indebtedness of the intestate. The statement made by the administrator in his objections filed before the master, though sworn to by him, is manifestly not sufficient, for at that time the time allowed by law for presenting claims against the estate of a decedent had not expired, and it would have been impossible for the administrator to know the amount of the indebtedness of his intestate. Indeed, he only ventures to give an estimate "according to his best information."

But waiving all this, and assuming the fact

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to be, as the ad*ministrator then supposed it to be, we are unable to see any ground upon which the appeal can be sustained. As we have held in Elliott v. Mackorell, 19 S. C. 239, the right of homestead secured by the constitution and the several acts passed in pursuance thereof, is not an estate but is a mere right of exemption. Hence the only effect of an assignment of homestead is to ascertain and designate what particular property is covered by such exemption, so that the same cannot be applied to the payment of debts. The petitioner had the right to have so much of the property of her deceased husband as was exempt from being applied to the payment of his debts, whether

they were large or small, specifically designated and set apart, so as to prevent the administrator or any one else from applying or subjecting the same to the payment of such debts.

What interest the administrator has in the matter, it is difficult for us to conceive. If there should prove to be a sufficient amount of property, over and above that set apart under these proceedings, to pay the debts of the intestate, what possible objections can the administrator have to the designation of the particular property which cannot be applied to the payment of such debts. But if, on the other hand, there should not be a sufficient amount left for the payment of the debts, then, as we understand the argument of the appellant, it was conceded, and as we think properly conceded, the exemption could be claimed. The real ground of complaint on the part of the appellant seems to be the apprehension that by the assignment of homestead to the widow the interests of the other heirs-at-law and distributees in the property so assigned, will be either defeated or in some way impaired. What interest the administrator has in this matter, at least so far as the real estate is concerned, it is difficult to understand. But as the administrator may be regarded as the representative of the distributees, and bound to protect their interests in the personal property, we will consider the question.

We do not understand the homestead laws as designed to alter or in any way affect the statute for the distribution of intestate's estates, and they do not even purport so to do. It is true that the legislature might, if so

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minded, make that, or any other *alteration, in the law regulating the distribution of an intestate's estate, but we see nothing in the homestead laws indicating any such intention. On the contrary, as we have said, the sole purpose of these laws was to exempt a certain amount of property from liability for debt, leaving the title to such property exactly where it was before, and only throwing around it a shield to protect it from the grasp of creditors. It seems to us, therefore, that the assignment of homestead in this case can have no other effect than to designate and set apart certain property of the intestate as exempt from being applied in any way to the payment of his debts leaving the title to such property just where it was before, and leaving the property so designated as exempt, as well as any other that may remain after the payment of the debts of the intestate, to be divided amongst the heirs-at-law and distributees according to the provisions of the statute of distributions.

The judgment of this court is that the order of the Circuit Court which is appealed from, be affirmed.

20 S. C. 249

JONES v. COLUMBIA AND GREENVILLE RAILROAD COMPANY.

(April Term, 1883.)

[1. *Railroads* ⟸406.]

The killing of stock by a railroad train being proved, the law presumes that the injury was done through the negligence of the railroad company, until the contrary is shown. This rule of law is unaffected by the recent statutes requiring stock to be kept enclosed.

[Ed. Note.—Cited in Fuller v. Port Royal & A. Ry. Co., 24 S. C. 133; Walker v. Columbia & G. R. Co., 25 S. C. 144, 145; Joyner v. South Carolina Ry. Co., 26 S. C. 61, 1 S. E. 52; Harley v. Eutawville R. Co., 31 S. C. 152, 9 S. E. 782; Davis v. Florida Cent. & P. R. R., 47 S. C. 392, 25 S. E. 224.

For other cases, see Railroads, Cent. Dig. § 1401; Dec. Dig. ⟸406.]

2. Danner v. Railroad Company, 4 Rich. 329 [55 Am. Dec. 678] explained and affirmed.

[Ed. Note.—Cited in Joyner v. South Carolina Ry. Co., 26 S. C. 56, 59, 1 S. E. 52.]

[3. *Railroads* ⟸414.]

If cattle on the road-bed of a railway were trespassers, and while so trespassing are negligently injured, nevertheless, the owner of such cattle would be entitled to recover from the railroad company damages for the injury so done.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1474, 1475; Dec. Dig. ⟸414.]

[4. *Railroads* ⟸441.]

Where the killing of cattle by a railroad train was proved, and the company offered no testimony in defense, the Circuit judge committed no error in refusing to charge that the company were not liable unless shown to have been guilty of gross negligence or willful injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1575–1595; Dec. Dig. ⟸441.]

[5. *Railroads* ⟸446.]

No evidence being offered by the defendant, the question of contributory negligence was not involved in the issue submitted to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627–1641; Dec. Dig. ⟸446.]

[This case is also cited in Simkins v. Columbia & G. R. Co., 20 S. C. 261, without specific application.]

Before Wallace, J., Abbeville, February, 1883.

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*This was an action by Thomas Jones against the Columbia and Greenville Railroad Company commenced in a trial-justice's court, on March 23d, 1882, to recover the value of two hogs and one sheep, alleged to have been killed on the railway track by defendant's train.

The hogs were killed by a freight train in December, 1881, before Christmas, late in the evening, just before dark. The sheep was killed by a freight train in the evening, in January, 1882. The stock got out of plaintiff's pasture alongside of the railroad. The plaintiff did not report the killing to the railroad at the time.

In the case agreed upon, the following statement appears: "Defendant offered no testimony, the complaint served having fail-

ed to specify time, or place, or circumstance; and no notice of the stock-killing having been given the railroad company until the summons was served, at least two months after the sheep was killed. The defendant, during the time included, was running six or eight freight trains a day, and two passenger trains. Among so many trains after so long a time, it was impossible to discover by what train, engineer or conductor the alleged damage was done."

Judgment was rendered by the trial-justice in favor of the plaintiff. Defendant appealed to the Circuit Court, and trial was had de novo before his Honor, Judge Wallace, at the February Term, 1883, the testimony on the trial being read to the jury. The verdict was for the plaintiff, for seven dollars and costs.

Notice of appeal was duly given, and exceptions filed, and the case came up to this court on the following grounds of appeal:

1. Because his Honor erred in charging the jury that, the killing of stock by the company's train being proved, the law presumes that the injury was done by the negligence of the railway; that this has been the law of South Carolina ever since Danner's Case, and that the stock law has not removed this presumption.

2. Because his Honor erred in refusing to charge that where the law forbids the stock owner to permit his stock "to run at large beyond the limits of his own land, or the lands

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leased, *occupied or controlled by him," and where there is no law compelling the railway company to fence its track, if the cattle are at large or have escaped from a fenced pasture, and are killed or injured on the track by the railway company's trains, the stock owner cannot recover damages against the company.

3. Because his Honor refused to charge that in such case the burden of proof is on the stock owner to show that he is not guilty of contributory negligence.

4. Because his Honor refused to charge that the stock owner cannot recover unless the injury is attributable entirely to the fault and negligence of the railway company.

5. Because his Honor refused to charge that if the jury believe the stock were at large because of the owner's negligence, they cannot give him damages unless the railway company is proved guilty of gross negligence, or that the injury was inflicted wantonly and willfully.

6. Because his Honor refused to charge that the stock owner cannot recover damages if the jury believe there was a want of due diligence on both sides; and that a mere preponderance of negligence on the part of the railway company will not entitle the stock owner to recover where both parties are at fault.

7. Because his Honor refused to charge that, under the provisions of the stock law, stock roaming at large on the track or roadbed of a railway company are trespassers, and their owner cannot recover for injury done them by the railway trains unless the company's gross negligence or willful injury is proved.

Mr. W. C. Benet, for appellant.

The enactment of the stock law has altered the circumstances under which the rule in Danner's Case, 4 Rich. 329, was perhaps to be tolerated. 10 Rich. 227; 4 S. C. 61; 7 Id. 167; 10 Rich. 53; 2 Stat. 81; 6 Stat. 331; 15 Stat. 654; 16 Stat. 251, 400, 689; 17 Stat. 591, 854; Cooley Torts 337; 5 Wait Ac. & Def. 331; Pierce Railr. L. 298, 428; 19 S. C. 20; 1 Thomp. Negl. 502, 512, § 15; 1 Add. Torts 42; 4 Wait. Ac. & Def. 687; 1 Redf. Railw. 466, 471, 500. Under the stock law, the stock owner cannot recover damages for

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stock killed by a train on *the railroad track. 4 N. Y. 349; 2 Vr. 229; 28 Ill. 513; 11 Barb. 112; 49 Pa. 107; 51 Id. 240; Cooley Torts 654; 1 Thomp. Negl. 500, 531; 26 N. Y. 428; 8 Rich. 126; 15 Id. 209. Under this law, burden of proof is on stock owner to show that he was not guilty of contributory negligence. Cooley Torts 429, 673; 8 Rich. 126; 4 Wait Ac. & Def. 687; 1 Add. Torts 42; Pierce Railr. L. 298, 429. To entitle plaintiff to recover, defendant must be solely at fault. 1 Thomp. Negl. 495; 2 C. B. (N. S.) 740. If negligence on both sides, the company must be guilty of gross negligence. Pierce Railr. L. 402; 4 Wait Ac. & Def. 687; Cooley Torts 655; 1 Redf. Railw. 477; 115 Mass. 460; 121 Id. 118; 1 Otto 494; 5 Kans. 168; 51 Pa. St. 240. Stock on a railroad are trespassers, and only for injuries inflicted through gross negligence are the company liable. Cooley Torts 338; 42 Verm. 265; Pierce Railr. L. 402; 17 Ill. 541, 580; 1 Redf. Railw. 468. In this case, the company explained why they did not produce their agents to show how the killing occurred

Messrs. Lee & Blake, contra.

November 27th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The action in this case was brought to recover the value of two hogs and one sheep alleged by plaintiff to have been killed on the railway track of the defendant. The plaintiff relied upon the presumption of negligence arising from the naked fact of the killing, as held in the celebrated case known as Danner's Case, 4 Rich. 329 [55 Am. Dec. 678]. Judge Wallace, who heard the case on appeal from a trial-justice court, sustained the ruling in Danner's Case as applicable to this, no testimony having been offered by the defendant. The appeal controverts this charge of the Circuit judge, and insists that since the passage of the "stock law," which was of force in Abbe-

ville at the time of the killing, that Danner's case has no application in such cases, and that now, to make railroad companies responsible for the killing of stock, &c., negligence must be affirmatively and expressly

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proved, as is contended to be the *law in all other cases where actions are brought for injuries sustained. In other words, that the stock law has withdrawn such cases as this from the operation of Danner's Case. The appeal contains several other exceptions besides this, but this is the main one and we will consider it first.

There can be no doubt but that the recent acts of the legislature, known as the stock law, have materially and fundamentally changed the previous law, as to the roaming at large of cattle. Prior to the passage of these acts, the law, in its effect, required crops to be fenced in and it permitted cattle to roam at will. It was then no trespass for the stock of one man to graze upon the uninclosed lands of another. Now, however, this is changed, and stock is required to be fenced in, and crops need not be inclosed. There can be no doubt either that the effect of this legislation has been to make the roaming of cattle upon the uninclosed lands of others than the owner of such cattle a trespass, for which such owners may in some form or other be held responsible. These principles are conceded.

Was Danner's Case based on the law first announced above to such extent that the doctrine announced and applied there would not have been announced and applied but for the fact that that law was then of force? Would the presumption of negligence arising from the naked fact of killing as established in that case, have been established by the court, had the present stock law been of force making it a trespass for the cattle of others to roam upon other lands than that of their owners, instead of permitting, and to some extent legalizing, such roaming? If the foundation of Danner's Case was the law as it then stood as to crops and cattle, requiring the one to be fenced in and the other to be fenced out, then there would be much merit in the appeal and the case would be relieved from many of the difficulties now surrounding it. It would not involve the overruling of Danner's Case or touch the wise doctrine of stare decisis, as in that view the underlying principles of law controlling the facts in Danner's Case being changed by subsequent legislation, as it is contended, the question would be presented in an entirely new attitude.

If, however, Danner's Case rested upon

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other principles than *this, principles which have not been impaired by the subsequent stock law legislation—principles which our Supreme Court at that time found well established and settled—then that case would stand directly across the path of the appellant, and the plaintiff might successfully invoke the doctrine of stare decisis. Danner's Case was not only solemnly decided after careful examination by the court of last resort, but it has been subsequently approved and affirmed. And that it has been the law of this State since its decision has never been doubted. And although it may seem to be a new principle and not in full harmony with many railway decisions in America, yet it would be a precedent which under the circumstances this court would feel constrained to follow, unless upon examination it is ascertained to have been founded upon a state of facts requiring the application of a different principle of law from that which the facts now require. In fact we would have no other alternative unless we disregarded the settled practice and rules of this court.

There seems to be some misapprehension as to the real point decided in Danner's Case, as well as to the principles upon which it rested. The court did not decide that railroad companies were responsible in all cases where stock were killed on their track, whether the killing was willful, negligent or accidental; nor did it discriminate between slight, ordinary or gross negligence. These questions were untouched and left under the operation of the common law rules already established. But what the court did decide was rather in the nature of a rule of evidence than otherwise, determining the quantum of testimony which might carry a case of this kind to the jury, and it seems to have been founded upon what the court regarded as a necessity in such cases. The court simply held that the plaintiff, upon proof of the killing, might rest; that this would make out a prima facie case of all that was necessary to hold the defendant responsible, and if it remained unexplained, liability attached.

The court did not hold that the proof of negligence was unnecessary, or that it was not incumbent upon the plaintiff to offer such proof, but it held that while this fact was a necessary ingredient in the liability of defendant, yet the proof of the killing, unexplained by the circumstances or by the

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testimony of the *defendant, furnished in itself sufficient evidence of the presence of such negligence as would hold the defendant responsible. The court said: "That the company did not produce witnesses to show how the damage occurred, nor explain why they omitted to do so, tends to induce the belief that they could make no defense. They had the witnesses under their control. The plaintiff may not have been present when his cattle were killed and may not be able to discover who were the persons employed on the train when the damage was done. When

a party is charged with an act or declaration which may subject him to an action, and does not deny it, his silence is construed into an admission. The same construction may be put on a party's omission to offer testimony in his defense when it is in his power to produce witnesses who might exculpate him." This was the principle upon which the case turned, to wit, the fact that it was in the power of the defendant alone to explain, and that he failed to attempt it. There is not a word or an intimation appearing in the case which involved the stock law as it then existed, as one of the elements of the decision.

Nor can we say that the opinion of the court was unsustained by authority. The cases relied on and cited seem to support it. Leame v. Bray, 3 East 593; Weaver v. Ward, Hopk. 134; Christie v. Griggs, 2 Cam. 79; Piggott v. Eastern Counties R. R. Co., 54 Eng. Com. L. 228; Ellis v. Portsmouth & Roanoke R. R., 2 Ired. 140. But whether this be so or not, Danner's Case was heard in 1851, over thirty years ago. Since then it has been regarded as the settled law of this State. It had the sanction of an unanimous court, Judge Frost delivering the opinion of the court and O'Neall, Evans, Wardlaw and Whitner concurring, than whom neither our judicial gallery nor that of any State has ever furnished a more imposing array. It has grown gray with time, and the country, citizens, railroads and all have understood it and conformed to it. Under these circumstances its roots have gone down too deep to be torn up easily.

In addition to the authorities referred to supra, in Cooley on Torts the following is found, which fully accords with Danner's Case. Mr. Cooley says: "The duty being

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pointed out, the fail*ure to observe it is to be shown; in other words, the existence of negligence. This is an affirmative fact, the presumption always being, until the contrary appears, that every man will perform his duty. But the quantum of evidence necessary to make out a prima facie case of negligence is very slight in some cases, while in others a more strict showing is required. A bailee who returns in an injured condition an article which has been loaned to him, is by this very condition called upon to explain, for a presumption of fault must arise therefrom against him. If a child is sent into the streets of a city in charge of a spirited team, which, apparently, he is too young and weak to manage, the negligence seems manifest, while there might be no appearance of want of due care had the team been broken down by labor and years. Often the injury itself affords sufficient prima facie evidence of negligence. Thus if the buildings of individuals are destroyed by fire originating in sparks from a locomotive, the fire itself is held to be evidence of negligence which requires to be overcome by some showing that the railway company provides suitable precautions against such an occurrence, &c. There is consequently nothing unreasonable in presuming negligence from the occurrence of an injury and calling upon the railway authorities to rebut the prima facie case by showing that they took reasonable care," &c. Cooley Torts, p. 665.

The rule in Danner's Case is not modified either in Murray's, Roof's or Rowe's Case. In Murray's Case, Judge Wardlaw did say, that on account of the fence law which prevailed in the State at that time, "it was not unlawful for the owner of horses or cows to permit them to roam at large upon all lands of his own or of others that were not guarded by a fence such as the law prescribes; and the entry of a horse or cow upon the uninclosed track of the railroad is no trespass. The owner of cattle who permits them to roam runs the risk of all damage which they may receive accidentally, and so may sometimes be said to be negligent of his own interests; but he is not guilty of legal negligence such as embarrass his recovery from a person who, through negligence, hurts his cattle." He further said: "The court acquiesces, too, in the reference which the recorder made to Danner's Case for the presumption which arises from

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the *killing of the horse by a train of cars established and unexplained, and for the unfavorable inference raised by the absence of all the defendants' agents who were at the killing. Negligence rather than accident is shown by proof of damage done by a train when nothing more appears," &c. 10 Rich. 231 [70 Am. Dec. 299]. In Roof's Case, 4 S. C. 61, Danner's Case was followed upon the principle of stare decisis, and was affirmed in Rowe's Case, 7 S. C. 167. We find, therefore, no error in his Honor's charge as to the first exception.

The other exceptions involve refusals to charge. It is to be regretted that the charge of the judge is not found in the brief. It would have been better to have had it set out in full so that we might have seen what he did say, and, therefore, been better able to determine the force and effect of the exceptions. The second, fifth and seventh exceptions raise substantially the same point, to wit, that inasmuch as under the stock law, cattle roaming at large on the track or roadbed of a railway company are trespassers, their owners cannot recover for injury done them by the trains under any circumstances, as urged in the second exception, and in the seventh, unless the company's gross negligence or willful injury is proved.

We think these requests were properly refused. Certainly, the first could not have been charged, because, even assuming that it might be held to be a trespass for cattle to roam upon a railroad track in those counties where the stock law prevails (as to which we

do not now express an opinion,) yet this would not have warranted the charge requested. True, where one is a trespasser upon the land of another, either in himself, his servants, or his cattle, he may be made responsible in an action for damages; but we know of no law which would warrant the injured party to take the law into his own hands and kill the trespasser. The courts may redress his wrongs; but he has no authority to undertake to right himself, much less to inflict vengeance.

No doubt some negligence must be proved; whether it must be gross or not is not necessary for us to determine. In fact, the difference which is sometimes attempted to be

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drawn between *different kinds of negligence is so shadowy that it is by no means easy to define clearly what is gross, or what is ordinary, or what is the degree in a special case. But if there be a distinction, it was not necessary for the judge to charge as requested here. The rule in Danner's Case required him to say when the killing was proved, that the plaintiff might rest, and if the defendant failed to explain this killing so as to exculpate the company, either by proof that the killing was accidental, unavoidable or free from negligence, then the fact of killing, with the prima facie case which it made, was sufficient, as this furnished all the proof which the case in the first instance required. This the judge charged.

As to the third, fourth and sixth exceptions. These raise the question of contributory negligence. The facts of the case are not fully stated in the brief; so far as it appears, no testimony was offered by the defendant; in fact, it is so stated in the brief. The question, then, as to contributory negligence, was an abstract question having no reference to the facts. These exceptions may have contained good law, but it was irrelevant here.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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20 S. C. 258

SIMKINS v. COLUMBIA & GREENVILLE RAILROAD COMPANY.

(April Term, 1883.)

[1. *Railroads* ⇐405.]

A horse found upon a railroad track in this State is not a trespasser, not even under the terms of the stock law, where the horse is in its owner's inclosed pasture, through which the railroad has only a right of way.

[Ed. Note.—Cited in Joyner v. South Carolina Ry. Co., 26 S. C. 59, 61, 1 S. E. 52; Harley v. Eutawville R. Co., 31 S. C. 152, 9 S. E. 782; Harmon v. Railroad Co., 32 S. C. 129, 10 S. E. 877, 17 Am. St. Rep. 843; Davis v. Florida Cent. & P. R. R., 47 S. C. 392, 25 S. E. 224.

For other cases, see Railroads, Cent. Dig. § 1396; Dec. Dig. ⇐405.]

[2. *Negligence* ⇐1.]

Negligence is a relative term, and its existence depends upon the requirements of the occasion.

[Ed. Note.—Cited in Molair v. Port Royal & A. Ry. Co., 29 S. C. 157, 7 S. E. 60.

For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. ⇐1.]

[3. *Railroads* ⇐406.]

In the running of a railroad train, the employés must regard the safety of the passengers and the property of the company, as well as dangers to cattle and persons on the track, and the question of negligence is influenced by these considerations; but it cannot be said that a railroad company is liable only for gross negligence in the killing of a horse on its track by a train of cars, or for wanton negligence or willful misconduct.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1401; Dec. Dig. ⇐406.]

[4. *Railroads* ⇐447.]

The Circuit judge committed no error in refusing to charge the jury "that if it appear that a horse killed or injured by a train was first discovered or was first discoverable on the track at such a short distance from the place where he was killed or injured that the train

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could not have been stopped *in time to prevent running over or against the horse, it was not necessary that the persons running the train should have seen the horse, or, having seen him, that they should have attempted to stop the train."

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1642–1650; Dec. Dig. ⇐447.]

[5. *Set-Off and Counterclaim* ⇐29.]

Horses on a railroad track were killed by a passing train, which was thereby thrown from the track and its engine injured. *Held*, that the injury to the engine was no proper counterclaim in action for damages brought by the owner of the horses against the company.

[Ed. Note.—Cited in Humbert v. Brisbane, 25 S. C. 514; Roberts v. Jones, 71 S. C. 409, 410, 51 S. E. 246.

For other cases, see Set-Off and Counterclaim, Cent. Dig. § 51; Dec. Dig. ⇐29.]

[6. *Trial* ⇐143.]

There being contradictory evidence, the judge properly refused to direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. ⇐143.]

[7. *Trial* ⇐260.]

Where a request to charge asserts a general proposition of law, which, so far as applicable to the cause at issue, had already been charged, there is no error in refusing the request.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⇐260.]

[8. *Eminent Domain* ⇐319.]

[Cited in Miller v. Seaboard Air Line Ry., 94 S. C. 108, 77 S. E. 748, to the point that the servient owner retains the ownership of a railroad right of way and might use it in any way not inconsistent with the railroads easement.]

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 847–850; Dec. Dig. ⇐319.]

[This case is also cited in Miller v. Seaboard Air Line Ry., 94 S. C. 110, 77 S. E. 748; Wilkins v. Hilton-Dodge Lumber Co., 95 S. C. 252, 78 S. E. 873, without specific application.]

Before Pressley, J., Newberry, February, 1882.

This was an action by Eldred C. Simkins against the Columbia and Greenville Railroad Company, commenced April 7th, 1881, to recover $500 damages for the killing of two horses belonging to plaintiff by a train of cars of the defendant company, on or about March 1st, 1881. The defendant denied liability and asserted as a counter-claim injuries done to the engine and cars of the company by the presence of these horses on the track. To this counter-claim there was no reply.

The accident occurred at a trestle, towards which the horses had run on the track from one hundred and twenty-five to two hundred and fifty yards, as estimated by witnesses from the tracks of the horses. All this was within the pasture of plaintiff, through which defendant had a right of way, and the horses were killed about midnight. The employés of the company, in charge of the train, did not know that these horses were on the track until after the engine had been thrown off by the killing of the horses. As to the speed of the train, the darkness of the night, and the burning of a headlight on the engine, the evidence was conflicting.

The defendant presented several requests to charge. Those which were refused are correctly quoted in the exceptions, and the opinion states the reasons given by the Circuit judge for his refusal. He did charge the jury as follows:

"That under the laws of this State a railroad company is not bound to protect its track by fences or other inclosure from the

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*incursions of horses, cattle, or other animals. That a railroad company is not liable for the killing of a horse upon the track by its train, if such killing is accidental. That a railroad company is not liable for injuries caused by the mere fact that a train was of such length, or was running at such speed at night, that it could not be stopped by the engineer and brakeman short of one hundred or two hundred or even three hundred yards, inasmuch as such running of a train is not negligence or misconduct. That in the absence of proof of gross negligence or willful misconduct on the part of the railroad company itself, the damages for the killing or injuring of horses on the track can in no event be vindictive, but merely compensatory for the actual loss proven to have been sustained by the same."

And he further charged the jury that the fence or stock laws of this State applicable to Newberry county and other counties at the time these horses were injured changed the rule of law formerly prevailing here, so as to do away with the presumption of negligence on the part of the railroad, derived from a mere fact of killing or injuring stock, and so as to put upon the owner of the stock killed or injured the burthen of proving that such killing or injuring was the result of negligence on the part of the railroad or its employés; but that the plaintiff having introduced testimony on the point of negligence, if the jury should conclude from the testimony in the case that there was negligence on the part of the railroad or its employés, they should find for the plaintiff, the owner of the stock.

The jury rendered a verdict for the plaintiff for $328.

The defendant appealed upon the following exceptions, together with those copied into the opinion:

6. "Because his Honor refused the request of the defendant to charge the jury 'That a railroad company is not liable for the killing or injuring of a horse upon the track by its train, unless such killing or injuring is the result of either wanton negligence or willful misconduct of the employés running the train.'

7. "Because his Honor refused the request of the defendant to charge the jury 'That since the enactment of the stock or fence laws of this State, the killing or injuring of horses by a railroad train, on its track,

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in Newberry county, does not put the *burthen of proof upon the railroad company, that such killing or injuring was accidental or inevitable, but that in such case it is necessary, in order to make the railroad company liable, that there be proof of wanton negligence or willful misconduct on the part of the employé or employés running the train.'

8. "Because his Honor refused the request of the defendant to charge the jury 'That if it appear that a horse killed or injured by a train was first discovered, or was first discoverable, on the track at such a short distance from the place where he was killed or injured, that the train could not have been stopped in time to prevent running over or against the horse, it was not necessary that the persons running the train should have seen the horse, or having seen him, that they should have attempted to stop the train.'

11. "Because his Honor refused the request of the defendant to charge the jury, 'That where a party seeks to recover damages for injury to his person or property, resulting from the negligence of another, he must show that his own conduct has been free from blame; and it must not appear that he has contributed to the cause of injury on account of which he complains.' "

Messrs. Suber & Caldwell, for appellant.
Messrs. Moorman & Simkins, contra.

November 27th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The respondent seeks to recover in this action, the value

of two horses, killed on the track of defendant's railroad, by a train of cars passing over them. Unlike the case of Jones against this defendant, just decided by this court, [see next case ante,] the respondent assumed the duty of proving negligence affirmatively by other testimony than the mere killing, and he did not rely upon the presumption arising from the fact of killing as in Danner's Case [4 Rich. 329, 55 Am. Dec. 678]. The defendant also introduced evidence upon the subject of negligence, and the case was stoutly fought, on both sides, as to that question. The defendant submitted various legal

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propositions, *some fourteen in all, to the Circuit judge, with requests to charge them. The judge declined eleven of these requests, which now constitute the grounds of appeal.

The first four, as is admitted, involved the same principle and hinge upon the same point, and they were discussed before us, on both sides, under the same head. They rest upon the general proposition, that a horse found upon a railroad track in this State is a trespasser, and that all questions as to the liability of a railroad company in the killing of such horse, must be adjudicated under the light of the fact that he is a trespasser. No doubt the counsel presenting these requests intended them to apply to Newberry county, the place of trial, as legal propositions arising under the operation of the stock law, and to such other counties in which the stock law had become the law. They intended to claim that in such counties, since the enactment of the stock law, stock were not at liberty to roam at large as formerly, and if in such cases they were found outside the premises of their owner, it was illegal, and a trespass, and that in such cases the law, as to injuries done them, should be applied under the influence of that fact.

The propositions, however, as presented to the judge, were general in their terms, no reference being made to Newberry county or to the stock law. The judge made a written indorsement on these requests, as follows: "They relate to the general law of the State, and not to the fence law of this (Newberry) county. As a general rule of law in this State, said propositions are contrary to the decisions of this State." It does not appear that any effort was made to correct this misunderstanding of the judge, or to inform him that the requests were founded upon the stock laws of force in Newberry county. On the contrary, the charge as thus indorsed seems to have been submitted to. This court has no power to consider propositions not made below, or to review refusals to charge in the absence of requests to charge. Errors of commission are of course before us, when brought up by proper exceptions, but errors of omission must be founded upon a previous request to the judge, in addition to the exceptions necessary to bring them under our review.

Looking at the requests as understood by

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the judge, based *upon the generality of the terms in which they were couched, there can be no doubt that his ruling was correct. But had he understood the request to have reference to Newberry county, and based upon the stock law of force in that county, according to the view which we take of the question it would not have been error to refuse the request, as we do not think the stock law has any application to the case. The injury complained of was sustained at a point on the track where it passed through an inclosure of the plaintiff, used by him as a pasture for his cattle. The only statute of force at the time the disaster occurred was the act of December 14th, 1878. 16 Stat. 689. The language of which is, "That in the counties of Abbeville, Union, Newberry and Laurens, it shall not be lawful for the owner or manager of any horse * * * or neat cattle of any description to permit the said animals or any of them to run at large beyond the limits of their own land."

It is conceded in this case that the railroad company did not own the land upon which its track rested at the point where the damage was done, but was only entitled to a right of way, an easement, over the said land. The act above cited, further provides that "wherever any of the said stock be found upon the lands of another person than the owner, the owner of such stock shall be liable for all damages sustained." It will be observed that the prohibition is against permitting stock to run at large beyond the limits of the owners of land, and the penalty is a liability for damages, if one's stock is found upon the lands of another. In this case the animals of the plaintiff were not beyond the limits of his land. They were not upon the lands of the defendant. The defendant had only an easement, an incorporeal hereditament, which is something different from land. The plaintiff still retained the ownership of the land, and might lawfully use it in any way not inconsistent with the easement of the defendant.

There was, therefore, nothing unlawful in the act of the plaintiff in permitting his stock to roam at large in his inclosed pasture upon his own land, through which the defendant only had the right of way, and it was not a trespass on his part for his animals to stray upon the track of the defend-

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ant's railroad. *We have not been able to discover in any of the various acts in relation to the stock law, any indication of an intention to embrace within their provisions the various railroad tracks in this State, and it seems to us clear that the terms used in the act referred to, according to their proper

construction, cannot be extended so as to embrace the track of a railroad in which the company has a mere easement, and does not own the land over which the track passes. In our opinion, therefore, all of the grounds of appeal based upon the stock law must be overruled.

Fifth exception. "Because his Honor refused the request, that a railroad company is not liable for killing or injuring a horse upon the track of its train unless such killing or injuring is the result of gross negligence on the part of the employés running the train, or at least on the part of the engineer." The judge allowed this except the word "gross." We think the weight of the authorities sustains the judge's ruling. The subject of negligence has been much discussed, and various definitions have been given of it, and much confusion has arisen in reference thereto. Sometimes it has been held to be a question of fact and left almost entirely to the good sense of the jury. At other times it has been regarded as a question of law, and sometimes it has become a mixed question of law and fact. It is not necessary for us in this case to go into this question and explore the mass of cases in the different States and courts where this subject has been considered and adjudged. The exception itself submits it as a question of fact, and the only objection is that the Circuit judge did not require as a legal proposition that the jury should be limited to such negligence as might be termed gross.

Negligence, as we understand it, is the absence of care, and in its essence, in all of its forms, it implies wrong and fault in the party committing it. There may be different degrees of care. There may be a most assiduous, minute and scrupulous attention governing one's conduct, or there may be that sort of attention which characterizes the conduct of ordinary men, or, still further, that which belongs to the reckless and indifferent. And there may be the absence of all care, substituted by a wanton, willful act, intended to do injury. The absence of these degrees of care may characterize the negli-

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gence which results. In the *first class the negligence might be designated as slight; in the second, ordinary, and in the third, gross, if epithets are necessary. Now there are but few cases where that minute and scrupulous attention, referred to above in the first class, is required by the law, and consequently but few cases where slight negligence can be made the foundation of an action for damages. All that the law requires, as a general rule, is that sort of care which prudent men, influenced by personal interest, ordinarily bestow on their business and conduct, and it is the absence of this kind of care which in most cases gives rise to actions at law. This of course includes the third class, where there is not even the care of the reckless and indifferent.

It should be observed here, however, that negligence is a relative term, and its existence in a given case depends upon the requirements of the occasion. I mean to say, that an act may be negligent under one state of facts when the same act under a different state of facts might be entirely free from negligence. For instance, to drive a wild and dangerous horse, and of unusual speed, along a crowded street with hundreds of persons and vehicles on the way, would be a negligent act, for the injurious consequences of which, if any, a party could, no doubt, be held responsible; but to drive the same horse at the same speed along an unoccupied street, or along some secluded road in one's own enclosure, seldom or never traveled by others, might be free from every feature of negligence. So, too, in those counties in the State where the stock law has not become the law, and where cattle are at liberty to roam at large upon railroad tracks and elsewhere at will, for a train of cars to dash forward, without the precaution which should be observed in such cases, might be negligent, whereas the same train, going at the same speed, and without the same precaution, in the counties where the stock law has been adopted, and where the railroad employés had no thought that cattle would be found on the track, would not be a negligent act.

So, at last, the kind of negligence for which a party may be made responsible depends on the degree of care which may be required in the special case. If the care of the most prudent and scrupulous is required, then slight negligence may be actionable. If ordinary care is only required, then the absence

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of this or *ordinary negligence would sustain an action. If the case demands only the care of the indifferent and reckless, (and we know of no such case,) then gross negligence would be necessary. Negligence in all of its forms, as we have said, implies wrong. It carries with it the idea of fault—a failure to do what is required to be done. And an injury resulting from this failure must be redressed, whether it be a slight, ordinary or gross failure. That is to say, in cases where either of these degrees is actionable under the principles laid down above, then an injury resulting from it is entitled to be redressed.

It is true, it has been held in words in some of the States where the rule of the common law as to cattle prevailed, to wit, where the owner was bound to keep them on his own land, that railroad companies could only be made answerable for an injury to them wantonly perpetrated, or, as is said in some of the cases, where the act causing the injury was reckless and willful. This seems to have been held in Massachusetts, New York, Rhode

Island, and in some other of the States. But in Vermont, and in some other States, the doctrine prevails that the company is liable for injuries to cattle upon its track if they could have been avoided by its servants in the exercise of ordinary care. Pierce Railr. L., p. 322–326, where the different cases are collected.

These principles, although seemingly in direct conflict, may yet be somewhat harmonized by remembering, as urged above, that negligence is relative, and its character depends upon the care required in a given case; and, therefore, what would be negligence, gross or otherwise, in one case, might have no feature of negligence in another. In the running of a railroad train, the employés must look to the safety of the passengers and of the property of the company, as well as to dangers to cattle and persons on the track, and the question of negligence must be determined by these considerations and others; but after letting these have their legitimate influence subordinating the danger of cattle to these higher interests, we cannot agree to the doctrine, that only gross negligence, to wit, the absence of that care which the reckless and indifferent would give, could alone make the road responsible. We do not see that the fact that stock are required to be fenced in, and are not expected to be found on

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*the track, should release the company from the bestowal of such care as would be reasonable in such a case. It certainly ought not to license the company to any conduct short of gross, willful and vicious, or, as is said in some of the cases, willful negligence. We think, therefore, that the Circuit judge was warranted in striking out the word "gross" in the exception.

Of course, we do not undertake here to determine what would be slight, ordinary or gross negligence in these railroad cases. All that we determine is, that it is not necessary to show gross negligence, and that liability may attach below this. We think the law requires these companies, even in counties where the stock law prevails, to exercise at least reasonable care, such as ordinarily prudent men would be expected to exercise under the circumstances. Whether this has been exercised in a special case is a question of fact for the jury.

The next two exceptions, the sixth and seventh, in which the judge was requested to charge that nothing short of wanton negligence or willful misconduct could make the defendant responsible, are disposed of by what we have already said.

We do not see that the eighth exception involves any principle of law. If it was a fact that the horse was first discovered or was first discoverable at so short a distance on the track that the train could not have stopped in time, then this might have been urged upon the jury as proof that there was no negligence; but we do not see that the judge was required to charge that there was no negligence as matter of law.

The ninth exception alleges error because his Honor refused to charge as requested: "That a counter-claim for damages resulting from the trespassing of the horses set up in the defendant's answer in an action for damages for the killing or injury of horses by the train of a railway company is proper, and must be allowed to the extent of the damages proved to have actually resulted to the railroad from such trespassing, if it appear that such damage to the company was not the result of blamable conduct on the part of the company or the employés running the train." Under the code (section 171) a counter-claim may be interposed: 1. Where the cause of action of defendant, which he attempts to set up by counter-claim, arises

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out of the contract *or transaction set forth in the complaint as the foundation of plaintiff's claim, or is connected with the subject of the action. 2. Where the plaintiff's action is on contract, and the defendant's cause of action is also on contract and in existence at the commencement of plaintiff's action. Lynch's Code, p. 72.

The plaintiff's action here did not originate in contract, so we need not consider any of the grounds above, except that portion of the first which provides for a counter-claim where the defendant's cause of action arises out of the transaction set forth in the complaint, or is connected with the subject of the action. Did the defendant's cause of action, presented in his counter-claim, arise out of the transaction set forth in the complaint, or was it connected with the subject of plaintiff's action? The foundation of the counter-claim is an alleged trespass by plaintiff's horses, which resulted in injury to defendant's engine. The transaction, if it be a transaction, which is the foundation of plaintiff's action, is an injury done to plaintiff's horses by a train of cars of defendant. These two events were nearly contemporaneous in this instance; but did the first arise out of the latter?

There is certainly no necessary connection between two such events. The one may happen, and frequently does happen, without the other; but even when happening at or near the same time, we do not see how the trespass of the horses, even if it be admitted that they were trespassing, (which must always be in such cases the first event,) can grow out of the injury done to the horses. Let it be assumed that it was a trespass for the horses to be on plaintiff's track, and this gave the defendant a right of action. The horses were upon the track before the train arrived, and a right of action had accrued to defendant before any cause of action arose to plaintiff.

It may be said, however, that the injury

for which defendant seeks by his counter-claim to recover damages occurred afterwards. This is true, but did it grow out of the killing of the horses, which is the transaction constituting plaintiff's cause of action, or did it grow out of the fact that these horses were upon the track and threw the engine off? We do not see that defendant's cause of action grew out of the transaction which is the foundation of plaintiff's suit, in

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the sense of the counter-claim provided *for in the code, or that it has such connection with the subject of plaintiff's action as, under the code, authorizes it to be set up as a counter-claim here. On the contrary, the two causes seem to us to be entirely separate and independent of each other. The foundation of each is a tort. But these torts have no dependence the one upon the other. The alleged tort of the defendant which constitutes the foundation of plaintiff's action is the negligent running of defendant's cars by which his horses were killed; the alleged tort of plaintiff which is the foundation of defendant's counter-claim, was the alleged illegal presence of his horses upon the railroad track by which the train was thrown from the track and the engine injured. The injury to the engine in point of time, it is true, followed in quick succession that of the injury to the horses; but it cannot be said that the illegal presence of the horses on the track, which is the foundation of defendant's counter-claim, arose out of the negligence of defendant in running the cars, which is the foundation of plaintiff's action. Nor was it connected with the subject of plaintiff's action.

In most of the States having the code, similar provisions to ours in reference to counter-claims have been adopted, and in some of the States, the terms "transaction," "arising out of," "subject of action" and "connected therewith," have been much discussed. The decisions are not uniform, and from them it is difficult to arrive at a definite and satisfactory conclusion. In some of the States, especially in New York, the tendency has been to limit and narrow the meaning of these terms. In others, the construction has been more liberal. In the first, the principles of the former doctrine of set-off and recoupment, which applied to actions ex contractu entirely, have controlled, more or less; in the latter, it has been held that the terms "transaction" and "subject of the action" mean something more than contracts, and that consequently counter-claims may embrace other causes of action besides those arising in contract.

This whole subject is fully discussed with great ability and perspicuity in Mr. Pomeroy's second edition of his Remedies and Remedial Rights, § 734, et seq., p. 772. And at section 790, will be found a discussion of

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the "cases in which the *demands of both parties are for damages arising from tort," in which he says: "Counter-claims of damages from torts, when attempted to be enforced against causes of action for damages also arising from other torts, have, with few exceptions, been rejected. The courts have been inclined to adopt, or at least to assume as a general principle, that such a cross-demand can never arise from the transaction set forth by the plaintiff as the foundation of his claim." It will be seen, however, that this doctrine has not been universally accepted. And he presents in the foot note an array of cases from which this principle was extracted. Opposed to this doctrine, he also cites a few cases announcing the principle, that under special circumstances a tort may be counterclaimed against a tort. No doubt this is true, where there is an evident connection. Under the former practice, when the law of set-off and recoupment prevailed, it is certain that the cause of action which the defendant attempts to set up here could not have been interposed. Nor do we see, upon our analysis of the counter-claim provision in our code, that it can be done by virtue of the code. Under these circumstances, while the cases in other States are not authority, yet we are disposed to follow on that line in which the most of them seem to have gone; and, therefore, to hold that the Circuit judge was right in refusing this request of the defendant.

Tenth exception. Because his Honor refused the request of defendant to give a binding charge to the jury "to find for the defendant, because of there being in this case no proof, or, at most, a mere scintilla of evidence of negligence on the part of the defendant or its employés." The judge declined this because there was contradictory testimony on that point which must be left to the jury. We see no error here.

Eleventh exception, as to contributory negligence, was refused in the form presented, because, as stated by his Honor, "A charge should not merely state a general rule of law. It should be made in connection with a point in the case on which evidence has been offered. And the above rule, as applicable to horses, has already been charged upon and the defendant held liable for negligence, if proved." A judge is not bound to charge general and abstract propositions of law,

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however sound. They must *have some connection with the case and the facts relied on. So far as this principle had reference to the horses, it seems that the judge had charged upon it, and it was not necessary for him to go over that ground again. We think the reason which he gives vindicates his refusal.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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BOBO v. VAIDEN.

(April Term, 1883.)

[1. *Executors and Administrators* ⟸527.]

Where a surety on an administration bond petitions for relief and a new bond is required and given, the second bond becomes the primary security, not only as to the surety who petitioned, but also as to the other sureties on the first bond.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2355–2374; Dec. Dig. ⟸527.]

[2. *Executors and Administrators* ⟸527.]

But the administrator, when cited to show cause under his surety's petition, having made return showing a balance in hand much less than the true balance—an error resulting from an incorrect voucher given him by such petitioning surety—the first bond is primarily liable to the extent of such error.

[Ed. Note.—Cited in Hall v. Hall, 45 S. C. 179, 22 S. E. 818.

For other cases, see Executors and Administrators, Cent. Dig. § 2368; Dec. Dig. ⟸527.]

[3. *Assignments* ⟸94.]

A distributee who was also a surety on the administrator's bond, having made an assignment of his distributive share in the estate, the assignee is entitled only to what is left to such surety after paying his liability to the estate for the devastavit of the administrator. And the benefit of this rule may be claimed by the other sureties.

[Ed. Note.—Cited in Patterson v. Rabb, 38 S. C. 148, 150, 17 S. E. 463, 19 L. R. A. 831; Ex parte Wilson, 84 S. C. 450, 66 S. E. 675.

For other cases, see Assignments, Cent. Dig. § 165; Dec. Dig. ⟸94.]

Before Fraser, J., and Pressley, J., Union, June, 1881, and March, 1882.

This was an action by Ira L. Bobo and others, distributees of the estate of John Bishop, deceased, against W. H. Vaiden, administrator, and the sureties on his two bonds, for account and settlement, commenced August 29th, 1879. There were no unpaid creditors.

The facts connected with the points made in this court are sufficiently stated in the opinion. There was testimony of P. M. Cohen, a surety on the second bond, that before signing he made inquiry as to the amount of

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Vaiden's liability on his first bond, *and that he would not have signed it if he had known that the liability was for $300 more than he was then informed. There was no allegation of bad faith in Minter.

The decree of Judge Fraser was as follows:

As I understood the counsel in the argument before me, it was desired that the question of the rights of sureties as amongst themselves should be settled. Without entering into a full examination and discussion of the cases bearing on this subject, I will state my conclusions very briefly.

The words of the present act, Gen. Stat. p. 453, § 8, are substantially the same as the old act on the same subject. In Ordinary v. Bigham & Hudson, 2 Hill 516, it is said that the ordinary may revoke the administration and grant administration de bonis non, or he may order the administrator to substitute a new security for the discontented one in a new bond.

The doctrine in Enicks v. Powell, 2 Strobh. Eq. 196, I take to be, that where there is a revocation of the administration, and the same person is appointed and gives a new bond, the debtor and creditor being united in the same person, there would be the usual presumption of payment to the administrator in his new capacity; that this would be followed by the same consequences as an actual payment to any other person who might have been appointed in his place, and the sureties on the first bond relieved, ipso facto, by such revocation and re-appointment. Where, however, there is no revocation but an order for a new bond only, all the sureties are parties to a common undertaking, and jointly liable to the beneficiaries. If the circumstances show that the new bond was given at the instance of a surety, and for his protection, as in Field v. Pelot, then the sureties to the new bond are primarily liable, and the sureties to the first bond, who petitioned for relief, only secondarily liable.

Only one of the first set, John R. Minter, is before the court in this case, and he was the petitioner. Was the order of the Probate judge in this case a revocation? It certainly was not an order simply to substitute a new surety for the discontented one—at least not so intended. In Field v. Pelot an order had been made by the Court of Equity for guardi-

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ans to give a new bond *with sureties, "on or before March 1st next, or after that day the letters of guardianship shall be considered as revoked." Some time after this time had expired the guardians gave a new bond, no new appointment having been made. The court held that the bond was a good one, but that though there was no new appointment the guardianship was a continuing one, and the new surety estopped from denying his liability on the bond. Dr. Stoney was a surety on the first bond and John S. Field was surety on the second. The court, per Harper, says: "That Dr. Stoney could not be discharged from all responsibility, but the surety might well assume the primary liability. * * * If Dr. Stoney had paid his bond with his own money he would have a right to be re-imbursed in full by Field. If Field had paid off his bond he could have recovered nothing against Stoney." This was said in reference to a guardianship bond. Field v. Pelot, McMull. Eq. 382.

In the same case, Chancellor Harper says: "There is nothing to prevent the new surety binding himself to the same extent as the old, whether for past or future liabilities (on administration bonds); and such are the plain terms and obvious purposes of his undertak-

ing. * * * When a party interested in the estate becomes dissatisfied. * * * it would seem that the new security is only collateral to the former. * * * But when it is the surety who becomes dissatisfied with his responsibility and seeks to be relieved, the converse seems to follow. * * * The court cannot substitute a new security so as to discharge the former from his contracts. But there is nothing to forbid its requiring a new security, which, as between the sureties themselves, shall be the primary one, leaving the former only collateral; and such seems to be the nature of the new sureties' undertaking."

The court, in the case of Field v. Pelot, seems to have expounded the principles in reference to sureties on administration bonds, and to have applied them to a case of guardianship bonds—in its leading features very much like the case now before this court. It is very difficult to see how any positive act of maladministration could be established in

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this case before twelve *months from the death of the intestate had passed, and before there could have been any lawful payments, either of debts or distributive shares. I am of the opinion that unless there was some positive breach of trust, by refusal to pay out on lawful demand, or of devastavit, by wasting the assets before the second bond was given, the second bond was the primary security, and all the circumstances show that was its purpose and that the sureties on the second bond are not entitled to call on John R. Minter, a surety on the first bond, and at whose instance and for whose protection the second bond was given, for contribution for any payments they may be compelled to make; that John R. Minter is liable to the distributees, and if he pays anything is entitled to contribution from the sureties on the second bond, and it is so ordered and adjudged.

All questions of costs and other questions in this cause are left open for future investigation and adjudication in this cause.

The decree of Judge Pressley was as follows:

The testimony and report of referee in this case are not in such form as would make me understand the various points raised by the exceptions; I therefore decide only:

1st. That the rule laid down by Judge Fraser in his past decision of this case, in favor of one of the sureties to the first bond, is also applicable to Elizabeth Bishop, she being liable on any devastavit of W. H. Vaiden, only in case the sureties to the second bond fail to pay the same.

2d. That no devastavit has been shown which would fall primarily upon the first bond, the amounts which the administrator failed to sell for cash being either to himself or having been collected by him, except the purchases of Mrs. Gordon Bishop, for which, I decide, he must receive credit as so much paid by him on her share as one of the distributees of her husband.

3d. The assignment of Catherine Vaiden to D. P. Duncan is valid, and he should receive out of her share the amount he paid for her husband, with interest at seven per cent. from the time he paid it.

4th. The other sureties on the second bond are entitled to have the remainder of the

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share of Catherine Vaiden in said estate *applied to her liability as co-surety, that application to extend also to her share in the shares of other distributees who may have died without leaving other heirs than brothers or sisters.

5th. All other points raised by any of the exceptions to said report are recommitted to the referee for further testimony and definite report thereon.

The decree of Judge Wallace simply embodied, in final form, what had already been decided.

Mr. R. W. Shand, for appellant.

Mr. J. C. Wallace, for administrator of Elizabeth Bishop.

Mr. J. B. Steedman, for J. R. Minter.

Mr. D. Johnson, Jr., for D. P. Duncan.

November 27th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. John Bishop, late of Union county, died intestate in April, 1874. W. H. Vaiden was appointed his administrator May 13th, 1874, upon his entering into bond with Elizabeth J. Bishop, W. A. Johnson and John R. Minter, as his sureties. John R. Minter, one of the sureties, afterwards, to wit, on November 30th, 1874, upon petition to the Probate Court to that end, obtained an order releasing him from all further liability upon the administration bond which he had signed and the defendant, W. H. Vaiden, was required in said order to give another bond on or before December 8th next thereafter, and in default thereof, that his letters be revoked. On December 15th, 1874, seven days after the time fixed in the order, Vaiden gave a new bond as administrator, with Caroline Vaiden, James M. Johnson, W. M. Stewart, John Ray and P. M. Cohen, as sureties. The action below was against the administrator, W. H. Vaiden, and some of the sureties on each bond, and was for an accounting.

A short time before Minter was relieved,

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he had a transaction *with the administrator, in which he gave to said administrator a receipt for $788.37, as so much paid on a debt which he, Minter, held on the estate of the intestate, when in fact the administrator only paid him $468.37, just $320 less than the amount called for in said receipt. Minter explained this by the statement that Bishop in his life-time had made payments on the note which he held, leaving a balance of

$468.57, which was paid by the administrator, but as there had been no credits on the note of the amounts previously paid by Bishop, that he gave a receipt to the administrator in full. The administrator in his return obtained a credit for the $788.57, as if the whole sum had been paid by him out of assets in his hands as administrator.

In the progress of the case, D. P. Duncan claimed that the share of Mrs. Vaiden, a daughter of the intestate, and one of the sureties to the second bond, had been assigned to him in payment of a debt due to him by Mrs. Vaiden.

The case in one form or other has been heard by Judge Fraser, Judge Pressley, Judge Aldrich and Judge Wallace; the principal questions involved being: First. The respective liabilities of the sureties on the two bonds. Second. Whether Minter shall be held primarily liable for the $320 difference between the receipt he gave to the administrator, and the amount actually paid him; and lastly, whether Duncan should be paid out of Mrs. Vaiden's share to the exclusion of her liability as one of sureties on the bond. Judge Fraser held the second bond the primary security as to Minter, but passed no judgment as to the $320. At that time Duncan had not intervened, and consequently his claim was not before the court, and Judge Fraser seemed to have understood that Elizabeth Bishop, one of the sureties to the first bond, had not been made a party, and consequently he made no decree as to her.

Judge Pressley held the second bond a primary security as against Elizabeth as well as Minter, this, as he said, being in accordance with the rule laid down by Judge Fraser as to Minter, but he did not pass upon the $320 matter. At that time Duncan had intervened and presented his claim and Judge Pressley allowed it, holding it superior to the rights of set-off and retainer asserted by Mrs. Vai-

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den's co-sureties on the administra*tion bond. Judge Aldrich recommitted the matter to the referee to state the accounts, and upon the coming in of a second report, Judge Wallace confirmed it, and passed an order in accordance with the previous decrees, making the second bond the primary security as to all of the parties, and allowing the Duncan claim in advance of any appropriation of Mrs. Vaiden's share to her liability on the bond.

Cohen, one of the sureties on the second bond, has appealed, raising the questions raised below, to wit: 1. What are the respective liabilities on the two bonds? 2. Is Minter primarily liable for the $320? 3. Should Duncan be first paid out of Mrs. Vaiden's share? Appellant's counsel admits, that as to Minter the second bond is the primary security, but he claims that Minter should save the sureties on the second bond harmless to the extent of the $320, the amount of the voucher to Vaiden, administrator, in excess of the amount actually paid him. He resists the claim of Duncan, and he denies that Elizabeth Bishop should have the benefit of Minter's release by the order of the Probate judge.

As to the first question. Under the act of 1789, the court of ordinary had power to grant relief in cases of this kind, either by revoking the letters of administration, or by requiring a new bond; yet the vested rights of the parties interested could not be impaired. Ordinary v. Wallace, 1 Rich. 507; Owens v. Walker, 2 Strobh. Eq. 289. The act of 1839 has made no material changes in the law on this subject. It is in substance the same as the act of 1789, differing principally in its phraseology; but under neither of these acts has the precise question now before the court ever been contested and distinctly decided. In Cureton v. Shelton, 3 McCord 412, there were but two sureties to the bond, and both petitioned for relief. In Trimmier v. Trail, 2 Bail. 480, there was only one, and he petitioned. So, too, in Waterman v. Bigham & Hudson, 2 Hill 512. So that the question here presented was not involved in either of these cases. Field v. Pelot McMull. Eq. 382, was a case of guardianship, and in Enicks v. Powell, 2 Strobh. Eq. 196, the administration was revoked and a new appointment was made de bonis non, of the same party, with a new bond. When a revocation

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*is ordered and a new appointment conferred on the same party, there is no difficulty, as, by operation of law, payment is presumed to the discharge of the first administration. It is in cases where there has been no revocation—where the original letters continue—that a new bond is ordered and given at the instance of one or more of the sureties to the first bond, where the difficulty is presented.

As a general principle, it has been settled that the second bond becomes the primary security, and the first is at least suspended until the second is exhausted. True, the first bond cannot be entirely discharged, so far as the parties interested in the estate are concerned; but as between the sureties to the two bonds, the second stands in the front rank and must protect the first. Glenn v. Wallace, 4 Strobh. Eq. 150 [53 Am. Dec. 657]. See also cases supra. If this was a case where all of the sureties to the first bond had petitioned, then these authorities would be directly in point. But here one only of the sureties, Minter, petitioned. Can this make any difference? While, as we have said, the question was not directly involved in either of the cases mentioned yet the opinion of the distinguished jurists pronouncing judgment is manifest from their utterances therein. See what Chancellor Dargan said on circuit, sustained on appeal, in case of Owens v. Walker, supra. Also the remarks in Field v. Pelot, supra. It seemed to be unquestioned that the general principle above ap-

plied as well to cases where any number less than all of the sureties to the first bond petitioned, as where all petitioned. In each case, if the relief afforded by the court consisted in requiring simply a new bond, with the original letters of administration continuing, this new bond became the primary security, and it operated to that extent, to the relief of all of the sureties on the first. Glenn v. Wallace, 4 Strobh. Eq. 150 [53 Am. Dec. 657].

Indeed, such must necessarily be the result unless the new bond is to be held simply as an indemnity to the petitioning surety. We find no authority for such a position. Nor could such be the understanding or the purpose of the order; because, if so, the new bond should always be executed to the party petitioning for relief, instead of in the usual form of such bonds. Besides, upon the theory that the new bond takes the place of

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*the first to the extent only of the name of the petitioning surety, which would in effect be the case if it is held simply as an indemnity to him, this would be making a new contract for the other sureties, and one not authorized by them. In this case, Elizabeth Bishop may have been perfectly willing to go on the first bond with Minter as a co-surety, and yet utterly unwilling to sign with the others, with Minter's name erased. "A release of one of several co-obligors is a release of all." Ordinary v. Bigham, 2 Hill 515. There is much force in what Chancellor Dargan said on this subject on circuit in case of Owens v. Walker, 2 Strobh. Eq. 293.

True, the original bond in this case, and all such bonds, are given subject to the act of 1839, in reference to relief to any of the sureties when demanded, but we think such relief should be afforded in harmony with the well-established principles of law in reference to contracts as to other matters, especially as this can be done under the authority conferred by the act of 1839. The power to afford relief is limited by the injunction that the rights of parties shall not be impaired. This injunction can always be regarded, and yet the necessary relief furnished, by following the decided cases, wherein it has been held that the only course for the court to pursue is either to revoke the administration or to require a new bond, which is to stand as a primary security to the old, and not simply as a substitute for the name of the petitioning surety on the old. We think there was no error in the court below as to this first question.

Now, as to the second question. It is not entirely plain from the proof what has been adjudged on this subject. Judge Pressley seems to have thought that Judge Fraser had ruled upon the whole liability of Minter, including that alleged to have arisen out of the error in Vaiden's return of the payment of $788.57 to Minter, and he declined to hear argument in reference to it, and this matter was not separately considered in the final decree of Judge Wallace. But whatever may be the facts in this respect, our view as to the relative liability of the two sets of sureties for the sum of $320 is this: that, as a general rule, the giving of the second bond would have the effect of postponing the liability of the sureties on the first bond to

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that *of the liability of the sureties on the second bond; but inasmuch as the second set of sureties had a right to suppose from the return required of the administrator, under the proceeding instituted by Minter, that the liability which they were assuming was $320 less than the final accounting has shown it to be, and inasmuch as they were thus misled by the act of Minter, (whether so intended or not is immaterial,) it would be inequitable to allow Minter to claim exemption from primary liability for the said sum of $320. And as Mrs. Bishop did not herself join in the application for relief, but can only obtain the same under or through her co-surety, Minter, her administrator cannot now claim any more than he can. We think, therefore, that the judgment of the Circuit Court should be so modified as to exempt the appellant from primary liability so far as the said sum of $320 and interest is concerned.

As to the Duncan claim. On December 15th, 1874, W. H. Vaiden was required to give a second bond for the administration of the estate of his intestate, John Bishop. Caroline, the wife of the administrator, and daughter of Bishop, and as such entitled to a share of his estate, became one of the sureties on the bond of her husband, as administrator. It seems that the administrator wasted the estate, and it becoming necessary to replace the assets out of the sureties, Mrs. Vaiden, or her assignee, insisted that in 1877 she, as distributee, had assigned to D. P. Duncan so much of her share in the estate as would secure a debt he had contracted for her husband, and the claim thus made was allowed. It seems to us that it would be inequitable to allow Mrs. V. to contract a liability to the estate by signing the administration bond of her husband, and afterwards to assign her interest in the estate, and thereby throw the whole weight of her husband's default upon her co-sureties, who probably were induced to join her in the suretyship on the faith of her interest therein. We are not informed whether she has any other means to meet said liability.

The real interest of a distributee in the estate is what remains after all his obligations to the estate have been discharged. It is upon this principle that he is chargeable with advancements and obligations to the intes-

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tate, even where the right of action is *lost. Wilson v. Kelly, 16 S. C. 216. The principle extends to obligations to the administrator, as where personal property is bought at his

sale. We do not perceive why a liability on the administration bond should not also fall under the operation of the same rule. Dues of the sureties upon the administration bond are only assets of the estate in place of those wasted by the administrator. Suppose there was only one distributee and he was the only solvent surety upon the bond. Until something was paid, there could be nothing for the distributee. He would be simply debtor to himself. If Mrs. Vaiden were now suing the estate for her share, is there any doubt that her liability as surety would be set off before anything would be paid her? Has the assignee any higher right? The demand is a mere chose in action, and, in such cases, the admitted rule is, that the assignee takes the interest assigned subject to all the defenses both legal and equitable against the assignor. Wait Anno. Code 120; Lynch's Code, § 135.

But it is said that the question as to whether there is an equitable defense must be determined by the facts as they stood at the time of the assignment, and at that time no devastavit had been established against the administrator, and that the sureties had paid nothing. It is true that, at the time of the assignment, the devastavit had not been established formally; but it is now established. We have no means of knowing precisely when it was actually committed. We incline to think it was before the assignment, as it appears from the accounting before the referee that there was nothing either received or paid out after the date of the assignment. But, under the authorities, it seems to be unnecessary to inquire when it was either committed or judicially ascertained. When the assignment was made, in 1877, the bond had been given for three years, and that was the obligation which created her liability, and to it the devastavit, whenever judicially established, must be referred. De La Howe v. Harper, 5 S. C. 470. Besides, the liability as surety is not an independent debt, but grows out of and is "connected with the subject-matter" of the estate, and it seems to us that Mrs. Vaiden has no share in the estate until that liability is discharged. The as-

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signment to *Duncan must be considered as subject to the liability of Mrs. Vaiden as surety on the administration bond.

The judgment of this court is that the judgment of the Circuit Court be modified so as to conform to the conclusion herein stated, and affirmed in all other respects.

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FIELDS v. HURST.

(April Term, 1883.)

[1. *Appeal and Error* ⊂⊃719.]

Objection was made by plaintiff to the hearing by the Circuit judge of defendant's exceptions to the referee's report; the objection was overruled and plaintiff excepted. After decree rendered, plaintiff filed exceptions thereto, but did not renew his exception to the hearing of defendant's exceptions to the referee's report. *Held*, that this question, not having been made a ground of appeal, was not properly before this court for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2968; Dec. Dig. ⊂⊃719.]

[2. *Appeal and Error* ⊂⊃267.]

No exceptions having been taken to an intermediate decree at the time, or after final judgment rendered, objections cannot be raised in this court to such decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1447, 1460, 1572–1578, 1581; Dec. Dig. ⊂⊃267.]

[3. *Appeal and Error* ⊂⊃273.]

Exceptions not considered, because too general.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1606, 1620–1623, 1625–1630, 1764; Dec. Dig. ⊂⊃273.]

[4. *Reference* ⊂⊃99.]

The provisions of the code as to referee's reports apply especially to cases at law. References in equity causes are governed by the rules which prevailed under the old chancery practice. The force and effect of a referee's report, in all cases, stated.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 154; Dec. Dig. ⊂⊃99.]

5. Findings of fact by a referee were reversed by the Circuit judge: the Circuit decree, upon these points, was sustained by this court. Mr. Chief Justice Simpson dissenting as to one of these findings of fact.

[6. *Account* ⊂⊃19.]

The Circuit decree, after allowing all proper items of debit and credit in an account, made a small balance in favor of plaintiff, but nevertheless dismissed the complaint upon the ground that they were substantially equal. *Held*, that the plaintiff was entitled to judgment for the balance ascertained in his favor in such statement.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 99; Dec. Dig. ⊂⊃19.]

Before Hudson, J., Darlington, November, 1882.

The decree of the Circuit judge makes a full statement of the case. It was heard by him on the following exceptions by defendant Hurst to the referee's report: "1. Because the referee erred in his findings both of law and fact. 2. Because the conclusions of the referee are unsupported by the testimony,

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*and contrary to the law applicable to the same." Before the hearing, plaintiff's counsel objected that the exceptions were insufficient, and suggested nothing to be heard by his Honor. The case was ordered to proceed, and plaintiff excepted.

The decree was as follows:

This cause was heard by me, November 28th, 1882, upon exceptions to the report of the referee. As this is a decree upon the main issues in the cause, except as to preliminary points heretofore adjudicated, a brief history of the litigation betwixt the parties to the original transaction will not be inappropriate. In fact, such a summary is necessary to a proper understanding of

the case. The litigation began twenty-two years ago, and the transactions giving rise thereto originated twenty-four or twenty-five years ago.

About the year 1857, one John Gatlin sold and conveyed the land described in the pleadings to one Jacob Kelly, and, to secure the purchase-money, took Kelly's notes —three in number, we presume, each for about $800; one, at least, was for that sum, and the land was sold for about $2,500. One of these notes for $800, some time afterwards passed into the hands of the present plaintiff, Matchet Fields. Hearing of this fact, and hearing also that there were against Gatlin in the sheriff's office various and sundry unsatisfied executions incumbering this land, Jacob Kelly became alarmed and dissatisfied, and expressed a desire to rescind the sale and regain possession of his notes.

An opportunity soon occurred to enable him to accomplish this purpose. In 1858, it was learned that Samuel F. Hurst desired to buy the land, and was willing to pay therefor about the sum contracted to be paid by Jacob Kelly, to wit, $2,500. To enable him to get a good title, an arrangement was entered into between Gatlin, Kelly, Hurst and Fields to the following effect: Kelly was to reconvey the land to Gatlin, and receive back his notes. Hurst was to give for the land a negro woman, valued at $1,000, and two promissory notes, the one for $825, payable January 1st, 1860, and the other for $850, payable January 1st, 1861, each bearing interest from January 1st, 1859. These notes, however, were to be made payable to Matchet Fields instead of to John

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*Gatlin, and the bill of sale of the negro woman was likewise to be made to Fields.

It was further agreed that Fields should thereupon give to Hurst his bond for titles to the land in consideration of the negro woman and the notes; and to enable Fields to put himself in condition to make good title to Hurst, he was to have the land sold at sheriff's sale under the outstanding executions in the office against Gatlin, and bid the same in. Betwixt Gatlin and Fields it was agreed that Fields, having thus secured title, should hold the same merely to reimburse himself for any outlay of money on his part in buying up and extinguishing the liens in the sheriff's office. That so soon as he should thus re-imburse himself from the notes of Hurst, the balance, if any, should go to Gatlin. As for the negro woman, it was agreed that she, the title being in Fields, should nevertheless be delivered over to the use and benefit of Mrs. Gatlin, wife of John Gatlin, then an invalid.

The parties accordingly met, when the other notes of Kelly, besides the one then held by Fields, were delivered into the hands of Fields, who then surrendered all of them to Kelly, whereupon Kelly assigned his deed to the land to Gatlin, and delivered the same, thus indorsed, to him, thinking thus to reinvest him with title. The bill of sale of the negro woman and the notes were then executed by Hurst and delivered to Fields, who executed and delivered to Hurst his bond for titles. It is also in testimony on the last reference, that the terms of the agreement between Gatlin and Fields were also reduced to writing, to the effect aforesaid, and duly delivered, but that the same has been lost or destroyed in some way.

It may be as well to remark here, that throughout the long protracted period of this contention, and amidst all the conflict of testimony, the aforesaid terms of the agreement and statement of the transaction between the parties are sustained by the testimony generally, except the contention as to the first note of $800 of Jacob Kelly, which went into the hands of Matchet Fields, he contending that he had bought and paid for this note in gold, and that for this outlay he was also to be re-imbursed out of the notes of Hurst, whilst the defendants, and witnesses who are able to speak of the transaction, deny this, and state in substance that

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*he held this note only as security for money laid out for Gatlin on executions, or to be laid out, and that the notes of Hurst were taken by substitution for and indemnity for the same outlay. At least such is the inference that defendant's counsel ask this court to draw from the testimony. At all events, this $800 note of Kelly is the pivotal point of the contention.

During this year, 1858, Fields did pay several hundred dollars on executions against Gatlin, and, having this land sold at sheriff's sale, did purchase the same at and for the nominal price of $20, representing that he was buying the same for Gatlin's benefit, and was to pay off the executions in the office against him, thus enabling himself to buy it at this low price.

In due season, Hurst becoming ready to pay his first note, went, in company with Gatlin, James, the son of Jacob Kelly, a Mr. Lee, and perhaps another, to the residence of Matchet Fields, to pay this note, and to have a settlement of the indebtedness of Gatlin to Fields on account of money laid out and expended for Gatlin's benefit. Fields evaded a settlement, saying that his papers were at the court house, and that in their absence he could not come to a settlement. Thereupon, Gatlin, Hurst and the others repaired to the court house to ascertain what amount Fields had paid on executions against Gatlin. Finding no evidence of any payments, or at least of but small outlays, Gatlin forbade Hurst to pay anything to Fields, and insisted that, as no out-

lay had been made by Fields, Hurst should make payment to him and take title from him. Accordingly, Hurst did so, paying then the first note, and subsequently the second one, and took title from Gatlin and also a quit-claim deed from Kelly.

Afterwards, learning of these transactions, Fields threatened to seize the negro woman, and began suit on the notes of Hurst. To prevent Fields from collecting this money of Hurst, and to compel him to deliver up further claim to the land, Gatlin, in February, 1860, filed his bill in the Court of Equity for Darlington, and sued out an injunction. To this bill, strange to say, Fields made no answer until August 31st, 1868. During this interval, at various and sundry times, he obtained leave for further time in which to answer, the injunction in the meantime remaining of force, with not an effort to dissolve the same.

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*The version of the contract given by Gatlin in his bill was strongly supported by affidavit of Jacob Kelly, Hurst, James Kelly, a Mr. Lee, a magistrate who drew the papers, and others. These facts, of course, are not evidence in this cause, and are only stated in narration of the course of litigation. In this answer to the bill, Fields gives his version of the contract and dealing of the parties, and avers that he bought and owned the $800 note of Jacob Kelly, and had settled in full with Gatlin and passed receipts, and that he was the sole and rightful owner of the negro woman and of the notes of Hurst, which had been wrongfully paid to Gatlin. Also, that he had perfect title to the land, having the sheriff's deed and also a quit-claim deed from Jacob Kelly. [Perhaps it is a mistake in me to say that Hurst had a quit-claim deed from Kelly.]

The cause stood thus on the docket of the Court of Equity, without a hearing, until 1871, when it was striken off. No further proceedings were had in relation to this contention until September, 1875, when, John Gatlin having died, Matchet Fields began this action against Samuel F. Hurst and the other defendants, some of them having, perhaps, been added by amendment. It should be here remarked that the defendant Harris purchased his part of the land from Hurst in 1862, and that Grantham bought his at some sheriff's sale—exactly when I don't discover from the answer or testimony. On January 8th, 1880, Grantham also took title from Fields, for $100, to his part, and on the same day Harris also took title from Fields for $500; and they, having also titles from all other claimants, are no longer concerned in the litigation.

Running over narration, the cause came on to be heard before his Honor, Judge C. P. Townsend, at the February Term, 1877, of this court, when judgment turned upon a technical issue—statute of limitations—and, being appealed from, was reversed by the Supreme Court and a new trial ordered. See 9 S. C. 277. The cause was then referred to J. J. Ward, Esq., as special referee, to hear and determine the issues of fact and of law. He heard the cause and non-suited the plaintiff. The plaintiff appealed to the Circuit Court, and Judge Pressley held that the appeal should have been directly to the Su-

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preme Court, but he recommitted it *to the referee with directions, if he saw proper, to give the plaintiff a rehearing.

The referee, after argument heard, granted a new trial and gave judgment for the plaintiff. To this the defendants excepted, and the case on exceptions was heard by Judge Kershaw, who, on August 1st, 1882, rendered his decree, in which, after passing upon various technical matters, he recommitted the case to the referee to ascertain the state of the accounts between Fields and Gatlin, holding, in effect, that Fields held the notes of Hurst in trust for Gatlin, as an indemnity to the said Fields for all moneys due him under the contract of 1858, and in trust to pay the balance to Gatlin. He orders the unsold part of the land to be sold to pay the balance so found to be due to Fields, if any, unless by a given day Hurst should pay the same.

This reference was accordingly held, and, after much testimony, the referee stated the accounts and reported a balance due by Gatlin to Fields, on January 1st, 1860, of $1,218.04. With interest to November 16th, 1882, this amounts to $3,324.50. As a credit, he has allowed Hurst $225 for use of the land by Fields' tenants for the three years last past, which being deducted, leaves a net balance, November 16th, 1882, of $3,099.50. The $600 which Fields got from Harris and Grantham he refused to allow as credit to Hurst because these men had also paid Hurst or Gatlin for their purchases—the payment to sheriff being considered payment to Gatlin.

The contest before me turns upon the $800 note of Kelly's charged against Hurst, alias Gatlin, and the refusal of the $600 credit. The referee who heard this case is an intelligent lawyer, and his findings of fact are entitled to great weight. In fact, those findings must stand unless they are discovered to be unsupported by the testimony, or against its manifest weight. I have, therefore, put myself to the trouble of reviewing the testimony with much care after listening to the earnest comments thereon of the learned and able counsel engaged in the cause.

The foregoing full recital of the history of the litigation through all its stages from beginning to end, has been given in order to bring before us in prominent shape the points

at issue. To recite the testimony here would
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give to this judgment undue *length and tediousness. I shall be content here merely to give the impressions made upon my mind by a review of all the proceedings and pleadings and documents placed in evidence, and especially by the testimony of the living witnesses who, without objection, have been admitted to give testimony to the transactions with both the living and dead.

I conclude that the following facts are established either by undisputed testimony, or by the great weight of the evidence:

First. That John Gatlin, being in embarrassed circumstances, and wishing to relieve himself of his pecuniary troubles that were pressing him, sold his land with that view to Jacob Kelly, who bought on a credit, not knowing of the liens of outstandiing executions. To remove these liens and thus prevent impending sale, Gatlin transferred one of the Kelly notes of $800 to Matchet Fields, not for its value in money, but as a security to Fields for money which he agreed to apply to liens in the sheriff's office.

Second. Fields began to apply money to these liens, in the small and by part payments, so as to keep creditors quiet when impatience was manifest. Kelly, learning of the existence of these liens, and that Fields had one of his notes, very naturally became dissatisfied, and desired a rescission of the sale. It was then learned that Hurst would take Kelly's bargain off his hands.

Third. It was then arranged between Gatlin, Fields, Hurst and Kelly, that the trade with Kelly should be rescinded, and that Hurst should become the purchaser, at $2,575, of which $1,000 should be paid by delivering a negro woman, and the balance should be secured by the two notes as aforesaid, one for $825 and the other for $850. As Matchet Fields was the man with money, it was agreed that he should get title to the land; that to him should be given the title to the woman and the two notes of Hurst, and to the said purchaser of the land Fields' bond for titles should be given; that Fields should extinguish the executions in the sheriff's office, a part of which he had already made payments on upon the security of one of the Kelly notes. To secure and indemnify Fields for all moneys thus expended, he was to hold the title to the land and to the negro, and notes given by Hurst, with the under-
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standing and upon the trust and *confidence, that when Hurst should pay the money, Fields should retain sufficient to pay himself for his expenditures, and account to Gatlin for the balance. Should Hurst fail to pay, then Fields should look to the negro woman and the land for pay; and if sold, he should, out of the proceeds, first pay himself, and then account to Gatlin for the balance.

Upon these terms the contract was consummated, the notes of Kelly were surrendered, and the obligations of Hurst were substituted, and Fields proceeded accordingly to pay further sums on the executions. The note of Kelly he held, not as a purchase, but as an indemnity. Had he paid the cash to Gatlin for this note, as he claims to have done, it is certain that the proceeds would have been promptly and gladly applied by Gatlin to the executions in the sheriff's office, and would have extinguished a much larger amount of those liens than Fields did extinguish from beginning to end, both while he held the Kelly note and after he got the larger security from Hurst. I only mention this as one circumstance amid the many in the case—to say nothing of the testimony of witnesses—going to show that the Kelly note was not bought by Fields, but was held by him only as an indemnity.

I am constrained, therefore, by what I conceive to be the great weight of the testimony and evidence in the case, to hold that the referee erred in charging this $800 note against Hurst and Gatlin in this accounting, and it must be stricken out. This item being erased from the account, there is left on the first day of January, 1860, due by Gatlin to Fields, for money expended by him for said Gatlin, and the interest thereon, the sum of $362.12; and this amount corresponds with the sum which living witnesses say that Fields did expend for Gatlin, and which Gatlin, in his bill in equity, alleged as the amount. He there stated that it was not over $400. Of course the allegation of that bill, and the denials in the answer, are not testimony, nor were they received as such; but I merely mention the fact that the testimony of living witnesses and the account thus corrected, corroborate what is averred in that bill, and which Fields took eight years' time to deny.
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*Now, on January 8th, 1880, Fields received of Grantham, for part of this land, $100; and from Harris, for another part $500. The referee does not allow Hurst credit for this, chiefly because these men had paid either Hurst or Gatlin for their purchases, and because he did not think that the order of Judge Kershaw was broad enough to admit of such an item of credit. But it is manifest that whatever Fields realized out of the securities he held, viz., the land and the money obligations of Hurst, was that much payment of the outlay for Gatlin. Hurst is just as much entitled to have the proceeds of these sales by Fields to these men credited on his notes, or passed to the credit of the cestui que trust, Gatlin, as if the same had been realized from a sale of so much of this land under a foreclosure sale at the suit of Fields. This money must be entered as a credit in the account, as of the date January 8th, 1880.

Now, the sum of	$362 12
Int. from January 1, 1860, to January 8, 1880, is	508 00
Leaves due, January 8, 1880	$870 12
Deduct	600 00
Balance due, January 8, 1880	$270 12

Now, the referee has charged Fields with rent for 1880, '81 and '82, $75 per annum, which wants but little of extinguishing this balance.

Accurately estimated, the account will stand thus:

Balance, January 8, 1880	$270 12
Int. to January 1, 1881	18 50
	$288 62
Then paid	75 00
Balance, January 1, 1881	$213 62

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*Balance, January 1, 1881, (bro't forward.)	$213 62
Int. to January 1, 1882	14 95
	$228 57
Then paid	75 00
	$153 57
Int. to December 1, 1882	10 74
	$142 83
Then paid	75 00
Balance due to date of decree	$67 83

But when we consider that Fields, during the life-time of Gatlin, refused to come to a settlement, and refused to take the money from Hurst, when he and Gatlin went to him and offered to pay every cent he had laid out and expended; that he refrained from instituting this suit until Gatlin was dead; and lastly, that he took advantage of Hurst's removal from the county, and, ousting his tenants, wrongfully took possession of this land of Hurst, pending this action, we do not deem that he deserves the most liberal and tender consideration at the hands of the court. The referee has failed to consider these circumstances in his estimate of what Mr. Fields should pay for the use of a place wrongfully taken possession of pending litigation. Our estimate is, that the six hundred dollars and three years' use and occupation of the land, fully repays him for the $362.12 which he expended for Gatlin twenty-four years ago, and which, twenty-three years ago, he refused to receive from Hurst when he offered to pay it.

It is, therefore, the judgment of the court that the plaintiff, Matchet Fields, is entitled to demand and receive nothing from Samuel F. Hurst on the notes in suit. It is further adjudged and decreed, that the said Matchet Fields do deliver up to the said Hurst, or his attorneys, the said notes to be canceled; and that he do execute and deliver within thirty days from this date to the said Samuel F. Hurst a warranty title in fee-simple to all the said tract of land, except the parts

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conveyed to the defend*ants Harris and Grantham. It is further ordered, that each party, the said Fields and the said Hurst, pay the one-half the costs of these proceedings, and that possession of said land be delivered up to said Hurst by the first day of January next.

From this decree, plaintiff appealed to this court upon the following exceptions:

1. "Because his statements of the case are not supported by the facts and the evidence.

2. "Because the evidence does not support his Honor's finding as to the agreement between Matchet Fields and John Gatlin, and the finding of Judge Kershaw as to that agreement was the judgment of the court.

3. "Because it was error to overrule the finding by the referee that the Jacob Kelly note belonged to Matchet Fields, there being not only no overbearing testimony, but no testimony at all, to justify the finding of his Honor, while three living witnesses support the findings of the referee.

4. "Because there is not a tittle of testimony to support the finding of his Honor that Fields held this Kelly note as security for money laid out and to be laid out for Gatlin on executions in the sheriff's office, while the proof is abundant that Fields was the absolute owner of the note.

5. "Because it was error to use the ex parte statements accompanying the bill for injunction as evidence or corroboration of a theory on the facts—the bill only being introduced in evidence to show dates and the fact of injunction.

6. "Because it was error to allow Gatlin, or Hurst, the $600 which Fields got for his interest in the land sold to Harris and Grantham, Gatlin and Hurst having already received the full benefit of the sale of their entire interest therein.

7. "Because upon his Honor's own estimate there is a balance due Fields sufficient to carry costs, and it was error to adjudge nothing to Fields and half the costs against him.

8. "Because there is no evidence that Fields commenced this action after the death of John Gatlin, or that he, Fields, ever refused settlement with Gatlin, or was in any way derelict. And there is no evidence that

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Fields wrongfully possessed himself of *the land in controversy, or ever got any benefit from it, but improved it.

9. "Because, if the contents of the bill of injunction was to be used at all, as it sought discovery, Fields' answer, being responsive to the bill, was conclusive until disproved by two witnesses."

Mr. B. W. Edwards, for appellant.

Messrs. Boyd & Nettles, contra.

February 19th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. [Omitting his statement of the case, which is fully stated in the Circuit decree.] In addition to the foregoing exceptions founded upon the decree of Judge Hudson, at the hearing of this appeal appellant's counsel undertook to review the decree of Judge Kershaw, claiming it to be an interlocutory or intermediate decree, and subject to review upon appeal from the final decree, citing Hyatt v. McBurney, 17 S. C. 143. And the appellant's counsel, in his argument, also raises and discusses the question, "Whether his Honor did not err in hearing the case on the exceptions taken to the referee's report." It is true this point was made below and, when overruled, was excepted to, but in the notice and grounds of appeal, this exception does not appear. It is a well-established rule that to authorize this court to consider any question on appeal, it must be made in some form, one of the grounds of appeal, and must be brought before us in some definite and distinct shape. It will not do simply to except below, but the question must be presented in the grounds, or exceptions brought up to this court, otherwise this court cannot know but that it has been abandoned, nor can the opposite party be expected to meet it. This question then not appearing in the grounds of appeal, we are not at liberty, under the rule referred to, to consider it, whatever may be the merit therein.

The same may be said as to the attempt to bring under our review the judgment of

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Judge Kershaw. No doubt this decree *was an intermediate decree. It was certainly not a final decree, and might have been made the subject of review here upon this appeal from the decree of Judge Hudson, which was a final decree, if it had been excepted to specifically or by specifying the grounds of error, if any, in the exceptions by which the case has been brought here; but this the appellant failed to do. There is no error alleged in the decree of Judge Kershaw except in the argument, nor have any exceptions thereto or notice of intention to appeal therefrom, ever been filed. It was too late at the argument. Cleveland v. Bryant, 16 S. C. 635; Pringle v. Sizer, 7 S. C. 134.

This brings us to the exceptions proper. The first, fifth, eighth and ninth are not very material. They do not affect the real questions involved, nor do they raise any question themselves necessary to be determined. The first is entirely too general, and is obnoxious to the same objection which the appellant made to the exceptions to the referee's report, and which he failed to pursue. The fifth and ninth refer to the use that was made of the bill in equity, &c. The judge in his settlement explains this satisfactorily. It seems to have been introduced in evidence by the appellant's counsel for a certain purpose and the judge says its use was confined to that purpose. The eighth seems to us wholly unimportant.

The appeal then must turn on the second, third, fourth and seventh exceptions. The second exception suggests a conflict between Judge Kershaw and Judge Hudson, as to the agreement between Fields and Gatlin. We do not see this conflict. It was held by both of the judges in effect, that Fields was a trustee holding the notes of Hurst as an indemnity until he was re-imbursed; Judge Kershaw said, for all his payments and expenditures on account of Gatlin; Judge Hudson said that Fields was to be re-imbursed for any outlay of money on his part in paying up and extinguishing the liens in the sheriff's office; but both seemed to understand that the $800 note, over which the most serious contest took place, was to be considered, and Judge Hudson did not exclude this on the ground that it was not one of the matters which, even though valid, could not be allowed under the agreement, because not one of the debts of Gatlin,

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*which Fields was to pay off; but he excluded it on the ground that the testimony failed to show that Fields had ever advanced money to Gatlin for said note. According to his idea, Fields held this note as an indemnity for moneys to be advanced for Gatlin on his debts, and that the Hurst notes were substituted in its stead when Kelly rescinded his trade and Hurst took his place as purchaser. So there is really no conflict between the two decrees on that subject.

The third and fourth exceptions raise substantially the same question, and that is whether the finding of the referee as to the $800 note should have been disregarded and overruled by the judge. When Judge Kershaw heard the case, after determining the principles upon which the contest should be decided, he recommitted the matter to the referee, Mr. Ward, to ascertain and report the balance due, if any, by the defendant Hurst upon his notes given for the purchase of the said land, after allowing the credits to which he is entitled under the agreement as adjudged by him. It will be observed from the recital of the substance of Judge Kershaw's order, that nothing but the finding of a certain matter of fact was referred to Mr. Ward, to wit, the balance due on Hurst's notes, after allowing the credits to be established. There was nothing for Mr. Ward to do but to ascertain the credits, and to deduct them from the notes. This involves nothing more than questions of fact.

Now, it is provided in the code, that when nothing more than a question of fact is referred to a referee, in such case his finding and report becomes a special verdict, or, rather, in the language of the code: "The report shall have the effect of a special verdict." Lynch's Code, § 296. Where the whole issue is referred, the report then

stands as a decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court (Ibid.), subject to be reviewed on appeal under the provisions of section 292 Lynch's Code. To what court this appeal must be carried, in the first instance, is not now involved. But the report of the referee upon an issue of fact referred to him becomes a special verdict, and being a special verdict it is subject to be set aside, for any of the causes for which verdicts may be set

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aside, and the action of the judge in *reference to such a case, so far as this court is concerned, must be considered as in any other case where verdicts are vacated and a new trial ordered.

These provisions of the code, however, are understood to apply especially to referees appointed under the code in actions at law, and not to referees appointed in equity causes. These latter are governed by a different rule: the rule which prevailed under the old chancery practice, where cases were referred to the master, an officer of the court, or to a referee, or sometimes to a jury, to assist the court, and for its information. The case before us is an equity case. It is substantially for specific performance, a case of equity cognizance, and must be governed by the rules established in this court in the various decisions upon subjects of this character, all of which are found cited in the "note of the reporter" in 12 S. C., p. 609. And it belongs to that class where there is a difference between the judge and the referee upon the facts. In such case, this court will examine the decree, and either adopt or reject it, as the facts may warrant, to the same extent as a Circuit judge passes upon the report of the referee. The question, then, is an open question uninfluenced by the previous findings, and free from the operation of the rule adopted in other cases, that said finding will not be disturbed unless there is an absence of all testimony to support it, or the evident and overwhelming weight thereof is the other way.

Coming to the examination of the question of fact as to the $800 note as an open question, dependent entirely upon the force and effect of the testimony, we are constrained to support the finding of the referee. The question as to this note was, Did Fields advance the money to Gatlin for that note, or was it placed in his hands as an indemnity for such sums as Fields might thereafter pay for Gatlin? The testimony of the plaintiff Fields is positive upon this subject. He states, unqualifiedly, that he paid Gatlin the full amount of this note. His son, P. G. Fields, swears that he wrote the indorsement on the note by which it was transferred to Fields; that this indorsement was witnessed by himself and one Jesse Walker; that Gatlin told him that he owed his father the note and a great deal more. Jacob Kelly, the maker of the note, knew

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the fact that Fields *had become possessed of this note very soon after he had executed it to Gatlin, and on that account, in part, he became dissatisfied with the trade. He did not want Fields to have this note upon him, and he had charged Gatlin not to let Fields have it.

Now this is all the testimony that bears directly on the note. It is true that the character of Fields was assailed, not, however, with entire success. Three out of thirteen witnesses would not believe him on his oath, but six of the same thirteen would; but then there is no doubt that the note was indorsed to and delivered by Gatlin to Fields. He thus became the legal owner, with all the presumptions in his favor. These all seem too strong to be overturned by the theory of the defense worked out of circumstances not entirely pertinent to the question at issue. We think the preponderance of the testimony is with Fields, and that he should have been allowed this note on the computation of his claims against Gatlin.

We sustain the finding of the judge as to the credit of the $600 received by Fields from Harris and Grantham. The intent and purpose of the transaction in reference to the land was to indemnify and secure Fields, and whatever he received therefrom should redound to the credit of Gatlin. Harris and Grantham, after they had purchased from Hurst and Gatlin, found it necessary to pay Fields this $600 to obtain good titles. Fields has no claim to this except as a benefit to Gatlin. He had no interest in the land except through Gatlin, and whatever he received was really for Gatlin, and he should account for it in a settlement with Gatlin, which settlement the court ordered the referee to make. If Harris and Grantham purchased from Hurst and Gatlin on a mistake as to the title, and the consideration has failed, they may possibly have a claim against Hurst and Gatlin to be re-imbursed; but this does not release Fields from the necessity of accounting for the amount received by him.

We do not see upon what testimony the judge decreed that Fields was entitled to nothing, and that he should be dismissed with one-half of the costs of the proceedings. After throwing out the $800 note, and charging Fields with the $600 received from Harris and Grantham, the itemized accounting,

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as appears *in the decree itself, brought Gatlin in debt $67.83. (This amount should have been $89.31, as clearly appears from a mistake in the calculation of deducting the interest instead of adding it.) This balance is then expunged, upon the general statement that the $600 and the use of the land

had sufficiently repaid Fields for the $362.12 found by the referee in his favor; yet the $600, and $75 per annum for three years' use of the land, had already been deducted from the $362.12 and interest, leaving this balance of $89.31 unpaid. The judge thought from the testimony that Fields had wrongfully taken possession of the land, and that the referee had not given sufficient consideration to this fact in estimating the value of the use and occupation of the land. This may be so; but this was not sufficient, as it appears to us, without further examination and testimony, to bring the parties exactly even, or to warrant a judgment that Fields was entitled to nothing.

I think upon the testimony that Fields should be allowed the $800 and interest; that his claims against Gatlin should be credited with the $600 received by him from Harris and Grantham, and that he should have judgment for whatever sum may then be found due, and that he should have his costs; and to this end that the judgment below should be reversed, and the case remanded to the end that a judgment in accordance herewith may be pronounced.

Mr. Justice McIVER. While I agree with the Chief Justice as to the other questions made in this case, I do not think the evidence is sufficient to warrant us in reversing the conclusion reached by the circuit judge as to the Kelly note for $800, and, on the contrary, think his conclusion is supported by the preponderance of the testimony.

There can be no doubt that the notes of Hurst were given to Fields, not as evidences of any debt due by the former to the latter, but simply to indemnify Fields against certain claims which he had against Gatlin. The burden of proof was, therefore, upon Fields to establish such claims. It was incumbent upon him to show that the note in question—the Kelly note—had been bought by him, and had thus become his absolute

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*property, and was not held by him merely as indemnity. Upon this point, as, indeed, upon almost every other point involved in this controversy, the evidence was conflicting, and when this is the case, as we have held in Maner v. Wilson, 16 S. C. 470, the conclusion reached by the circuit judge, even though adverse to that reached by the referee, must be regarded as prima facie the correct conclusion.

It does not appear distinctly when the plaintiff claims to have bought the Kelly note from Gatlin. The plaintiff, at one point in his testimony, says that he bought this note about twelve months before the transaction with Hurst, which, from the date of the Hurst notes, must have been on September 8th, 1858. At another place he says: "Bought the note in the latter part of '58 or first of '59, when the papers were fixed between him and Gatlin." P. G. Fields, the son of the plaintiff, says in his testimony that the note was indorsed by Gatlin to his father on April 18th, 1858, and that "witness and Jesse Walker were witnesses to the indorsement." This witness, when previously examined, fixed the date of the transaction between his father and Hurst at April 18th, 1858.

All of the witnesses, on both sides, agree in one thing—that when the transaction between Fields and Hurst took place, out of which the present controversy arises, the trade previously made between Gatlin and Kelly was rescinded, and Kelly's notes, given for the purchase-money of the land, were then surrendered to him; but there is no little conflict as to what occurred between the parties at the time. According to the testimony of the defendant Hurst, and his witness Lee, nothing was said by Fields when he surrendered the note which he had previously held on Kelly about his having bought the note, or about his having any absolute claim to it, although the plaintiff did, when last examined, claim to have mentioned the fact at that time. Nor does it appear that Fields set up any claim to have been the absolute owner of the note in question when the first note of Hurst fell due, and James Kelly, as the friend of Gatlin, with others, went to Fields for the purpose of having a settlement of what Gatlin might be due Fields. It seems, too, that Fields paid the largest judgment against Gatlin on

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October 22d, *1857, whether before or after the time he claims to have bought the Kelly note from Gatlin, his own testimony, and that of his son, leaves it doubtful, though it was certainly some time before the transaction with Hurst, and before the date (April 18th, 1858), fixed by his son.

It seems to me that the plaintiff's case rests entirely upon his own testimony, and upon that of his son; for according to my understanding of the matter, the testimony of Jacob Kelly affords no support whatever to the claim of the plaintiff. He only proves what is conceded on all sides—that Fields had one of the notes which he had given to Gatlin to secure the payment of the purchase-money of the land. He says: "From time I made bargain, I heard Fields was to get my notes. I charged Gatlin not to let him have them. He went and let Fields have one of my notes. * * * Gatlin went and left one of my notes with Fields." Now, when it is remembered that the character of Fields was, to say the least of it, proved to be not above suspicion; that he was an interested witness, testifying as to transactions with one whose mouth was closed by death; that his testimony was marked by numerous contradictions and inconsistencies, it is difficult to rest with confidence upon his statements, especially when contradicted by other wit-

nesses of unimpeached character, some of whom are entirely disinterested, and when his statements are contradicted by the probabilities of the case.

If, as he alleges, he was the absolute owner of the Kelly note, it is scarcely credible that he would have surrendered it without taking something definite in its place. Why was it that he did not require from Hurst one note for the exact amount of the Kelly note, to say nothing of the fact that, as testified to by two witnesses, he did not even claim at that time to be the absolute owner of the Kelly note? Gatlin's object in selling the land seems to have been to get released from the pressure of judgments then subsisting against him; and why should Fields pay him $800 in cash, a sum, as the event has proved, more than sufficient to satisfy all the judgments against him, and, at the same time, undertake to satisfy such judgments? If it be true that Fields paid Gatlin in cash for the note, what security did Fields then have to indemnify him against any amounts that

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he *might thereafter pay for Gatlin, to say nothing of the judgment for nearly $200 which he had then paid, or which he, at least, paid before the transaction with Hurst? If Fields paid the judgment for $195.12 in favor of Moses & Haynesworth v. John Gatlin, before he got the Kelly note, it is scarcely conceivable that he would have paid Gatlin the face of the note in cash, as he says he did, without deducting the amount thus paid. But if he paid such judgment afterwards, then, according to his version, he held no indemnity whatever; and yet, when the transaction was made with Hurst, he seems to have required the most ample indemnity. Such conduct is entirely irreconcilable with all the probabilities of the case.

The inevitable inference from all the facts and circumstances of the case is that the Kelly note for $800 was originally "left" with him (to use Jacob Kelly's expression) as an indemnity against any amounts which he may then have paid or might thereafter pay for Gatlin; and that when it was agreed to rescind the land trade which Gatlin had made with Kelly, this note, together with the other notes of Kelly, were surrendered; and the notes of Hurst, together with the title to the negro woman, were given to Fields as a substitute for such indemnity. This, at least, is the version of the only really disinterested witness to the transaction—one in whom all the parties seem to have had confidence, as he was called upon to draw the papers.

I think it is a mistake to say that there is no doubt that Gatlin indorsed the Kelly note to Fields, who thereby became the legal owner, with all the presumptions in his favor; for, while this fact is testified to by P. G. Fields, the son of the plaintiff, it is contradicted, not only by Hurst but also by Lee, who is an entirely disinterested witness, so far as the issues in this action are concerned, and who, being a surety on the note, would, most likely, have examined it very closely. Then, too, the account which P. G. Fields gives of the manner in which such alleged indorsement was made is, to say the least of it, very extraordinary; and the failure to produce the testimony of Jesse Walker, alleged to have been the other witness to this rather unusual proceeding, who does not appear to

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have been in any *way interested or connected with any of the parties, to prove this fact so important to the plaintiff's claim, is not without significance.

Without going into a minute discussion of the testimony, but after a full and careful consideration of all the facts and circumstances of the case, I am unable to see any sufficient ground for reversing the judgment of the Circuit Court as to the Kelly note. But, as is shown in the opinion prepared by the Chief Justice, there is error in such judgment upon another point, I think the judgment of this court should be that the judgment of the Circuit Court be reversed and that the case be remanded to that court with instructions to render judgment in favor of the plaintiff against the defendant, Samuel F. Hurst, for the sum of $89.31, together with interest thereon from the date of Judge Hudson's decree, and the costs of this case; and that unless the same be paid within a time to be limited in such judgment, then the lands described in the complaint, except such as have heretofore been conveyed to the defendants Grantham and Harris, be sold at such time and on such terms as the Circuit Court may prescribe, and the proceeds be applied first to the payment of the costs of this case, together with the expenses of such sale, next to the amount herein ascertained to be due to the plaintiff, and the balance, if any, be paid over to the defendant, Samuel F. Hurst.

Mr. Justice McGOWAN. I concur with the Chief Justice, except as to the Kelly note; but as to that, I agree with Judge McIVER. I think the claim that Fields paid cash for the note is inconsistent with the whole course of business between the parties.

Judgment reversed.

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20 S. C. 302

McLUCAS v. DURHAM.

(April Term, 1883.)

[1. *Partnership* ⇐311.]

A partnership was dissolved by written agreement, one of the partners, M., taking all the assets and assuming to pay all the debts. At the time, there appeared upon the books certain deposits to the credit of one E., and also

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*an indebtedness by E., the balance in his favor

being $700, and such balance was understood by the three partners to be the real indebtedness of the firm to E. But these deposits by E. having been of trust funds, judgment was recovered against the three partners for the full amount thereof, with interest. In action by M. against the other partners for contribution, E. being insolvent, *held*, that M. was liable for $700 of this judgment, and the three partners jointly for the balance. Mr. Justice McGowan, dissenting.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 724; Dec. Dig. ⟸311.]

[2. *Reformation of Instruments* ⟸17.]

[Cited in Knight v. Jackson, 36 S. C. 18, 14 S. E. 982, where mistake is shown by satisfactory proof equity will reform a written contract to conform to the intent of the parties.]

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 69–71; Dec. Dig. ⟸17.]

Before Kershaw, J., Marion, June, 1882.

This case is stated in the Circuit decree as follows:

This case was heard upon the testimony taken by the referee and the arguments of counsel. The following is a statement of the facts as I find them to be:

On September 1st, 1868, Solon A. Durham, William Evans and the plaintiff, John D. McLucas, entered into a copartnership for the transaction of mercantile business in the town of Marion, in the said State, under the name of S. A. Durham & Co. At several dates during the year 1869, while the copartnership continued, one Asa L. Evans deposited with the said firm the sums of money specified in the complaint, to wit: April 26th, $450; and June 22d, $1,076.51, and received therefor certificates of deposits from the firm, in the firm name, written by the plaintiff and signed by the defendant, S. A. Durham, acknowledging the deposit in each case and stating that the same should bear interest at the rate of seven per cent. per annum and be subject to the draft of the said A. L. Evans at three days' notice. At the time of these deposits the rate of interest prevailing for the loan of money was something like twenty per cent. On March 11th, 1872, the said Asa L. Evans let the firm have the further sum of $1,000, for which he received the note of the firm payable July 1st, after date, to the order of said A. L. Evans, at Marion Court House, with interest from date at one per cent. per month.

During the existence of the copartnership, the plaintiff was the bookkeeper, and S. A. Durham and he were the managers of the business. William Evans took no part in conducting it.

On February 1st, 1873, the firm was dissolved, the plaintiff purchasing the interests therein of the other partners, assuming all the liabilities of the firm and receiving an

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assignment of all *the assets belonging to the same. This contract was by deed of indenture executed between the parties, a copy of which is attached to the answer of the defendant, Durham.

At various dates during the existence of the copartnership and up to the dissolution, Asa L. Evans and the firm of Evans & McRae, of which he was a member, drew money and bought goods on a credit, of the said firm of S. A. Durham & Co., to a considerable amount; so that, at the time of the dissolution, it was estimated by the plaintiff that he owed the firm within $700 of the amount due on the said note and certificates of deposit, and a statement was made out for the purpose of informing William Evans of the condition of the business with a view to the purchase of his share by the plaintiff, and the aforesaid contract of dissolution showing that the liability of the firm to said A. L. Evans was only $700.

The money deposited with the firm by A. L. Evans belonged to the estate of one Samuel F. Gibson, of which A. L. Evans was the administrator, and this fact was known to the plaintiff at the time of the deposits. Asa L. Evans, in accounting with said estate, turned over the said note and certificates of deposit as assets of the same, and a judgment was obtained after the dissolution of the firm, against all the members thereof in an action brought upon those instruments by the then clerk of the court, suing for the benefit of said estate, under the direction of the court. To the said action the accounts and liabilities of the said Evans and Evans & McRae due to the said firm were pleaded as a discount or counter-claim.

The jury allowed the discount to the amount of the note and interest and found a verdict for the plaintiff to the amount of the said certificates of deposit and interest, and judgment was entered accordingly for the sum of $2,362.47. A. L. Evans was then insolvent and had been since 1873. After the dissolution of the firm, William Evans died, and the defendant, John G. Blue, administered on his estate. Plaintiff claims to be placed in the same position as if the entire discount set up against the claims of A. L. Evans had been allowed, which would entitle him to have the defendants contribute to the payment of the judgment equally with him. There was no distinct agreement between A.

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*L. Evans and the firm that his account and that of Evans & McRae should be allowed as a discount against the said deposits, but the plaintiff, and the defendant S. A. Durham, supposed and believed, at the time of the dissolution, that they would be so allowed as discounts, and the statement exhibited to William Evans was based upon that assumption, and he sold his interest upon that basis. They were all equally mistaken in this belief and there were no circumstances of fraud, misrepresentation, concealment or deception upon either part.

Upon these facts I conclude as matter of law that the plaintiff is not entitled to the relief demanded. I add here my reasons for these findings and conclusions, so far as I deem necessary. One of the grounds upon which the plaintiff claims relief is the want of notice of the trust affecting the money deposited; that S. A. Durham had notice and did not communicate the same to him; that it was Durham's duty to inform him and his failure to do so led to his assumption of a liability in his contract of dissolution far in excess of that he supposed he did. If there had been such concealment, plaintiff's case would have been very strong against Durham. I have been constrained to find that plaintiff had notice of the trust. He seeks to avoid the effect of his contract of dissolution and purchase on the ground of mistake superinduced by the concealment of a fact by one of the copartners which it was the duty of the latter to communicate.

The affirmative and burden of proof is upon him. The testimony which he has produced to sustain this allegation of want of notice is overcome, or at least neutralized, by the testimony of A. L. Evans and S. A. Durham. A. L. Evans is disinterested and says in his testimony that he thinks the plaintiff was notified—"had no doubt of it." Durham, having no greater interest than plaintiff, testifies positively that plaintiff was informed that the money deposited belonged to the Gibson estate. Durham and plaintiff are equally credible and respectable witnesses. I am, therefore, compelled to find against the plaintiff on the ground of notice. There were some circumstances tending to corroborate the one and the other of them, but not enough to cast the beam on the side of the plaintiff.

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*The question of law presented is, whether upon the facts found the mutual mistake of the parties is of such a character as to entitle the plaintiff to relief. It cannot be said to have been a mistake as to any fact existing at the time of the contract of dissolution. It was rather an erroneous opinion as to what would be the result of the transactions between the firm and A. L. Evans. It was a mistaken estimate as to the profits or advantages to accrue to the plaintiff, from the purchase shared in good faith by all the parties. They might all have believed that they had a valid discount to the amount claimed, which could be maintained in law, notwithstanding their notice of the trust. If so, it was a mistake as to the legal effect of the transactions.

The general rule (as is well known) is that mistakes of law furnish no ground for relief in equity, since all are presumed to know the law. 1 Story Eq., § 137. And the exceptions are said to be few in number and to have something peculiar in their character. Hunt v. Rousmaniere, 1 Pet. 15 [7 L. Ed. 27]; Bank of United States v. Daniel, 12 Pet. 32 [9 L. Ed. 989]. In this State it has been supposed that there has been a departure from the rule, and that courts of equity will relieve against clear mistakes of law. Lowndes v. Chisolm, 2 McCord Eq. 455 [16 Am. Dec. 667], has been cited at bar to establish this. But there Judge Colcock, who delivered the opinion, appears not to have gone further than to say that there are cases of mistakes in law in which the courts will grant relief, but he admits the general rule to be otherwise. He seems to rest that case upon the doubtful condition of law of mortgages after the acts of 1791 and 1797.

In the latter case of Keitt v. Andrews, 4 Rich. Eq. 349, the executor and the legatees had agreed upon the settlement of an estate, and had actually settled upon the basis of an erroneous construction of a will. The error was mutual, and there was no circumstance of fraud, management or undue influence. The court refused to relieve against the settlement. Like this case, the error there was rather an error of opinion as to the legal effect of the transactions than a mistake either of fact or law. It seems to me that the plaintiff could with as much reason claim relief if any assets of the firm, estimated to

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be good at the time *of the dissolution, had since been ascertained to have been bad at that time, as demand it in this case. It is a case of hardship, but it will not do to make the defendants share it under the circumstances.

It is, therefore, adjudged that the complaint be dismissed, and that the plaintiff pay the costs herein, to be adjusted by the clerk and inserted in the judgment, and that the defendants have execution therefor.

This case came to this court upon the following exceptions: Because his Honor erred in holding: "1. That there was no distinct agreement between A. L. Evans and S. A. Durham & Co., that his accounts and the accounts of Evans & McRae should be allowed as discounts against the certificates of deposit and the note. 2. That the plaintiff had notice that the money received by S. A. Durham & Co. from A. L. Evans, for which the certificates of deposit and note were given, belonged to the estate of S. F. Gibson. 3. That the defendant S. A. Durham was not chargeable with a failure to communicate his knowledge of the trust attaching to the money received from A. L. Evans to the plaintiff, his copartner. 4. That there was no 'mistake as to any fact existing at the time of the contract of dissolution,' when it is admitted on all hands, that no liability to the estate of S. F. Gibson was embraced in the statement upon which the contract was based, nor contemplated by any of the parties to the contract. 5. That the mistake in this case is not of such a character as to warrant the court in relieving the

plaintiff from the hardship it entails. 6. Because his Honor erred in not holding that the plaintiff and the defendants should contribute equally to the satisfaction of the judgment in favor of the estate of S. F. Gibson against the members of the late firm of S. A. Durham & Co."

Mr. C. A. Woods, for appellant
Mr. W. W. Harllee, contra.

February 28th, 1884. The opinion of the court was delivered by

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*Mr. Justice McIVER. On February 1st, 1873, John D. McLucas, S. A. Durham and William Evans entered into a written agreement for the dissolution of a mercantile copartnership under the name of S. A. Durham & Co., which had existed since September 1st, 1868, a copy of which is set out in the "Case." One of the terms of said agreement was expressed in the following words: "The said J. D. McLucas further assumes all the liabilities incurred by the said firm of S. A. Durham & Co. since September 1st, 1868, and hereby obligates himself to pay and discharge said debts and liabilities out of the proceeds of the choses in action of the said firm, hereinafter transferred to him, and to use all due and proper diligence to raise money by means of said choses in action, and to apply it promptly, when collected, to the payment of said debts of said firm herein assumed by said McLucas."

One of the liabilities of the said firm, as it appeared on their books, was a balance due to A. L. Evans, amounting to $700, which arose in this way: the said A. L. Evans, at different times, deposited with the said firm of Durham & Co. considerable sums of money, which were credited to him individually on the books of said firm, and contracted large accounts upon the faith of such deposits; and the balance above mentioned was the difference between the amount of such deposits and the amount of the accounts due by him. There can be no doubt that when the agreement for dissolution was entered into, all the parties based their action upon the condition of the firm as shown by the books, and by a balance-sheet taken from the books and shown to William Evans, who does not seem to have been an active partner, and was not so familiar with the condition of the business of the firm, or with the books of the concern, as the other two partners, who had had the principal management of the business.

It turned out that the money deposited with the firm of Durham & Co. by A. L. Evans was not his own money, but belonged to the estate of Gibson, of which he was the administrator, though the money was deposited to his individual credit and not in his representative character, and there was nothing whatever on the books of Durham & Co. to indicate that such money be-

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longed to *the Gibson estate, or that the firm was in any way indebted to said estate. Some time after the agreement for dissolution was entered into, A. L. Evans was required to turn over to the clerk of the court the certificates of deposit as part of the assets of the estate of Gibson, and an action was brought by him against S. A. Durham & Co. to recover the amount of such deposits, in which they attempted, unsuccessfully, to set up as a discount the amount of their claims against A. L. Evans; and judgment was recovered against said Durham & Co. for the sum of $2,362.47, the amount of said certificates of deposit with interest. The object of this action is to require the defendants to contribute their ratable proportion to the payment of said judgment, upon the ground that the liability thus judicially ascertained against S. A. Durham & Co. was not one of the liabilities which the plaintiff had assumed to pay under the agreement of dissolution.

The Circuit judge found as matter of fact that the plaintiff, as well as the defendant Durham, did have notice of the trust character of the money deposited with the firm by A. L. Evans; that, though there was no distinct agreement between A. L. Evans and the firm that his accounts should be allowed as discounts against the said deposits, yet "the plaintiff and the defendant S. A. Durham supposed and believed at the time of the dissolution that they would be so allowed as discounts, and the statement exhibited to William Evans was based upon that assumption, and he sold his interest upon that basis. They were all equally mistaken in this belief, and there were no circumstances of fraud, misrepresentation, concealment or deception upon either part." And as matter of law he found that the plaintiff was not entitled to the relief demanded, and he therefore rendered judgment dismissing the complaint.

Accepting as correct the conclusions of fact reached by the Circuit judge, (inasmuch as there was a conflict of testimony, and it cannot be said that such conclusions are without any evidence to support them, or are manifestly against the weight of the testimony,) the only question remaining for us to decide is, whether, upon the facts so found, the plaintiff, as matter of law is entitled to relief. It is clear, from the facts as found, that the parties never intended that the plaintiff should assume the payment of

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*any debt to the estate of Gibson, for none of them knew of any such indebtedness at the time of the dissolution. It is equally clear that they all assumed that the amount of the indebtedness of the firm to A. L. Evans was only $700. The books showed no indebtedness whatever to the estate of Gib-

son, and only showed a balance of $700 due to A. L. Evans. It is manifest, therefore, that if the Circuit decree stands, the plaintiff will be required to pay some $1,600 more than he understood he was assuming to pay, and that much more than the other parties understood that he was assuming to pay. How, then, can it be said that the minds of the contracting parties ever meet upon such a result? And this is an essential ingredient in every contract.

It is true that the terms of the written agreement, by which the plaintiff assumed the payment of the debts of S. A. Durham & Co., are very comprehensive. "All the liabilities incurred by the said firm of S. A. Durham & Co. since September 1st, 1868." And if it stood alone, might be sufficient to embrace any debt, whether known or unknown, of the said firm. But the testimony leaves no doubt of the fact that such agreement was based upon the condition of the firm as shown by the books, or by the balance-sheet taken from the books. The plaintiff, in his testimony, says: "My assumption of the liabilities of the firm was based upon the statement [the balance-sheet] referred to above." Durham says: "Had a general idea of the books, my capital in the concern, and my liability to the firm; upon this I based my offer to McLucas." Certainly the balance-sheet was exhibited to William Evans before the agreement for dissolution was entered into, as he, not being an active partner, had no other means of ascertaining the condition of the concern; and such is the testimony. There is as little doubt that all parties understood, at the time the agreement was entered into, that the accounts of Evans were to be discounted against the amount of his deposits. This the Circuit judge has found as a fact, and that William Evans sold his interest with that understanding.

These facts being established "by proofs entirely satisfactory," equity will perform the written contract so as to make it conform to the precise intent of the parties. As is said in 1 Story Eq. Jur., § 152, "Sometimes, by mistake, the written agreement con-

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*tains less than the parties intended; sometimes it contains more; and sometimes it simply varies from their intent by expressing something different in substance from the truth of that intent. In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties." Applying this doctrine to the case in hand, the agreement for dissolution should be regarded as binding the plaintiff to assume the payment of the debts of S. A. Durham & Co., as they appeared upon the books of that concern, or upon the balance-sheet taken from the books; and, inasmuch as no debt there appeared to be due the estate of Gibson, and only a balance of $700 due to A. L. Evans, the plaintiff cannot be held to have assumed any liability to the estate of Gibson, beyond the balance there appearing to be due to A. L. Evans, which, in reality, inures to the estate of Gibson.

The result, therefore, is that the judgment of the Circuit Court should be reversed, and that judgment should be rendered that the plaintiff pay the sum of $700 and interest on the judgment recovered by R. K. Clark as clerk of the Court of Common Pleas for the county of Marion against S. A. Durham, John G. Blue, as executor of the last will and testament of William Evans, deceased, and John D. McLucas, for the sum of $2,362.47, and that the plaintiff and the defendants herein are equally liable for the payment of the balance due on said judgment.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court with instructions to render judgment in accordance with the views herein announced.

Mr. Chief Justice SIMPSON, concurred.

Mr. Justice McGOWAN, dissenting. I have not been able to concur with my brethren in this case, and I think its importance requires that I should make a short statement of the grounds of my dissent. The facts are so fully and carefully stated in the Circuit decree, that it is not necessary to do

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more *than give in general terms the relations of the parties and the character of the issue.

Solan A. Durham, John D. McLucas and William Evans did a mercantile business at Marion under the name and style of "S. A. Durham & Co." Durham purchased the goods, made sales and was generally the active member, McLucas was the bookkeeper, and Evans took no active part in conducting the business. During the year 1869, one Asa L. Evans, who was the administrator of the estate of one Gibson, and member of another mercantile firm known as "Evans & McRae," deposited with the firm of S. A. Durham & Co., money which he had in his hands belonging to the estate of Gibson, viz., on April 26th, $450, and on June 22d, $1,076.57, and received therefor certificates of deposit from the firm in his own name, which stated that the deposits should bear interest at the rate of seven per cent. per annum, and be subject to the draft of Asa L. Evans at three days' notice. This transaction was had with Durham, the active member, who certainly had notice that the money deposited belonged to the estate of Gibson, and he claimed that McLucas also had such notice, but this McLucas denied. On March 11th, 1872, the said Asa L. Evans let the firm have the further sum of $1,000, for which he took

the note of the firm, bearing interest at the rate of one per cent. per month. During all this time Asa L. Evans individually and Evans & McRae were running up a considerable account with S. A. Durham & Co., less, however, than the aggregate amount of the aforesaid deposits and note by about the amount of $700, but no settlement was made, the charges on both sides remaining open on the books of the firm.

Matters were standing in this condition on February 1st, 1873, when the firm of S. A. Durham & Co. was dissolved, the plaintiff, McLucas, agreeing to purchase the interest of the other partners, assuming all the liabilities of the firm and receiving an assignment of all the assets belonging to the same. This contract of dissolution was by deed executed by all the parties. It is long, containing many stipulations and mutual agreements, and among others that "the said Mc-

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Lucas further *assumes all the liabilities incurred by the said firm of S. A. Durham & Co. since September 1st, 1868."

Afterwards, the said Asa L. Evans, being pressed by those interested in the Gibson estate of which he was administrator, transferred the aforesaid certificates of deposit and note to the clerk of the court in discharge of his liabilities as administrator, and action was brought on them against the members of the late firm of S. A. Durham & Co. To this action McLucas, who had assumed the liabilities of the concern, pleaded as a discount the accounts of Asa L. Evans and of Evans & McRae, alleging that Evans before the transfer had expressly agreed that the matter should be set off, one against the other. The counterclaim was allowed to the extent of the note and interest, but not as to the certificates of deposit, which were recovered and judgment rendered for the sum of $2,362.47, which according to the terms of the deed of dissolution is a liability of McLucas alone.

Asa L. Evans and Evans & McRae turned out to be insolvent, and the accounts of S. A. Durham & Co. against them, worthless, and the plaintiff, McLucas, brought this action against his late partners, Solon A. Durham, and John G. Blue as executor of William Evans (who had died in the meantime), alleging that he purchased their shares in the firm with the belief and upon the understanding of all the parties, that the accounts against Asa L. Evans and Evans & McRae would, upon settlement, be discounted against the certificates of deposit, leaving really due in that regard, only about $700, instead of the large amount recovered as above stated, and praying that the defendants should be ordered, notwithstanding the terms of the deed of dissolution, "to satisfy said judgment and for such other relief as the court might think just," &c. The defendants insisted upon the terms of dissolution, alleged that McLucas knew as much of the condition of the business as they did, and that the contract was fair, without fraud, misrepresentation, concealment or deception of any kind.

It was referred to the master to state the facts, and the testimony is all printed in the brief. Judge Kershaw dismissed the complaint, saying that "There was no distinct agreement between A. L. Evans and the firm

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that his account and that of Evans & *McRae should be allowed as a discount against the said deposits, but the plaintiff and the defendant S. A. Durham supposed and believed, at the time of the dissolution, that they would be so allowed as discounts, and the statement exhibited to William Evans was based upon that assumption and he sold his interest upon that basis. They were all equally mistaken in this belief, and there were no circumstances of fraud, misrepresentation, concealment or deception upon either part. Upon these facts I conclude as matter of law that the plaintiff is not entitled to the relief demanded. * * * One of the grounds upon which the plaintiff claims relief is the want of notice of the trust affecting the money deposited; that S. A. Durham had notice and did not communicate the same to him; that it was Durham's duty to inform him, and his failure to do so led to his assumption of a liability in his contract of dissolution far in excess of that he supposed he did. If there had been such concealment, plaintiff's case would have been very strong against Durham. I have been constrained to find that plaintiff had notice of the trust," &c.

From this decree the plaintiff appeals to this court, upon various grounds. The first four exceptions complain of error on the part of the Circuit judge in his findings of fact: First, that McLucas, the plaintiff, had notice that the money for which the certificates of deposit were given, belonged to the estate of Gibson; and, second, that there was no express agreement with Asa L. Evans that his account and that of Evans & McRae should be set off against the deposits. In a "chancery case" it is the duty of the Circuit judge to decide the facts, and when, after weighing the testimony, he has done so, this court, for obvious reasons, is disinclined to disturb his conclusions. It is possible that in the exercise of his judgment the Circuit judge may err, but the same thing may be said also of this court, and indeed of all human tribunals: but it concerns the interest of the community that there should be an end of litigation, and it has been found wise, upon the whole, to take as conclusive the honest judgment of the tribunal appointed to make the decision, only reserving the right to review and reverse in cases of plain error, or flagrant injustice.

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*The rule was very satisfactorily stated by Mr. Justice McIver in the unreported case of Gary v. Burnett, 16 S. C. 633: "Before this court will reverse the findings of fact by a Circuit judge, even where based upon written testimony, we must be satisfied that the clear result of undisputed testimony points manifestly to a different conclusion from that reached by the Circuit judge. Where the testimony is conflicting and the Circuit judge has, upon weighing it, reached a conclusion which can be supported by the testimony, we will not interfere, although there may be other testimony in the case pointing to a different conclusion. We are not to substitute our judgment for that of the Circuit judge as to the comparative weight of the testimony. It is only where there is no testimony to support his conclusion, or where manifest error is shown, that this court will undertake to overrule a finding of fact by a Circuit judge."

I have carefully read the testimony in this case, and can not say that there is no testimony to support the conclusion of fact reached by the judge. On the contrary, I think his conclusion may very well be supported by a review of all the testimony. I agree with him that the testimony did not make out an express agreement that the accounts and the deposits should be set off, one against the other pro tanto. Even the plaintiff himself, in his testimony, used no expression stronger than "understanding," which is a vague term, and does not necessarily mean a distinct contract between parties. It seems to me probable that all the parties took it for granted that such would be the result. Evans certainly did when he deferred a settlement on the ground, "that the firm would owe him a balance on settlement," but as Asa L. Evans was not then known to be insolvent, they did not think it necessary that there should be an express contract on the subject. It is true that Durham & Co. contracted no liability in terms with the estate of Gibson, but they did to Asa L. Evans, with the knowledge that the money he deposited belonged to that estate, and their liability to the estate was the incident and legal result of that transaction.

The facts being considered settled, as found by the judge, it does not seem to me that there was error in the law as held by him. The general rule undoubtedly is, that a mis-

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take in law *furnishes no ground for relief, as all persons must be presumed to know the law. It is not necessary to go into the vexed question, whether the court will undertake, in a certain class of cases, to grant relief for a mistake as distinguished from mere ignorance of the law. I cannot distinguish this case from that of Keitt v. Andrews, 4 Rich. Eq. 349, cited by the Circuit judge. In that case the parties had agreed upon the settlement of an estate and had actually settled upon the basis of an erroneous construction of a will. Upon bill filed to correct the settlement, confessedly erroneous, the court refused relief, and I do not think it necessary in this case to say more than to cite and adopt what was said by Chancellor Dargan, in pronouncing what was made the unanimous judgment of the old Court of Appeals in Equity:

"Is there any authority which goes so far as to say that a party is entitled to relief from a mistake of law when there is no fraud, misrepresentation, management or undue influence, and where the mistake was simply his own erroneous construction of a will or deed? In this case the parties seeking relief had the will before them. They were familiar with its provisions. The defendant did not seek, in any way, to impose their construction of it upon the complainant. It does not appear that they expressed any opinion as to its proper construction. * * * Where one interested in a will undertakes to construe it for himself, and construes it erroneously, or adopts the erroneous construction of another, and predicates a settlement and discharge on such construction, he is not entitled to open the settlement in consequence of such errors. He must abide the consequences of his misconstruction, provided of course there is no fraud, management or undue influence employed to inveigle him into the settlement. The case is not materially altered where both parties have fallen into the same error. A misconstruction, like that made out in this case, is rather an error of the judgment, than a mistake either of the law or of fact. The simple misconstruction of a will or deed, where there is no fraud or circumvention, cannot be regarded in any point of view as coming within the scope and authority of those cases where

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mistakes of *law, in contradistinction to ignorance of law, have been considered as affording grounds for relief," &c.

In this case McLucas certainly agreed to pay all the liabilities of the concern. Whether the claim of the Gibson estate was one of these liabilities was a pure question of law, as to which the parties assumed to act on their own judgment. If they had taken advice they might have been correctly informed. It seems to me only another form of stating the same proposition to say, that the parties understood, as a matter of fact, that there was only due $700 on the deposits of Asa L. Evans. In the case of Cuningham v. Cuningham, [next succeeding this,] this court refused to reform a deed of land which was clearly executed under a mistake as to the proper construction of a will. The difference between ignorance and mistake of law seems to me to be very shadowy, and I find that if the court undertakes to give relief in cases of alleged mistake of law, made

by parties relying on their own judgment, the result will be to introduce great confusion and uncertainty as to the rights of parties. I think the judgment below should be affirmed.†

Judgment reversed.

A petition was filed for the rehearing of this case. By order dated May 30th, 1884, this petition was refused.

†This completes the cases heard at April Term, 1883.—Reporter.

20 S. C. 317

CUNINGHAM v. CUNINGHAM.

(November Term, 1883.)

[1. *Wills* ⟸597.]

A testator, by the second clause of his will, gave certain lands and slaves to his widow for life, with remainder to his son and daughter should they both survive their mother; by the third clause, other lands and slaves to his daughter for life, with remainder to his son; and by the fifth clause, the balance of his lands and slaves to be equally divided between his widow, his son and his daughter, "the shares of my wife and daughter in said lands and slaves to be held subject to the same trusts and limitations as are provided in the second and third clauses of this will." *Held*, that upon the death of the widow, the two children surviving, the daughter took an absolute estate in the lands devised to the widow for life in the second and fifth clauses of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1319–1326; Dec. Dig. ⟸597.]

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[2. *Wills* ⟸597.]

*And under this daughter's will, whereby she devised all the property she held in her own right at the time of her death, her devisee took her interest in said lands of the widow.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1319; Dec. Dig. ⟸597.]

[3. *Wills* ⟸488.]

There being no latent ambiguity in either of these wills, extrinsic evidence cannot be received to show intentions not expressed in the wills themselves.

[Ed. Note.—Cited in Reynolds v. Reynolds, 65 S. C. 394, 43 S. E. 878.

For other cases, see Wills, Cent. Dig. §§ 1024, 1025, 1033–1036; Dec. Dig. ⟸488.]

[4. *Reformation of Instruments* ⟸17.]

The court may relieve a party from his contract entered into under a mistake of fact, but not generally where it is made under a mistake of law. Quære: Is there any reason now for a distinction between mistake of law and ignorance of law?

[Ed. Note.—Cited in Brock v. O'Dell, 44 S. C. 38, 40, 41, 21 S. E. 976; Hutchison v. Fuller, 67 S. C. 283, 285, 45 S. E. 164.

For other cases, see Reformation of Instruments, Cent. Dig. §§ 69–71; Dec. Dig. ⟸17.]

[5. *Reformation of Instruments* ⟸17.]

A woman having, with her brother, a joint estate in a tract of land under her father's will, but believing that she had only a life-interest in a moiety with remainder to her brother, conveyed to him in fee her interest in one-half of the tract after division, and took from him a conveyance of his interest in the other half for the term of her natural life. *Held*, that there was no ground for reforming these deeds, and that after the sister's death, one-half of the part taken by her in the division remained the absolute property of her brother, and the other half passed under her will to her devisee.

[Ed. Note.—Cited in Kerngood v. Davis, 21 S. C. 209; Norman v. Norman, 26 S. C. 48, 11 S. E. 1096; Roundtree v. Roundtree, 26 S. C. 469, 2 S. E. 474; Munro v. Long, 35 S. C. 360, 14 S. E. 824, 28 Am. St. Rep. 851; Smith v. Winn, 38 S. C. 192, 17 S. E. 717, 751; Howlett v. Garner, 50 S. C. 10, 27 S. E. 533; Smith v. Linder, 77 S. C. 542, 58 S. E. 610.

For other cases, see Reformation of Instruments, Cent. Dig. §§ 69–71; Dec. Dig. ⟸17.]

[6. *Estoppel* ⟸92.]

The acceptance by the sister of the deed to a life-interest only did not estop her devisee from claiming that she retained a fee-simple estate in her moiety of the land which was taken by her at the division.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 262; Dec. Dig. ⟸92.]

[This case is also cited in Brock v. O'Dell, 44 S. C. 36, 21 S. E. 976, without specific application.]

Before Witherspoon, J., Laurens, February, 1883.

Hon. T. B. Fraser, Circuit judge, sat in the place of the chief justice, who had given an opinion in the case while at the bar. This case is fully stated in the Circuit decree, which was as follows:

Robert Cuningham died in Laurens county, in 1859, leaving in force his last will and testament, and leaving surviving him, his widow Louisa, his son John, the defendant, and his daughter Pamela, referred to in the pleading and testimony as Ann Pamela. The widow, son and daughter were nominated executor and executrixes of said will. The main issue in the above action involves a proper construction of the second, third and fifth clauses of the will of Robert Cuningham, as follows:

"Second. As I have heretofore given to my son, John Cuningham, one thousand acres of land and forty-five slaves, with stock and other personalty, I now give to my beloved wife, Louisa Cuningham, during her natural life, one thousand acres of land, to be laid off so as to include my homestead and forty-five slaves; also, one-half of my stock of every description, and one-half of my household and kitchen furniture, wagons, planta-

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*tion tools, and so forth, which may be necessary for carrying on a farm, and at her death the said land, slaves and their increase, and other property to be equally divided between my son, John Cuningham, and my daughter, Pamela Cuningham, should they both survive their mother, and if not, then to the survivor, provided, however, that should either or both of them die before their mother, having issue living, such issue shall take

and receive the share to which their parents would have been entitled if living.

"Third. I give and bequeath to my daughter, Pamela Cuningham, my Dry Fork tract of land containing one thousand acres of land and forty-five slaves, together with the remaining half of my stock, household and kitchen furniture, wagons, plantation tools, and other articles necessary to the conducting of a farm: but should my said daughter die without issue living at her death, then it is my will that the same lands, slaves, and other property shall go to my son, John Cuningham, should he survive his sister, and if not, to such issue as he may have living at the death of my daughter.

"Fifth. It is my will that the balance of my land and slaves be equally divided between my wife, son and daughter; the land to be so laid off to them in such manner as may be most beneficial and convenient to the several tracts before given to them respectively. The shares of my wife and daughter in said lands and slaves to be held subject to the same trusts and limitations as are provided in the second and third clauses of this will." In a division of the balance of testator's land, under the fifth clause, 627 acres were allotted the widow, and a similar number of acres to the son and daughter respectively.†

Testator's widow, Louisa, died intestate, October 6th, 1873, leaving surviving her the defendant, her son John, and her daughter Pamela, the latter never having married. It appears that testator before his death disposed of the Dry Fork plantation devised to his daughter Pamela in the third clause of his will. After testator's death the defendant, John Cuningham, sold and conveyed to the widow and Pamela 785 acres of the land given him by his father. The widow, before

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her death, *conveyed to Pamela her half interest and Pamela thereby became seized and possessed of the 785 acres tract of land of which she died seized and possessed. Testator, in the sixth clause of his will, authorized his wife and children to select their own mode of making division.

After the death of the widow, Louisa, the defendant and his sister, Pamela, selected three citizens of Laurens county to divide between them the 1,627 acres devised and allotted to the widow for life. These commissioners, so selected, divided said land by allotting to defendant, John, 867 acres thereof, and to Pamela the balance of 760 acres, including the homestead. In January, 1875, defendant and his sister, Pamela, mutually selected their cousin, the Hon. B. C. Yancey, to draw deeds of conveyance to the tracts respectively allotted to be interchanged between them. Mr. Yancey drew the deeds, each reciting the provisions of Robert Cuningham's will, in the event that defendant and Pamela survived their mother. The deed so drawn and executed by Pamela to the defendant conveyed all of her interest in law and equity under her father's will to the 867 acres, whilst the deed from defendant to Pamela conveyed his interest in the balance of 760 acres for life only, under his father's will.

After said interchange of deeds in said division, on May 1st, 1875, Pamela Cuningham died, never having married, leaving of force her last will and testament, dated April 13th, 1871, wherein she gives (bequeaths) to her nephew, Clarence, the plaintiff (who is a son of defendant) "all of the property which I hold in my own right at the time of my death," subject to payment of certain legacies. Edward Noble qualified as executor of her will. After the death of his sister, about January 1st, 1876, the defendant, claiming as remainderman, under his father's will, and in accordance with his deed to his sister, on the division aforesaid, took possession of the 760 acres of land, and has ever since occupied and cultivated said tract of land.

On July 24th, 1882, the plaintiff, as devisee under the will of his aunt, Pamela Cuningham, brought the above-entitled action, alleging that under the will of his grandfather, Robert Cuningham, as devisee of Pamela he is entitled to the one-half in fee of the life-estate of Louisa, the widow of Robert Cun-

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ingham. *Plaintiff prays that the deed from defendant to Pamela for 760 acres in the division aforesaid may be reformed on the ground of mistake, error and inadvertence, so as to pass the fee instead of a life-estate, and that defendant be required to surrender to plaintiff said 760 acres of land, and that he account to plaintiff for rents and profits since January 1st, 1876.†† The plaintiff also demands that defendant do account for the personal property of the life-estate of the widow that went into his possession. The defendant insists that his sister, Pamela, took but a life-estate under the will of Robert Cuningham; but even if he should be mistaken in this view, that the court will not now open the settlements made between himself and sister, Pamela, and pleads the statute of limitations and laches as a bar to the relief demanded by plaintiff. It was referred to the master to take testimony in regard to all the issues of fact, and report the same to the court.

As the defendant and his sister, Pamela, both survived the widow, I must conclude and decide that upon the death of the widow they each took a fee in one-half of the 1,000 acres of land devised the widow for life under the second clause of Robert Cuningham's will.

† It was conceded that Ann Pamela held this 627 acres only for her life.

†† Or else that the entire life-estate of Mrs. Louisa Cuningham be partitioned between the plaintiff and defendant.—REPORTER.

The interest or estate of Pamela in the additional 627 acres allotted to the widow depends upon the construction of the fifth clause of said will. In the fifth clause, testator directs that the shares of the wife and daughter in the balance of the lands and slaves therein devised, "be held subject to the same trusts and limitations as provided in the second and third clauses of this will." It will be observed that the provision made by testator for his wife and daughter, as well as the limitations in the second and third clauses, are separate and distinct. It seems to me that the trust and limitations imposed by testator in the fifth clause must be referred to and construed in connection with the provision made for wife and daughter respectively in said second and third clauses. The widow certainly took the 627 additional acres of land allotted to her of the remaining lands devised under the fifth

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clause, upon the same *limitation that attached to the devise of the 1,000 acres in the second clause. The defendant and Pamela both surviving the widow, I must conclude and decide that they were each entitled to a fee in the one-half of the 1,627 acres of land devised and allotted to the widow for life. This construction gives effect to each and every clause of testator's will, and is consistent with the intent as deduced from the words of the will.

Having concluded that the fee to one-half of the 1,627 acres was in Pamela, is the plaintiff, as devisee, entitled to have the settlement in January, 1875, between defendant and Pamela, opened? So far as the conveyance from defendant to Pamela of the 760 acres is concerned, no question has been made as to the right of the plaintiff to bring this action. The plaintiff bases his claim for relief upon the ground that Pamela, in said division or settlement, accepted the deed from defendant for life by mistake, error and inadvertence. There is neither allegation nor proof that defendant was guilty of fraud, misrepresentation or concealment in the division of the mother's life-estate between himself and his sister, Pamela. It appears that the defendant was not present when Mr. Yancey drew the deeds to be interchanged in this settlement, he having been detained at that time in Brooklyn by sickness.

The authorities draw a distinction between ignorance of law and a mistake at law. Where a party acts in ignorance of law, he is passive, and does not presume to reason. As ignorance cannot be proved, the courts cannot relieve on account of such ignorance. Mistake at law, however, is susceptible of proof, and the court will afford relief where such mistake is palpable or clearly established. In the cases of Lawrence v. Beaubien, 2 Bailey 623 [23 Am. Dec. 155]; Lowndes v. Chisolm, 2 McCord Eq. 463 [16 Am. Dec. 667], and Executors of Hopkins v. Mazyck, 1 Hill Eq. 250, relief was granted where the party acted upon the erroneous advice of counsel. In the case of Keitt v. Andrews, 4 Rich. Eq. 349, it was held that where an executor and legatee honestly misconstrued the will, and had a settlement based upon such misconstruction, the court would not open the settlement. In that case it was held that ignorance of law or error of judgment does not afford ground for relief.

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*The testimony does not disclose the motive that prompted Pamela, at the time of the settlement, to accept from defendant the conveyance of the 760 acres of land for life. It cannot be determined satisfactorily from the testimony whether Pamela then acted upon the erroneous advice of counsel as to her right under her father's will, or upon her own erroneous misconstruction of her rights under said will. Mr. Yancey testifies that Pamela did not ask him to construe her father's will for her at the time he drew the deeds. He states that her mind was not impaired; that he conferred with Pamela as to the deeds, and she approved of the deed for 760 acres he drew for the defendant to sign. G. W. Calhoun, a witness for the defense, testified on cross-examination, without objection, that he had heard Pamela say that counsel had advised her that she took only a life-interest under her father's will, but the witness did not fix the time of such conversation. Mr. Yancey testifies that he heard Pamela express dissatisfaction with the provisions of her father's will, but this was before the settlement; and this witness testifies that he did not know that Pamela ever advised with counsel as to her rights under her father's will.

The recitals in the deeds between the parties, as well as the terms employed by Pamela in devising to plaintiff "all the property she held in her own right at the time of her death," indicate that both defendant and Pamela, in said settlement, acted upon a misconstruction of the rights of Pamela under the will of Robert Cuningham. Whether such misconstruction was the result of Pamela's erroneous judgment, or the erroneous judgment of counsel, does not satisfactorily appear from the testimony. I am, therefore, constrained to conclude and decide that plaintiff has failed to establish, at the time of settlement, such a mistake at law as would entitle him to have said settlement opened, or the deed from defendant for the 760 acres to Pamela for life reformed, as demanded in his complaint.

Under the deeds of settlement between defendant and Pamela, whilst Pamela has released and conveyed to the defendant the fee to which she is held to have been entitled in one-half of the 867 acres, the defendant being entitled to the fee in the balance or other half of the 867 acres, it does not

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appear that, in said *settlement, the said Pamela ever released or conveyed to defendant the fee in the one-half of the 760 acres to which she was entitled. The plaintiff, as devisee, must be held entitled to the fee in the one-half of the 760 acres retained by Pamela, and not released or conveyed by her in said settlement with the defendant.

As the settlement between defendant and his sister appears to have been made in good faith under a mutual misconstruction of their father's will, and defendant took possession of the 760 acres of land after his sister's death under said misconstruction, I conclude and decide that defendant should only account to plaintiff for the one-half of the rents and profits of said land from July 24th, 1882, the date of the commencement of plaintiff's action. Scaife v. Thomson, 15 S. C. 368.

The widow died October 6th, 1873, and her daughter, Pamela, administered on her estate. The testimony does not sustain plaintiff's demand against defendant for an accounting of the life-estate of the widow alleged to have gone into defendant's possession. The plea of the statute of limitations, however, must be held to bar plaintiff's right to require such accounting.

It is ordered and adjudged that plaintiff, as devisee of Pamela Cuningham, and the defendant, are each entitled to the fee in one-half of the 760 acres of land embraced in deed from defendant to Pamela Cuningham, January 9th, 1875, and that a writ do issue to divide and partition said tract of land between plaintiff and defendant, allotting to each the one-half thereof in value. It is further ordered and adjudged that defendant do account to plaintiff before C. D. Barksdale, master for Laurens county, for the one-half of the rents and profits of said 760 acres of land from July 24th, 1882, and that it be referred to said master to ascertain and report to the court the amount of rents and profits ascertained to be due plaintiff under this decree. It is further ordered and adjudged that plaintiff is not entitled to the relief demanded in his complaint, except as hereinbefore ordered, adjudged and decreed.

The plaintiff appealed from this decree on the following grounds:

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*1. "Because his Honor held that the plaintiff, as the devisee of Miss Ann Pamela Cuningham, was barred from claiming one-half of the 867 acres of land conveyed in fee by said Miss Cuningham to the defendant, who, in consideration therefor, took a conveyance from the defendant of a life-estate in 760 acres, said interchanged deeds having been executed, as plaintiff alleged, under a palpable mistake of law in regard to their rights under the will of their father, Robert Cuningham. Said allegation of mistake, it is respectfully submitted, was supported by proof clearly establishing the mistake.

2. "Because his Honor erred in not holding and decreeing that said interchanged deeds, dividing 1,627 acres, were executed under a palpable mistake of law in construing the will of said Robert Cuningham, and should be set aside, said will devising in fee, in remainder, 1,627 acres between defendant and the said Miss Cuningham, at the death of their mother, Mrs. Louisa Cuningham, who had a life-estate therein.

3. "Because his Honor, it is respectfully submitted, erred in holding that the proof submitted did not clearly establish a palpable mistake of law on the part of said Miss Cuningham, plaintiff's devisor, induced, according to the uncontradicted proof, by the erroneous legal advice of eminent counsel, given at her solicitation, but for which advice, inducing the mistake, she would never have been a party to the interchanged deeds.

4. "Because his Honor should have granted one or the other of plaintiff's prayers, either to have decreed the deed for 760 acres be reformed, so as to give a fee instead of a life-estate to plaintiff's devisor, or to have set aside both deeds and ordered a partition of the 1,627 acres equally between the plaintiff, as devisee, and the defendant, according to the will of the said Robert Cuningham."

The defendant appealed on the following grounds:

I. "Because his Honor erred in holding that the testatrix, Pamela Cuningham, had a fee-simple interest in any portion of the 1,627 acres of land.

II. "Because his Honor erred in not holding that she had elected to take a life-inter-

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est in the 760 acres of land, and that *the plaintiff is bound by said election, and is estopped from claiming what his testatrix acquiesced in and did not set up any title to.

III. "Because his Honor erred in holding that Pamela Cuningham died testate as to the 760 acres of land or any portion thereof.

IV. "Because his Honor erred in disregarding the testimony which showed that Robert Cuningham, by his own construction of his will, designed thereby only a life-estate for Pamela Cuningham in any of his property, and that Pamela and John Cuningham so thus understood the scheme or meaning of that will, and acted upon that construction.

V. "Because his Honor erred in excluding or disregarding the testimony of G. W. Calhoun, which proved that Pamela Cuningham had not, in her will, intended, and never intended, to devise to plaintiff any estate or interest in the land held by her mother for life.

VI. "Because his Honor erred in stating or ruling that no objection had been taken

by defendant to plaintiff's right to bring this action.

VII. "Because his Honor erred in not holding that the settlement or division between the defendant and Pamela Cuningham was a quit-claim to, and surrender of, any estate, except for life, in the 760 acres of land to John Cuningham."

Mr. Edward Noble, for plaintiff.

Miss Cuningham took a fee-simple in remainder in the lands given to her mother for life by Robert Cuningham's will. Parol evidence is inadmissible to show testator's intention. 5 Rich. Eq. 107; 15 S. C. 357. The interchanged deeds of January, 1875, do not estop plaintiff from claiming the fee. 3 Bl. Com. 308; 13 S. C. 370; 15 S. C. 352, 362; 2 Bail. 649; 2 McCord Ch. 455. Testatrix did not die intestate as to the 760 acres, her will covering all of her estate, and this being a portion of her estate. The interchanged deeds, having been executed under a palpable mistake of law, induced by the erroneous advice of counsel, should be reformed or set aside. 2 McCord Ch. 463; 2

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Bail. *623; Mosely 364; 1 Hill Ch. 250; 1 Story Eq. Jur., §§ 110, 137, 165. In Keitt v. Andrews, 4 Rich. Eq. 349, there was ignorance of law, not mistake. See 1 Desaus. 437; 4 Id. 122; 1 Bail. Eq. 343.

Mr. Benjamin D. Cuningham, for defendant.

The clauses of a will should not be construed technically and alone, but rather the scheme of the whole will and the evident intention of testator should be regarded. 2 Bay 255; 12 Johns. 289; 1 Nott & McC. 69; 2 McCord Ch. 307; 1 Desaus. 131; 2 Id. 450; 2 Jarm. Wills 741; 15 S. C. 337; 3 Strobh. Eq. 222. The intention of testator may be gathered from the circumstances surrounding him when he wrote his will. 15 S. C. 356; 18 Id. 101; 3 Jarm. Wills 794; 6 Rich. Eq. 85. The terms of the interchanged deeds show an election by Ann Pamela to take only a life-interest in the 760 acres. 3 Washb. Real Prop. 99, 119; Big. Estop. 347, 287, 293 et al.; 1 Lead. Cas. Eq. (H. & W.'s notes) *233, *249, *250; 2 Spenc. Eq. Jur. 600; 2 Ves. Sr. 593. The settlement between John and Pamela operated as a quit-claim to John, and a surrender of any estate except in the 760 acres, and there was no such mistake as can be corrected by the court. 2 Bail. 623; 2 McCord Ch. 463; 1 Hill Ch. 250; 4 Rich. Eq. 349; 3 Washb. Real Prop. 356, 366, 380; 1 Id. 552; 2 Wait Ac. & Def. 504; 5 Id. 437; 2 Strobh. Eq. 153; 2 S. C. 108; 4 Rich. Eq. 354; Bail. Eq. 154.

Mr. John Cuningham, same side.

February 1st, 1884. The opinion of the court was delivered by

Mr. Justice FRASER. [Statement of facts is omitted, as it has been already fully given in the Circuit decree.] None of the grounds of appeal bring up for the consideration of this court any questions concerning the personal property included in the life-estate of Mrs. Cuningham, or as to the order for account of the rents and profits, and these matters need not be referred to. The only questions which remain are those affecting the

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*title of the 867 acres and the 760 acres of land. They are as follows:

1. What is the proper construction of the second, third and fifth clauses of the will of Robert Cuningham?

2. What is the proper construction of the will of Pamela Cuningham, and what interest did plaintiff take under it in this land, if any?

3. Is it competent to use parol or any extrinsic evidence to control or aid in the construction of these wills, as to the matter before the court?

4. Did Pamela or John Cuningham, or either of them, in making the division of the land, in January, 1875, act in ignorance or under a mistake of law as to what were their rights in the land covered by their deeds of that date?

5. Was there any ignorance or mistake which is a ground of relief in this court?

6. Is Clarence Cuningham, as devisee of Pamela Cuningham, estopped from setting up any claim to the fee in consequence of her accepting a conveyance for life only in the 760 acres from John Cuningham?

When John Cuningham survived his mother, Louisa, who died in 1873, it can scarcely admit of a doubt that he took under the second clause of Robert Cuningham's will a fee in one-half of the 1,000 acres of land given to her for life. The only contingency in reference to his interest at her death was as to his having died before her, in which event his issue, if any, were substituted in his place to his share. Precisely the same words are used as to Pamela, and, having survived her mother, she took also a fee in remainder. Upon the words of the will itself, the matter is too plain for argument. Whether parol or extrinsic evidence of any kind can control this will be considered hereafter. The wife and daughter, however, each received in the division, under the fifth clause, 627 acres of land "subject to the same trusts and limitations as are provided in the second and third clauses." Now, in the second clause, the life-estate is in the widow, and the period of distribution is her death, and then to the survivor of John and Pamela, or both, if they both survive, the issue of either who had

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died in her life-time to be substituted. *In the third clause, the life-estate is in Pamela, and at her death without issue the property goes to John if living, and if not to his issue.

The construction which would hold Pamela's share under the fifth clause subject to

the limitations in the second, or the widow's share under that clause subject to the limitations under the third, would lead to such confusion in construction as would make it impossible to carry out the will. It would not be possible, on this construction, to say at what period the fee, as to a part of it at least, became vested in John Cuningham, and the right of his children or issue to be substituted in his place lost. The only view which seems clear of difficulties is, that the widow and daughter took under the fifth clause, subject to the trusts and limitations as to them respectively in the second and third; and that the 627 acres was held by the widow in the same way as the 1,000 acres under the second clause; and as John and Pamela both survived her, they each took a fee in one moiety thereof. So much for the will itself.

The next question of construction is as to what passed to Clarence Cuningham under the will of Ann Pamela Cuningham. The words of the will are very comprehensive by which the testatrix gave her property to the plaintiff: "All the property which I hold in my own right at the time of my death." A will now speaks at the death, as well to realty as to personalty, and as if to provide against any doubt as to what was intended, the time of her death, and not the date of the will, or even of the codicil, is chosen as the period to which is referred the ownership of the property intended to be covered by the terms of the will. These words cover everything, and would cover even after-acquired property as well as property in which, as in the land here in question, the testatrix had a contingent interest—an interest in her own right, if the contingency happened, as it did.

Is there anything in either of these wills as to the matters before the court to justify a resort to parol or extrinsic evidence? It might not be amiss to refer to some of the authorities on this subject. We find in the general rule of construction laid down by Jarm. Wills (vol. III., p. 705,) the following rule: "That extrinsic evidence is not admis-

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sible to alter, detract from or add *to the terms of a will (though it may be used to rebut a resulting trust, attaching to a legal title created by it, or to remove a latent ambiguity) arising from words equally descriptive of two or more subjects or objects of gift." We find the same rule substantially in Abbott's Trial Evidence, § 105, where there is an "equivocal designation of the beneficiary," or "A similar ambiguity as to the property given." "And it cannot be made admissible even by showing that the testator did not own the parcel designated in the will, and did own another, and that the draftsman made the mistake." Id., § 102.

The rule is laid down in Wigr. & O'H. Wills 14, in these words: "Where the object of the testator's bounty, or the subject of disposition (i. e. person or thing intended), is described in terms applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator." This kind of evidence can be admitted when it "merely tends to explain and apply what the testator has written, and no evidence can be admitted which merely shows what he intended to write." McCall v. McCall, 4 Rich. Eq. 455 [57 Am. Dec. 733] quoted, approved and applied in Scaife v. Thomson, 15 S. C. 357. There can be no doubt as to what persons were intended in either of these wills, or what property is covered by the language used. There is no latent ambiguity which calls for extrinsic evidence as to either the persons or property, and the conclusions reached as to the proper construction of the wills themselves cannot be controlled by any testimony which has been offered as to any intentions not expressed in the wills themselves.

It may be admitted, for the purposes of this case, that John and Pamela Cuningham were ignorant, or fell into a common error, as to their rights under the will of Robert Cuningham; and that the deeds of January, 1875, were executed by them under an impression that Pamela had only a life-estate in one-half of the 1,627 acres. It is more than probable that they reached this conclusion from what they knew of the wishes and general purposes of their father from himself, and not from any careful or critical examination of the terms of the will itself.

This court concurs with the Circuit judge,

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upon a careful *consideration of the testimony, in his conclusion that there was no mistake of law, as contradistinguished from ignorance of law. There does not appear in the testimony anything which goes to show that any person ever told Pamela that she had only a life-estate in the moiety of this land, and there is certainly no evidence that she ever submitted this will for a construction as to her rights under it to any one of the distinguished gentlemen‡ with whom it is said she conversed on this subject. It is more reasonable to think that, in a matter to the mind of this court so plain, they conversed or even advised with her on her own assumed construction of the will than construed it for her. She was a lady; though of feeble body, yet of well-matured intellect, of unusual intelligence and national reputation. Even Mr. Yancey, who drew the deeds of January, 1875, got his impressions from her, and, in his testimony in this case, says: "I was impressed with the belief that the widow and daughter took under the will only life-estates, derived from their statements or belief." Even at the time of this division

‡These were David Paul Brown, of Philadelphia; James L. Petigru, Henry C. Young and B. F. Perry, of South Carolina.—Reporter.

he does not seem to have construed the will for her, and seems to indicate that, if there was anything for him to construe, he would have declined to act. If there was any error it was her own.

If the mistake in this transaction had been one of fact, without any improper negligence on her part, all the authorities agree that the court could give relief if application be made in due time. A mistake of law stands, however, on a different footing. Facts, material facts, are often in the knowledge of only one of the parties, sometimes known to neither, and either inaccessible or carefully concealed. It is presumed that every one knows the law, and for the very good reason that the source of information is open for all equally. It is true, that questions of law are sometimes doubtful. Lawyers, and even courts, differ about them; but there is no unfairness, and nothing unreasonable in requiring parties in ordinary cases to take these with all the other inevitable risks of human life when they stand on equal footing with their fellows.

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*The case before the court does not call for any attempt to define the rule by which relief can be granted on account of mistake of law. Mr. Justice Story, in his work on Equity Jurisprudence, (vol. I., § 138,) says that "it may be safely affirmed upon the highest authority, as well-established doctrine, that the mere naked mistake of law, unattended with any such special circumstances as have been suggested, will furnish no ground for the interference of the Court of Equity, and the present disposition of the court is to narrow rather than enlarge the operation of the exceptions." The cases involving special circumstances are referred to in some of the preceding sections; but no general principle is deducible from them. Not more satisfactory is the elaborate collection of the cases and discussion of this subject in the note to Blush v. Ward, 15 Am. Rep. 171, or the rule suggested by Mr. Pomeroy in his valuable work on Equity Jurisprudence, vol. II., § 849.

In this State, however, the distinction has been sharply drawn between ignorance of law and mistake of law. In Lawrence v. Beaubien, 2 Bail. 623 [23 Am. Dec. 155], and in Lowndes v. Chisolm, 2 McCord Ch. 455 [16 Am. Dec. 667], the court holding that in cases of mistake, the court could give relief, and that it would be refused in cases of mere ignorance. The principal reason given being that mistake could be proved and that ignorance could not. As parties can now testify in their own behalf, it may be doubtful if this reason can be longer sufficient to justify the distinction. In Hopkins v. Mazyck, the Court of Appeals, in affirming the Circuit decree, takes occasion to put its judgment on another ground, and to reaffirm the doctrine in Lawrence v. Beaubien and Lowndes v. Chisolm, on which the chancellor had cast some doubt in the Circuit decree. The court, however, has never held that even a mistake in law stands in all cases on the same footing as a mistake of fact. And nowhere have any limitations been laid down capable of general application.

In Keitt v. Andrews, 4 Rich. Eq. 349, Chancellor Dargan, in the Circuit decree, which was affirmed per curiam, uses these words: "The simple misconstruction of a will or deed where there is no fraud or circumven-

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tion, cannot be regarded in any *point of view as coming within the scope and authority of those cases where mistakes of law in contradistinction to ignorance of law have been considered as affording grounds of relief. It is a cardinal theory of the law, founded upon a necessary policy, that every one is presumed to have a knowledge of its principles. This presumption prevails as well in reference to civil rights as in the criminal code. Without this doctrine, no system of law can practically fulfill the ends of its institution."

That case arose in this way: The will of Daniel Hesse gave certain lands to his grandchildren. The lands were sold and the money being in hand for distribution, all the grandchildren referred it to the ordinary to make up a statement for them according to the will, the sale and conveyances having been made by the grandchildren themselves. By this statement, a settlement was made letting in several grandchildren who were born after testator's death, and clearly not entitled to anything. It is true, that there were other grounds on which the Circuit decree rested the judgment, and the action was to recover back money paid. Yet this is very high authority for the opinion that, "the misconstruction of a deed or will is not to be regarded as coming within the scope and authorities of those cases where mistakes of law, as contradistinguished from ignorance of law, have been considered as affording grounds of relief."

In this view, this court concurs, and holds that even if there is a difference as to ignorance of law and mistake of law, and it should be regarded as in fact true that Pamela Cuningham had formed an opinion, either from her own construction of this will or in consequence of erroneous advice of others, this is no ground on which this court can relieve her devisee from the effect of these solemn deeds executed in 1875.

In the view taken by the court of this case, it is not necessary to consider the question of laches or the statute of limitations as a bar to plaintiff's claim; but, though urged in argument, no question has been made in reference thereto by the exceptions.

No act can be considered an estoppel unless it has been acted on by the party claiming the benefit of it. A man will not be allowed

to aver against his own deed; but there is
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nothing in *the deed of January, 1875, of John Cuningham to Pamela Cuningham, or in the deed of same date of Pamela Cuningham, which in any way undertakes to dispose of the fee in this 760 acres of land after the death of Pamela. It stands now where it was before the deed was made—one moiety in John Cuningham and one moiety in the plaintiff, to whom it passed under Pamela's will. The parties simply held possession according to the terms of their respective deeds. We have held that these deeds cannot be reformed, but must stand according to their terms; and if the deed from John to Pamela had gone on to dispose of the remainder in the 760 acres after the death of Pamela, that would have been an end of the whole matter; but the omission of that deed to dispose of this remainder, has left such remainder untouched, and which thus fell under the will of Robert Cuningham, as herein construed.

No question has been raised by the appeal as to the mode of accounting for the rents and profits.

It is therefore ordered and adjudged, that the exceptions be overruled; that the judgment of the Circuit Court be affirmed, and the appeal dismissed.

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20 S. C. 334

TRUMBO v. CUMMING.

(November Term, 1883.)

[1. *Judgment* ⇐800.]

A sale by the sheriff under a junior judgment of the State court divests the liens of senior judgments upon the property so sold, of both State and United States Courts.

[Ed. Note.—Cited in Blohme v. Lynch, 26 S. C. 303, 2 S. E. 136; In re Voorhies, 46 S. C. 125, 24 S. E. 170; Matthews v. Nance, 49 S. C. 396, 27 S. E. 408.

For other cases, see Judgment, Cent. Dig. § 1421; Dec. Dig. ⇐800.]

[2. *Mortgages* ⇐295; *Vendor and Purchaser* ⇐130.]

Where the mortgagee purchased the mortgaged land at a sheriff's sale under a junior judgment, and (the land having been forfeited to the State for non-payment of taxes) also obtained deed from the commissioners of the sinking fund, the lien of this mortgage, and also of all outstanding judgments and taxes, was divested, and, therefore, the mortgagee acquired a good, marketable title, which a purchaser from him was bound to accept.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 815, 817–831; Dec. Dig. ⇐295; Vendor and Purchaser, Cent. Dig. §§ 245–247; Dec. Dig. ⇐130.]

Before Wallace, J., Charleston, July, 1883.

Controversy without action between Sarah H. Trumbo, plaintiff, and James D. Cumming, defendant. The opinion states the case.

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*Mr. Jennings W. Perry, for appellant.

Mr. T. M. Mordecai, contra.

January 15th, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. This was a controversy submitted without action, and the facts out of which it arose are as follows: Christopher C. Trumbo owned certain real estate in the city of Charleston, in fee-simple, for sixteen years prior to January 1st, 1880, the same being, however, all the while subject to a mortgage in favor of the city council of Charleston. Between July 27th, 1867, and May 11th, 1882, sixteen judgments and one money decree were duly recovered and entered in the Court of Common Pleas for Charleston county (sometime district) against the said C. C. Trumbo, and executions were duly issued thereon. The first judgment bears date July 27th, 1867, and the last, May 11th, 1882. On December 20th, 1867, a judgment was recovered against the said C. C. Trumbo in the Circuit Court of the United States for the District of South Carolina, and execution was duly issued thereon but no further action had.

The said C. C. Trumbo having neglected from year to year to pay the State and county taxes on the premises, the same were regularly forfeited to the State of South Carolina, and the commissioners of the sinking fund conveyed the said premises to the city council of Charleston on July 20th, 1881. On May 11th, 1882, the premises were levied on by the sheriff of Charleston county, under and by virtue of an execution issued on the junior judgment above mentioned, and, after duly advertising, the same were sold at public outcry to the city council of Charleston. In pursuance thereof, the said sheriff, on June 5th, 1882, conveyed the said premises to the city council of Charleston, who, on November 15th, 1882, conveyed to the plaintiff. On June 30th, 1883, the plaintiff contracted in writing to sell the said premises to the defendant for the sum of $6,000 in cash, and the object of this proceeding is to enforce the specific performance of such contract.

The only question submitted for the deter-
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mination of the court *was, whether the title of the plaintiff was such a marketable title as the defendant was bound to accept. The Circuit judge answered this question in the affirmative, and rendered judgment for the plaintiff. From this judgment, the defendant appeals upon two grounds: 1st. Because the sale, under the execution of May 11th, 1882, did not divest the lien of the senior judgment in either the State or the United States courts. 2d. Because the commissioners of the sinking fund could not convey a title in fee-simple.

First, as to the lien of the senior judgments in the State courts. Ever since the cases of Snipes v. The Sheriff of Charleston,

1 Bay 295, and Greenwood v. Naylor, 1 McC. 414, followed by Gist v. McJunkin, 1 McMull. 342; Vance v. Red, 2 Speers 90, and McKnight v. Gordon, 13 Rich. Eq. 222 [94 Am. Dec. 164], recognized in the recent case of Agnew v. Adams, 17 S. C. 364, it has been uniformly held in this State that a sale by the sheriff under a junior judgment divests the lien of the senior judgments and confers a good title on the purchaser—the senior judgments being first entitled to the proceeds of the sale in the order of their priorities. It is very clear, therefore, that so far as the senior judgments recovered in the State courts are concerned, the purchaser took a good title against them.

Next, as to the lien of the judgment recovered in the United States Court. The case of Pulliam v. Osborne, 17 How. 471, makes it equally clear that the sale by the sheriff divested the lien of that judgment also.

We do not deem it necessary in this case to consider or determine the extent of the powers of the commissioners of the sinking fund in making a sale of land forfeited to the State for non-payment of taxes where the rights of third persons are concerned, for, here, whatever interest the State may have had under the forfeiture for non-payment of taxes, has been conveyed to the city council of Charleston, who held the first lien, by way of mortgage, on the premises in question, and, by its purchase at sheriff's sale of the mortgagor's interest, has extinguished that lien. Schnell v. Schroder, Bailey, Eq. 334; McLure, Brawley & Co. v. Wheeler, 6 Rich. Eq. 343; Allen v. Richardson, 9 Rich. Eq. 53. The city council having thus acquir-

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ed all of the interest *of C. C. Trumbo, which is conceded to have been a fee, divested of all the liens, and having conveyed the same to plaintiff, her title has become good and marketable, and such as the defendant is bound to accept.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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20 S. C. 337

FOOSHE v. MERRIWETHER.

(November Term, 1883.)

[1. *Appeal and Error* ⇐563.]

Attention called to the necessity of giving dates in the "Case" as prepared for argument in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2500; Dec. Dig. ⇐563.]

[2. *Dower* ⇐111.]

A demandant in dower is entitled as of right to her costs for all expenses incurred in the admeasurement of her dower, including her exceptions to a return, which finally was confirmed.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 359, 360; Dec. Dig. ⇐111.]

[3. *Dower* ⇐111.]

The special provision for costs in cases of dower (Gen. Stat. § 2287,) must be regarded as an exception to the general law (Ibid., § 2425; Code § 323,) regulating costs, so far as the two may seem to conflict.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 359; Dec. Dig. ⇐111.]

[4. *Statutes* ⇐231.]

The General Statutes of 1882 and the amended code of procedure having been adopted at the same time, must be regarded as one act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 312; Dec. Dig. ⇐231.]

[5. *Appeal and Error* ⇐552.]

[The case on appeal should point out by date every proceeding which the supreme court is asked to review.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2458; Dec. Dig. ⇐552.]

Before Wallace, J., Abbeville, February, 1883.

Petition by Mary Fooshe against M. E. Merriwether, in the Probate Court, for dower. The opinion states the case.

Mr. L. W. Perrin, for appellant.

Messrs. Noble & Noble, contra.

January 15th, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. On October 6th, 1879, the demandant filed her petition in the Court of Probate for Abbeville county, demanding that her dower be assigned to her out of a tract of land formerly owned by her deceased husband, but then owned and occupied by the defendant. The commissioners appointed to admeasure the dower made their return, showing that they had divided

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the land *into three parcels, of nearly equal area, by two parallel lines running entirely across the tract, and had assigned to the demandant, as her dower, the middle parcel, the house and plantation buildings being on one of the outside parcels. To this return the demandant filed exceptions, principally upon the ground that the parcel assigned to her was not of equal value of the others, and also charging the commissioners with partiality. The charge of partiality was not sustained by the evidence, but the judge of Probate, after hearing much conflicting testimony as to the value of the premises, referred the return back to the commissioners, that they might include in their estimate the value of the improvements. The commissioners then made a further return, in which they stated that, in their opinion, the parcel containing the improvements, including the value of such improvements, was not greater in value than the parcel assigned to the demandant as her dower. This return was confirmed, and demandant was put into possession of the parcel assigned to her as her dower.

The judge of Probate then taxed against the defendant all the costs which had ac-

crued up to the time of the filing of the exceptions by the demandant; but the costs of the witnesses and of the hearing upon these exceptions were taxed against the demandant. An appeal was taken by the demandant to the Circuit Court from so much of the action of the Court of Probate as taxed any costs against her, which appeal was dismissed. The demandant now appeals to this court upon the following grounds: "1. Because his Honor should have held that the Probate judge is required by the law to tax the costs of proceedings in, or admeasurement of, dower against the person who claims the land, or who is in possession of it. 2. Because his Honor should have held that the Probate judge was without discretion in the matter of the taxation of costs in proceedings in dower, and that the costs follow the event of the action. 3. Because his Honor erred in holding that proceedings in dower in the Probate Court was a case in chancery, and the Probate judge might exercise his discretion in taxing the costs against either party."

The decision of the Circuit judge is based upon the theory that this is "a case in chan-

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cery," and governed by the provisions *of section 323 of the amended code, as embraced in the general statutes of 1882, by which costs in such cases are in the discretion of the court, and that, as the judge who heard the case is best qualified to exercise such discretion, no reason was perceived for disturbing the taxation of costs as made by him.

The general statutes did not take effect until May 1st, 1882; and whether this case is to be governed by the present law, or that which was of force prior to the enactment of the general statutes, it would be impossible to say, owing to the conspicuous absence of dates in the "Case" as prepared for argument here. According to the case of Kapp v. Loyns, 13 S. C. 288, costs are to be governed by the law in force at the time the verdict is rendered; and, by parity of reasoning, they should be governed in this case by the law as it stood at the time the return of the commissioners appointed to admeasure the dower was confirmed. But when that was, whether before or after May 1st 1882, does not appear. The only dates given are the commencement of the proceeding on October 6th, 1879, and the date of the last return of the commissioners October 31st, 1881; but when the order of the Court of Probate confirming the return was made, or when the costs were taxed by that court, or when the appeal was taken from such taxation, or when the judgment now appealed from was rendered, appear nowhere in the "Case." We take this occasion, therefore, of calling the attention of the bar to the importance of giving, in the "Case" as prepared for argument here, the dates of the several steps in any proceeding which they desire this court to review.

Fortunately, however, in this particular case the absence of dates works no practical injury to either party, for, according to our view, the law governing this case is the same now as it has been ever since the passage of the act of 1786, 4 Stat. 743. By this act it is provided "that the expenses that may be incurred in making such admeasurement of dower, as aforesaid, shall be paid by the person or persons who shall claim the property or be in possession of the said lands." The same language was incorporated in section 5, ch. CXIII., of the general statutes of 1872, as well as in section 2287 of the general statutes of 1882. These words, in the act of 1786,

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have been construed in *Harshaw v. Davis, 1 Strobh. 74, where it was held that the owner of the land, out of which dower is claimed, must defray the expenses of assigning the dower, and he cannot exempt himself from the charge by a return to the summons that he was ready and offered to assign the demandant her dower before the summons was issued.

Now, if the demandant has a right to except to the return of the commissioners appointed to admeasure her dower, as she undoubtedly has, both at law (Beaty v. Hearst, 1 McMull. 31,) and in equity, (Gibson v. Marshall, 5 Rich. Eq. 254,) certainly the expense of having such exceptions heard and determined is as much a part of the expenses incurred in the admeasurement of her dower as anything else incident to a proper admeasurement; and, if so, then, by the express terms of the statute, such expenses must be paid by the person who claims the property or is in possession of the lands. We do not think, therefore, that it makes any difference whether this be regarded as a case in chancery or a law case. For, even assuming that it is a case in chancery, and that the question of costs is to be governed by the law as it now stands in reference to costs, as seemed to be assumed in the argument here, the general provisions in reference to costs found in section 323 of the code of 1882 must be reconciled with the special provision found in section 2287 of the general statutes in reference to costs in cases of dower; for the general statutes, embracing the code of procedure, was passed at the same time, and must be regarded as one act.

Now there is no doubt of the rule that where general terms, no matter how comprehensive they may be, are used in a statute which are apparently in conflict with other special provisions contained in the same statute, such conflict may be avoided by regarding the latter as exceptions to the former, and that, for this purpose, courts will read the two provisions as if words of exception were inserted. Pott. Dwar. Stat. 272-3; State v.

Shaw, 9 S. C. 143. The special provision in regard to the expenses incurred in making the admeasurement of dower must, therefore, be regarded as an exception to the general rule established by section 323 of the Code; and, hence, there was error in taxing any part of the costs of this case against the demandant.

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*The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to the Court of Probate for Abbeville county for such further proceedings as may be necessary to carry out the views herein announced.

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20 S. C. 341

STATE v. HICKS.

(November Term, 1883.)

[1. *Witnesses* ⟸358.]

Where defendant offered a witness who impeached the general character of the prosecutor for veracity, and such witness on the cross-examination was interrogated and permitted to testify as to certain offenses with which the prosecutor had been charged, the defendant, in reply, may further interrogate such witness as to those offenses.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1160; Dec. Dig. ⟸358.]

[2. *Criminal Law* ⟸698.]

If a party brings out incompetent testimony, without objection, it becomes competent in the cause on trial, and may be treated as any other competent evidence.

[Ed. Note.—Cited in Latimer v. Trowbridge, 52 S. C. 197, 29 S. E. 634, 68 Am. St. Rep. 893.

For other cases, see Criminal Law, Cent. Dig. § 1651; Dec. Dig. ⟸698.]

Before Kershaw, J., Newberry, July, 1883.

This was an indictment against Coleman Hicks, Jr., and Charley Gallman, for burglary and larceny. The opinion states the case.

Messrs. Johnstone & Cromer and M. A. Carlisle, for appellant, cited Best Ev., p. 1060; Whart. Ev. 572–3; 1 Greenl. Evid. 467, 468; Reyn. Steph. Dig. Ev., Arts. 126, 127, 131.

Mr. Solicitor Duncan, contra.

January 15th, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. On the trial of this case the defendants offered one Charles Brown as a witness to impeach the character of the prosecutor, and on the cross-examination he mentioned certain particular offenses with which the prosecutor had been charged. In reply, counsel for the defendants proposed to interrogate the witness further as to the particular offenses which had been mentioned in his cross-examination, but such questions were upon objection, ruled out, and exception

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was duly *taken. The correctness of this ruling is the sole matter presented by this appeal.

The Circuit judge, in his report, says: "My reasons for excluding the question were these: A witness can only be impeached in this way by proof of his general bad character (i. e. reputation), and evidence of particular offenses committed by the witness cannot be given for that purpose. It was relevant and proper for the State, on cross-examination, to inquire into the grounds for the opinion expressed by the impeaching witness. When it was shown by the replies that the opinion was founded upon alleged particular offenses, and not upon general character, the impeachment was rendered more or less nugatory. In reply, the counsel for the defense could not destroy or impair the effect of the replies elicited on the cross-examination by evidence tending to show the nature, extent and truth of the particular offenses imputed by the impeaching witness. Therefore, such testimony was irrelevant in reply, as much as it would have been in the first instance."†

There is no doubt that the Circuit judge has laid down the rule correctly, that the character of a witness cannot be impeached by testimony tending to show that he has been guilty of, or has been charged with, particular offenses, though there is a case (Anonymous, 1 Hill 251,) in which evidence of a particular fact, to wit, that the witness sought to be impeached had been heard to say on a particular occasion, "that on some occasions he would swear a lie," was held to be competent for the purpose of impeaching the character of the witness. And there is as little doubt that the party offering the witness whose character is sought to be impeached, may test the value of the opinion expressed by the impeaching witness by asking him, on cross-examination, whether his opinion is based upon the general reputation which the witness bears in his neighborhood, or upon particular facts within his own knowledge or upon specific charges which have been brought against the witness whose character is sought to be impeached. But

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when, as in this case, *the cross-examination proceeds further and brings out particular facts or specific charges against the witness to be impeached, it seems to us that the other side ought to have the privilege of asking questions in reply in reference to such facts or charges as have been voluntarily brought out by the party offering the witness whose character is assailed, for he has thus volun-

†The learned judge cited in support of this ruling the following authorities: Whart. Ev. §§ 562–63, 49, 50; State v. Alexander, 2 Mill. Con. R. 171; Dollard v. Dollard, 1 Rice Dig. p. 294, ¶ 439.—Reporter.

tarily thrown open the door to inquiries which otherwise would have been incompetent.

This view seems to have the support of authority. In 1 Whart. Ev., § 573, that learned writer uses the following language: "It is also said that when a witness is cross-examined as to inadmissible matter, the party calling the witness has a right to re-examine as to such matter." So in 1 Stark. Ev. 144, (Metcalf's Edit.,) it is said: "If, by an unfortunate or unskillful question put on cross-examination, a fact be extracted which would not have been evidence upon an examination-in-chief, it then becomes evidence against the party so cross-examining.

The rule therefore seems to be, that if a party chooses to bring out what would be incompetent evidence if objected to, it becomes competent in that particular case, and must be treated as any other competent evidence. It was upon this principle that the case of Free ads. The State, 1 McMull, 494, was decided. In that case testimony was received without objection, showing that the witness, relied upon by the State to prove the offense alleged in the indictment, had stolen two great-coats, and it was held that the Circuit judge erred in refusing to allow counsel for the defendant to comment on the testimony showing that the witness had stolen the coats. Butler, J., in delivering the opinion of the court, after saying that the testimony was clearly incompetent, and would have been ruled out if objected to, used this language: "Incompetent testimony is frequently received by consent; indeed parties are, sometimes, sworn themselves in their own case. When such testimony is so received, it is usually regarded as competent testimony is, to be believed or not believed as the jury may think proper." So here we say it was clearly incompetent to offer testimony tending to show that the prosecutor had been guilty of, or had been charged with, certain particular offenses, but when it was

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brought out not only without *objection, but by the cross-examination on the part of the State, the counsel for the defense had a right to have it "regarded as competent testimony is," and hence had the right to examine, in reply, in reference to such testimony.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

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20 S. C. 344

Ex parte ELLIS.

(November Term, 1883.)

[1. *Homestead* ⟸200.]

Where an appraisement of homestead is set aside by the court, and a new appraisement ordered, it is the Circuit judge who must appoint the new appraisers, and it is no error of law in him to appoint those suggested by one of the parties in interest, without notice to the other party.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 375; Dec. Dig. ⟸200.]

[2. *Homestead* ⟸200.]

Notice of exception filed by creditors to an appraisement of homestead, need not be served upon the judgment-debtor.

[Ed. Note.—Cited in Ex parte Ransey, 54 S. C. 519, 32 S. E. 522; Bleckley & Fretwell v. Shirley, 58 S. C. 55, 36 S. E. 503.

For other cases, see Homestead, Cent. Dig. §§ 372–377; Dec. Dig. ⟸200.]

[3. *Homestead* ⟸200.]

Exceptions to a return of commissioners in homestead being filed with the clerk of court, and by the clerk properly docketed on the calendar of the court, there is no provision of law requiring notice to be given of a motion to set aside the return.

[Ed. Note.—Cited in Ex parte Brown, 37 S. C. 185, 15 S. E. 926.

For other cases, see Homestead, Cent. Dig. §§ 372–377; Dec. Dig. ⟸200.]

Before Wallace, J., Abbeville, February, 1883.

Mr. Eugene B. Gary, for appellant, cited Wade Notice, §§ 1184–1188.

Mr. L. W. Perrin, contra.

January 15th, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The respondents, Cochran & Bonner, having obtained a judgment against the appellant, John E. Ellis, and issued execution thereon, the appellant, on or about April 1st, 1882, applied to the sheriff to have a homestead set off to him in the land upon which he resided. Accordingly three commissioners were duly appointed for the purpose, and they made their return on May 15th, 1882, in which they appraised the land of the appellant, consisting of 210

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acres, more or less, *at the sum of $945, and assigned and set off the entire tract to the appellant as his homestead.

This return was duly filed in the clerk's office on June 1st, 1882, and on the 20th day of the same month the respondents, by their attorneys, duly filed exceptions thereto upon the ground that the real estate assigned exceeded in value the amount allowed by law as a homestead, but no notice of these exceptions was served upon the appellant. At the February Term, 1883, of the Court of Common Pleas, after hearing affidavits from three parties that each of them was ready and willing to pay in cash $1,350 to $1,400 for the said real estate, Judge Wallace granted an order "setting aside the said appraisement and appointing three other commissioners to set off said homestead, all of whom were nominated by the plaintiffs." The appellant received no notice "to nominate an appraiser, nor did he receive notice that a

motion would be made to set aside said return."

From this order John E. Ellis appeals upon the following grounds: "1. Because said John E. Ellis did not receive any notice whatsoever to nominate an appraiser to set off his homestead, and the three appraisers named and appointed in and by the order aforesaid, were nominated by said Cochran & Bonner. 2. Because said John E. Ellis was not served with notice of the exceptions of said Cochran & Bonner to the return of the commissioners appointed to appraise and set off said homestead. 3. Because said John E. Ellis was not served with notice that a motion would be made to set aside said return. 4. Because said order is a complete surprise to said John E. Ellis, and will not subserve the ends of substantial justice by depriving him of the right to nominate an appraiser. 5. Because said order is, in all respects, contrary to law."

The act which was in force at the time these proceedings were instituted, is the act of 1880, (17 Stat. 513), although its terms, so far as it affects the present case, are identical with section 1994 of the general statutes, which did not take effect until May 1st, 1882. It is difficult to perceive wherein the terms of this act have been violated. It did not provide, when a new appraisement was ordered by the court, that one of the appraisers should be nominated by the judg-

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ment-debtor, as it does in the case of *the first appraisement, but on the contrary, it expressly provides that the re-appraisement shall be made by other appraisers appointed by the court; and certainly the court might, without any violation of the law, adopt those suggested by one of the parties, or by any officer of the court, or by any one else. The first exception cannot, therefore, be sustained.

As to the second exception, it will be sufficient to say that the act, in prescribing the mode of proceeding in cases like this, nowhere requires that any notice of the exceptions filed by the creditor should be served upon the judgment-debtor. All that is required is, that the exceptions shall be filed within thirty days after the filing of the return of the appraisers originally appointed; and this was done.

So, too, as to the third ground of appeal, we find no requirement that notice of a motion to set aside the return should be given. Indeed, it would seem to be wholly unnecessary to give the judgment-debtor any such notice. The very fact of filing the exceptions, as required by the act, operated as such notice, and when they were filed it would be the duty of the clerk to place the case upon the calendar for hearing by the court, as any other case, and, in the absence of any evidence to the contrary, we are bound to assume that the clerk, as a public officer, performed this duty. When the appellant made his application to have his homestead assigned to him, he knew, or ought to have known, as the act is very plain, that he had inaugurated a proceeding which could not become final or effectual until his creditors had had an opportunity to file exceptions, and that he could not take the final step necessary to perfect his right, for the protection of which such proceeding had been inaugurated by him, until after the expiration of the time allowed for filing exceptions, or until the exceptions, if filed, had been disposed of; and, surely, there could be no necessity for giving him formal notice of each step in the regular and orderly conduct, as prescribed by statute, of the proceeding which he himself had instituted. See Johnstone v. Manigault, 13 S. C. 403, where this court adopted a similar view in reference to another special statutory proceeding.

As to the fourth ground, we can only say, that if the order appealed from has operated

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as a surprise to the appellant, such a *result is due to his own laches in not following up his own proceeding according to the terms of the act, of which he was claiming the benefit, and not to any error of law on the part of the Circuit Court. The fifth ground of appeal, as has often been ruled, is too general in its terms to require any special notice.

The judgment of this court is that the order of the Circuit Court, which is appealed from, be affirmed.

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20 S. C. 347

RICHARDSON v. COOLEY.

(November Term, 1883.)

[1. *Executors and Administrators* ⟸45.]

A woman being entitled to property in her own right, upon her marriage it was settled absolutely upon her during her natural life, with an absolute power of disposition, and it passed as money into the hands of a trustee. The woman survived her husband and died intestate, leaving issue. *Held*, that action against this trustee, for an account of the trust estate, could be maintained only by an administrator.

[Ed. Note.—Cited in Pickens v. Bryant, 45 S. C. 24, 22 S. E. 750; Grant v. Poyas, 62 S. C. 436, 40 S. E. 891.

For other cases, see Executors and Administrators, Cent. Dig. §§ 296, 307; Dec. Dig. ⟸45.]

[2. *Executors and Administrators* ⟸3.]

Parties can set up a claim to personal property, under the statute of distributions, only through regular administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 3; Dec. Dig. ⟸3.]

3. This case distinguished from Huson v. Wallace, 1 Rich. Eq. 1, and also from Kaminer v. Hope, 9 S. C. 253.

Before Wallace, J., Anderson, March, 1883.

This was an action by J. M. Richardson, assignee of Frances M. Moore, against W. M.

Cooley and one of the sureties on his bond, the other distributees of Mrs. Ann Duckworth being also parties defendant. Action commenced December 4th, 1880.

Mrs. Ann Cooley, a widow, with several children, being about to marry Howard Duckworth, who was the father of several children by a former marriage, and both of them being possessed of property in their own right, entered into a contract, by the terms of which Mrs. Cooley renounced all claim of dower and other claims against her intended husband's estate, and Mrs. Cooley retained "the property now in her possession," which was to be "only subject for the demands now against her, which she is to be the real owner and possessor of during her natural life, and to be disposed of by her according to her own discretion." This was in 1846. No trustee was provided for by this settlement.

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*In 1852, a trustee was appointed, who obtained possession of moneys belonging to Mrs. Duckworth, he having given his bond as such trustee to the commissioner in equity. Howard Duckworth died about 1860, and many years afterwards his widow died, her surviving distributees, under the statute, being her children and grandchildren by her first husband. W. M. Cooley and Mrs. Frances Moore were two of these children. This action was afterwards brought by an assignee of Mrs. Moore's share. Other matters are stated in the opinion. Upon the point decided by this court, the arguments were as follows:

Messrs. Joseph N. Brown and Murray, Breazeale & Murray, for defendant, W. M. Cooley.

The property was Mrs. Duckworth's own, personal and settled upon her for life only, with no remainders over. At her death, therefore, it was intestate property, distributable under the statute, and could be demanded only by an administrator. 10 Rich. 109, 393; 4 McCord 427; 9 S. C. 253. The trust became executed by the death of Howard Duckworth, or, at any rate, by the constitution of 1868, and Mrs. Moore and her assignee can only claim under the statute of distributions.

Messrs. Orr & Tribble, contra.

The objection for the want of proper parties was waived, because not raised by demurrer. Code, § 169. Administration not necessary, as it is a suit on Cooley's bond for an accounting. Hill Trust. 760; 9 S. C. 254. As an appointee of the Court of Equity, Cooley could not be made to account elsewhere. 12 S. C. 556; 6 Id. 346. The Probate Court cannot grant an administration, for the bond, the only estate, is assets in the hands of the heir. Gen. Stat., § 1964.

January 15th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Several questions have been raised in this appeal: but from the view which we take of the case it will not be necessary to consider but one of these questions. This lies at the thresh-

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old, and will dispose of the case, so *far as the present parties are concerned, before reaching the other questions. Besides, it would be improper to pass upon the others, as the parties legally interested therein are not before the court, and, therefore, they are not ripe for examination.

One Mrs. Ann Cooley, of Anderson county, in contemplation of marriage with Howard Duckworth, entered into a marriage contract with the said Duckworth, whereby her property real and personal was to remain hers, subject only to the demands then against her, further stipulating "that she was to be the real owner and possessor during her natural life, and to be disposed of by her according to her own discretion." No trustee was named in the deed; but in pursuance of a petition presented to the Court of Equity in 1852, the defendant, W. M. Cooley, was appointed said trustee, who gave bond to the commissioner in equity in the penal sum of $2,600 for the faithful discharge of his trust, with J. W. Poore, G. W. Turner and Reuben Poore as his sureties. Shortly after this appointment, William M. Cooley, the trustee, received as the trust funds the sum of $1,356.76. The interest upon this fund seems to have been paid regularly up to March, 1865, when there was an alleged investment in Confederate bonds of $500. The interest continued to be paid on the remainder until March, 1869.

Mrs. Duckworth died in 1879, having lived continuously with the trustee for the last six years of her life. She died intestate, having made no disposition of her estate, and leaving as her heirs-at-law and next of kin and distributees the defendant, W. M. Cooley, Francis Moore and the children of Mrs. J. W. Poore, deceased. No administration has ever been taken upon her estate. This action has been brought by the plaintiff Richardson, who claims one-third of the estate as assignee of Francis Moore. The action is upon the trust bond, and the complaint prays an accounting with the view to ascertain the amount in the hands of the trustee, and that plaintiff have leave to issue execution in severalty against Cooley, the trustee, for one-third of the amount ascertained to be due by the master which he claims as assignee. The defendant answered, setting up among other defenses—First, that the complaint did not state facts sufficient to constitute a cause

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of action; and, second, that *the action could not be sustained in the absence of administration on the estate of the deceased.

We cannot see why this defense was not sustained. It was apparent upon the record

that the deceased had died intestate, and that no administration had been taken out upon her estate. The property in question belonged to her and was subject to administration at her death, and we do not know by what authority her next of kin or their assignees could claim possession, except through an administrator. This is not like the case of Huson v. Wallace, 1 Rich. Eq. 1, where there was but one distributee and no debts. On the contrary, here there are numerous distributees besides creditors, or at least one party setting up claims against the estate. Mrs. Duckworth had the right, under the marriage contract, to dispose of the property as she saw fit; but she made no disposition, and the only claim which the plaintiff or the other parties can set up is through the statute of distributions; and there is no mode of enforcing such claims except by regular administration.

The case of Kaminer v. Hope, 9 S. C. 253, has no application here. There the question was, whether the bond of the administrator, executed to the Probate judge, could be sued in the name of the distributees to whom the administrator was accountable; but there is no such question as that here. There it was admitted that the administrator was accountable to the distributees, and the question turned on that fact. Here it is denied (and there is no doubt about the correctness of the position) that the defendant can be held accountable to the distributees in the first instance. It was held in the case of Kaminer v. Hope that there could be no title in the distributees of an intestate estate, except in due course of administration; and in all suits brought in that character the administrator is a necessary party, referring to 1 Dan. Ch. Pr. 295; Story Eq. Pl., § 170; Bradford v. Felder, 2 McCord Eq. 169; Farley v. Farley, 1 McCord Eq. 506; Gregory v. Forrester, Id. 318; Humphreys v. Humphreys, 3 P. Wms. 349. On this ground we think there was error in the judgment below.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

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*STATE v. JENKINS.

(November Term, 1883.)

[1. *Criminal Law* ⇐202.]

A person indicted for arson and acquitted by direction of the judge, as the offense did not constitute the crime of arson, was, afterwards, for this same act of burning, put upon his trial for the statutory offense of burning an untenanted house, and he interposed the plea of autrefois acquit. *Held*, that this plea was properly overruled.

[Ed. Note.—Cited in State v. Rodgers, 100 S. C. 82, 84 S. E. 305.

For other cases, see Criminal Law, Cent. Dig. § 400; Dec. Dig. ⇐202.]

[2. *Criminal Law* ⇐170.]

An indictment charged an offense to have been committed at a future day; after the jury was charged, the error being discovered, the indictment was quashed, and a new and correct one found upon which the defendant was put upon his trial. *Held*, that a plea of autrefois acquit was properly overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 313; Dec. Dig. ⇐170.]

[3. *Indictment and Information* ⇐171.]

The testimony in all cases must correspond with the allegations, and especially in criminal cases.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 536, 537, 549; Dec. Dig. ⇐171.]

Before Witherspoon, J., Anderson, June, 1883.

The opinion makes a full statement of the case.

Mr. Columbus Wardlaw, for appellant.

A person cannot be tried twice for the same offense. It is forbidden by the common law, the Federal and State constitutions. Were the offenses the same? The question turns upon the meaning of the word "offense. "Offense" means any violation of law. Mr. Justice McLean uses the words "same act." 18 Wall. 178; 1 Mart. & Y. 122; 1 Green. 375; 15 S. C. 370.

Mr. J. B. Moore, same side, cited 1 Bailey 651; 2 Treadw. 517; 4 McCord 254; 2 Nott & M. 15; 18 Wall. 163.

Mr. Solicitor Orr, contra.

January 15th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The appellant, Wesley Jenkins, was tried and convicted at the June Term, 1883, of the Court of Sessions for Anderson county, of burning an untenanted house. To the indictment, he plead autrefois acquit, which being overruled, upon trial he was convicted and sen-

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tenced, *the sentence being "confinement in the penitentiary for two years at hard labor."

The appeal raises the single question whether his plea of autrefois acquit should have been sustained. To understand this question, the facts must be stated. It appears that the appellant was indicted and tried at the February Term, 1883, of the court for Anderson, for arson, the indictment charging him with having burned a house within two hundred yards and appurtenant to the dwelling-house of one Jesse J. Dobbins, &c. Upon this trial, it being evident that the house burned was not appurtenant to a dwelling-house, under instructions from the court, the jury returned a verdict of not guilty.

At the next term of the court, to wit, in June, 1883, he was again indicted, this time under the act for "Burning an untenanted house." After the jury had been impaneled

but before any testimony was adduced, the solicitor discovered that the accused was charged with having committed the offense on December 19th, 1883, (a future time,) instead of December 19th, 1882, (the real time,) whereupon he moved to quash the indictment, which was ordered against the objection of appellant's counsel, who claimed that his client was entitled to a verdict. The indictment, however, was quashed, and, the grand jury not having been discharged, a new indictment charging the proper time, and that the property belonged to J. Jesse Dobbins instead of Jesse J., as in the first, was found, upon which the accused was tried, and, as above stated, convicted and sentenced.

The question is, Was the offense charged in this last indictment the same as in either of the other two? If so, the appeal should prevail, as there can be no doubt that in such case he could successfully invoke for his protection the principle that no person shall for the same offense be twice put in jeopardy, or, as is said in the Constitution, section 18, article I.: "No person after having been once acquitted by a jury shall again for the same offense be put in jeopardy of his life and liberty." The question is a mixed one of law and fact. The facts, however, are not disputed, and, therefore, the question of law is alone to be considered. Were the offenses the same? There is no doubt but that the same occurrence gave rise to all

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three indictments, *but it is equally clear that no two of these indictments on their face charged the same offense. Because the first charged arson, the second, burning an untenanted house, on December 19th, 1883, and the third, burning an untenanted house on December 19th, 1882. These were all different. The second charged no offense, as it was impossible for the accused to have committed the act on the day mentioned, and the first required essentially different facts to constitute it from the last. So that it is obvious that no two of the indictments on their face charge the same crime.

Let us subject the question to another test. Could the accused have been convicted at the first trial and under the first indictment of the offense charged in either of the other two? When put upon trial for arson, could he have been convicted of burning an untenanted house? Certainly not, as arson does not necessarily embrace the other offense. Nor, inasmuch as the indictment for arson did not contain a charge of facts constituting the other offense, could testimony have been introduced as to the other, as it is a rule of law, that the testimony must correspond with the allegations, a rule applicable to both civil and criminal cases, and especially so to criminal. If then the accused could not, under any circumstances, have been convicted of the present offense in the former trial, how then can it be said that upon the present trial he has been put in jeopardy twice for the same offense, or, in the language of the Constitution, "That after having been once acquitted by the verdict of a jury of an offense, he has again been put in jeopardy of his life or liberty for the same"? The same may be said as to the two last indictments—the accused could not have been convicted under either of the offenses charged in the other. The following authorities are referred to to sustain this conclusion: 1 Arch. Cr. Pl. 348–351; 9 East 441; State v. Taylor, 2 Bailey 49; State v. Glasgow, Dudley 40; State v. Risher, 1 Rich. 219.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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*TRIMMIER v. BOMAR.

(November Term, 1883.)

[1. *Appeal and Error* ⇐1024.]
A finding of fact by the Circuit judge, on a motion made before him for a preliminary injunction, sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 820, 3816–3823, 3836, 3837, 4020–4022, 4025–4028; Dec. Dig. ⇐1024.]

[2. *Counties* ⇐178.]
Doubted, whether the managers appointed to hold an election on the question of county subscription to the Greenwood, Laurens and Spartanburg Railroad Company, were required by the act of 1880 (17 Stat. 497) to take any oath.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269–273; Dec. Dig. ⇐178.]

[3. *Counties* ⇐178.]
The requirements of the statute authorizing an election to determine the question of a county subscription to a railroad company having been substantially complied with, and the majority at the election so held having been admittedly in favor of such subscription, an injunction to restrain the issue of county bonds therefor was properly refused.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269–273; Dec. Dig. ⇐178.]

[4. *Counties* ⇐154.]
The machinery provided for the conduct of elections, in so far as it is not necessary to determine the result, is directory and not mandatory. The great matter in elections is the result.

[Ed. Note.—Cited in State ex rel. Parler v. State Board of Canvassers, 79 S. C. 418, 60 S. E. 967.

For other cases, see Counties, Cent. Dig. § 234; Dec. Dig. ⇐154.]

[5. *Injunction* ⇐130.]
Where the taxing power is involved, such power can be exercised only in the manner and form prescribed by the statute; but where the question is raised only as to a power that depends upon the result of an election, the sole inquiry then is, whether the election has been held and the result ascertained.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 295; Dec. Dig. ⇐130.]

[6. *Appeal and Error* ⟸1009.]

[A finding in a chancery case which is neither without any testimony to support it, nor opposed to the preponderance of the testimony, will not be disturbed.]

[Ed. Note. For other cases, see Appeal and Error, Cent. Dig. § 3971; Dec. Dig. ⟸1009.]

[This case is also cited in Mauldin v. City Council of Greenville, 33 S. C. 21, 11 S. E. 434, 8 L. R. A. 291, as to facts.]

Before Witherspoon, J., Spartanburg, March, 1883.

This was an action by F. M. Trimmier, Lewis Yarborough, J. T. Pool, Alfred Tollerson and Joseph Walker against J. E. Bomar et al., county commissioners of Spartanburg county, and the Greenwood, Laurens and Spartanburg Railroad Company.

The decretal order appealed from, was as follows:

This action was brought by plaintiffs, taxpayers of Spartanburg county, to restrain the county commissioners of said county from issuing certain bonds of said county in aid of the Greenwood, Laurens and Spartanburg Railroad Company. The allegations of the complaint will be more specifically pointed out in the statement of facts on motion hereafter decided. At the commencement of the action an ex parte order was made, requiring the county commissioners of said county to show cause, before me, why they should not be enjoined from issuing said bonds until the final hearing of the cause, and restraining

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*them from issuing same until further orders of the court. The defendants county commissioners have filed their answer to the complaint, which it is unnecessary to set out in this decree. Upon due notice, the Greenwood, Laurens and Spartanburg Railroad Company was made a party defendant, and allowed to appear and join in the return to the rule.

The return to the rule was heard before me at chambers at Union Court House, on the 6th and 7th of the present month. The affidavits submitted for and against the rule are voluminous, and it is impracticable to state the same fully. It is only necessary to say that the only matters in controversy were certain alleged irregularities at the voting precincts in said county, at an election held pursuant to act of general assembly of December 24th, 1880, authorizing a subscription by the county of Spartanburg to the capital stock of the Greenwood, Laurens and Spartanburg Railroad Company, in that the managers and voters were not sworn according to law, and the oaths of managers were not filed in the clerk's office, and an alleged irregularity in counting the votes and the proper certificate of the result of said election to the county commissioners of said county.

As to the irregularities, either in the failure of the managers or of the voters at said election to take the oaths alleged to be necessary, no testimony has been offered by plaintiffs except as to five precincts. Such testimony was insufficient to sustain the allegations of the complaint, and was contradicted by positive affidavits on the part of defendants, except as to two small precincts in said county, and at one of these the record shows that at least the chairman of the board was properly sworn as a manager. But, admitting that the plaintiffs had shown fatal irregularities at any or all of said five precincts, so as to necessitate their being thrown out, the majority of votes for the subscription would still be more than one thousand. The case of the plaintiffs must therefore, necessarily, rest upon the alleged irregularity with reference to the counting of the votes and certification of the result of the election.

It is unnecessary now to consider what was under the act, the proper mode of counting the votes and certifying the result. The fact of a majority of thirteen hundred and

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eleven votes for *subscription is not disputed by plaintiffs, and is conclusively established by testimony for defendants. It is further clearly established that within three days after the election, on July 12th, 1881, it appeared to the county commissioners of said county, by the original returns from all the precincts in said county, then in their possession, and a tabulated statement of same made and certified to by a number of the managers at said precincts, that the majority for subscription was as hereinbefore stated, and that the board on said day adopted a resolution as above stated. No fraud or misconduct on the part of any officer connected with said election or any voter is alleged or proven. The sole question therefore is, whether, upon a technical irregularity which itself is disputed and is not satisfactorily established, the will of the qualified voters of Spartanburg county upon the question of subscription to the railroad company shall be defeated. On this question I can have no doubt. The purpose of this election was to discover the will of the voters of the county in the premises. That has been conclusively shown, and it ought not to be defeated by minute objections and mere irregularities of manner and form even when well established.

The other grounds for issuing the injunction, alleged in the complaint, are so clearly untenable as not to require extended discussion. I therefore have no hesitation in deciding, from the testimony, that there is nothing to invalidate the election, and that there has been such substantial compliance with the requirements of the act as should authorize and require the county commissioners to issue the said bonds in pursuance of the terms of subscription to said railroad company.

In addition to what has already been said,

I also consider that plaintiffs are estopped from bringing this action. From the date of the election in July, 1881, the plaintiffs have quietly rested, making no complaint and taking no action, although all the matters upon which they now rely were more accessible to them and susceptible of proof than now. In the meantime rights have vested in third parties. The county commissioners, on September 6th, 1881, subscribed the sum of $75,000, in bonds of said company, to the capital stock of the said railroad company, agreeing to issue said bonds as the work of construc-

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tion of said road shall *progress. The defendant railroad company having received said subscription and obligation to issue bonds of the county therefor, have, in advance, pledged said bonds to certain contractors for the work of construction of said railroad through Spartanburg county. Some of these bonds have already been issued, and others should be pursuant to the terms of said contract. The contract was bona fide, and it seems to me that the promises under such contract stand in a court of equity on an equal footing with bona fide holders of bonds already issued.

It is therefore ordered and adjudged, that the rule herein against the defendants, requiring them to show cause why an injunction should not issue, restraining the defendants county commissioners from issuing the aforesaid bonds, be and the same is hereby discharged, and the order for injunction heretofore granted herein be dissolved.

From this order the plaintiffs appealed, upon the ground stated in the opinion and upon two others, denying an estoppel.

Mr. Stanyarne Wilson, for appellants.

The action of the county commissioners is not res judicata. In the cases from 1 McCord 59, 2 Treadw. Com. R. 646, and 2 Rich. 7, there were special statutes for political elections, constituting the officers judicial officers as to the elections, and with no conditions precedent as here. In 16 S. C. 236, and 17 Id. 563, the matters were between parties litigant, and within the jurisdiction of the county commissioners. Big. Estop. 9. The principles upon which municipal decision has been sustained are, that where municipal officers have, by statute, power to determine whether the conditions precedent to the issue of the bonds have been complied with, and they so determine and place their recital to that effect in the bonds, this decision is final as to a bona fide holder for value before maturity, but not as to the original payees or purchasers with notice. 21 How. 539; Burroughs Pub. Sec. 272–320, 360; 4 Otto 429; Cooley Const. Lim. 196. There were fatal irregularities in the conduct of the election and making the return. The citations for respondents all relate to political elections. Cheves 269. In elections involving

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the tax*ing power there is nothing pre-existing, and a strict compliance is necessary. Burroughs Pub. Sec. 262; Dill. Mun. Corp. § 108; 19 Barb. 558; Pot. Dwar. 223, 225, note; 5 Mich. 154; 14 Ill. 223; 2 Cranch 127; 1 Paine 406; Ang. & A. Corp. 103; 27 Ill. 309. Instances of fatal irregularities, 19 Wis. 298; 16 Wall. 660; 70 N. Y. 28; 67 Ill. 61; 13 Gray 83.

Messrs. J. H. Evins, S. J. Simpson, E. H. Bobo and J. S. R. Thomson, upon the points considered by this court, cited 17 Stat. 497, §§ 7, 8, 9; 14 Barb. 259; 10 Minn. 107; 10 Cal. 352; 1 Sneed 637; McCra. Cont. El. 123–131, 145, 175, 304, 305, 554; Pot. Dwar. 226; 5 S. C. 264; Pierce Railr. L. 104; Jones Railr. Sec., §§ 280–1; 4 Otto 640; Cheves 269; High Inj., § 9; 13 La. Ann. 175; 21 Pick. 148; Harp. 139; 104 Ill. 343.

January 15th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. By an act of the Legislature approved December 24th, 1880, (17 Stat. 497,) the county commissioners for Spartanburg county were authorized to subscribe to the capital stock of the Greenwood, Laurens and Spartanburg Railroad Company, such sum as the qualified electors of said county should determine by an election to be held under said act, and to that end the act further provided machinery for the election, among other things enacting, in section 8, "That it should be the duty of the managers to make returns, and meet at their court house and count the votes and declare the result, as in other elections, which result should be certified in writing by the chairman of each board of managers to the chairman" of the board of county commissioners. On July 9th, 1881, an election was held under this act, and out of a vote of 4,435 in the whole, the vote for subscription was 2,873, a majority of over 1,300 in favor thereof. The amount to be subscribed according to this vote was $75,000, which subscription was immediately thereafter made, and bonds to the amount of $10,500 issued and turned over to the company.

In 1881, a convention of the tax payers of the county was held for the purpose of elect-

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ing commissioners to represent the *stock in a meeting of the stockholders of this railroad company, at which the plaintiff Trimmier was elected as one of three of said commissioners. Trimmier, Yarborough and Pool were members of this convention. The plaintiff Walker was elected one of the directors of the road, and it was upon his motion that a committee was appointed to receive the county bonds and to sell them; and Tollerson participated in the election. The subscription of the county was received by the

company. A contract for grading was made, which was commenced, and $10,500 of the bonds issued before the action below was instituted, which was in February, 1883.

The purpose of the action was to obtain a permanent injunction, restraining the commissioners from issuing the bonds of the county, in payment of the said subscription, and that another election should be ordered, if necessary. The grounds upon which this relief was asked, were—first, that the plaintiffs were the owners of over $100,000 worth of property located in said county liable to be taxed for the payment of said bonds; second, that the subscription was illegal and void, because the act authorizing the election had not been complied with in the following particulars, to wit: (1) That the managers had not been sworn; (2) that their oaths had not been filed with the clerk; (3) that the managers had not assembled at the court house after the election, as required by section 8, supra, and, (4) that the chairman of each of said boards had not certified the result in writing to the board of county commissioners, as also required. The result of the election as above stated was not denied, nor was there any allegation of unfairness, fraud or irregularity in said election, either as to its inauguration or to its conduct, except in the particulars above stated.

The complaint having been filed, the case was presented to Judge Witherspoon at chambers, for a temporary injunction until the hearing of the cause, whereupon Judge Witherspoon issued an order requiring the defendants to show cause before him at Spartanburg on March 21st, thereafter, why the prayer of the plaintiffs should not be granted with leave on their part to appear at any prior day, upon 10 days' notice, at the same time granting a restraining order against the

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defendants upon certain con*ditions. The defendants answered, and on March 6th, 1883, after due notice, a motion was made and heard before Judge Witherspoon to dissolve this injunction, who, after full investigation with voluminous affidavits on both sides, granted the motion, holding as a matter of fact, that the allegation in reference to the failure of the managers to take the oath alleged to be necessary, had not only not been sustained by the testimony, but was contradicted by positive affidavits on the part of the defendants, except as to two small precincts, which, if thrown out, would still leave a majority of votes for the subscription of over 1,000; and as to the two other alleged irregularities, to wit, of the managers not meeting at the court house, and not certifying in writing the result of the election, by the chairmen of the different boards, he held, that while not satisfactorily established, yet, if having occurred, they were nothing more than mere technical irregularities which ought not and could not affect the result, in the face of the overwhelming fact, not denied, that a large majority of the vote had sustained the subscription. He also held the plaintiffs estopped from bringing the action.

The appeal seeks to reverse the rulings of the Circuit judge, first, "Because his Honor held that it did not appear from the pleadings and evidence that there were such fatal defects and irregularities, in the conduct of the election and making the return, as to prevent the issue of the bonds of the county." This ground involves two questions: first, the existence of the alleged irregularities, which is a question of fact; and, secondly, if any, their effect, which is a question of law. This being a case in chancery, both of these questions are within our jurisdiction. The Circuit judge held as to the alleged irregularities, in reference to the oaths of the managers, that they were not sustained by the testimony, and therefore could not be considered as to their legal effect. Under the law governing the findings of fact by a Circuit judge when brought before this court for review, we see no cause for disturbing the finding here. Upon a careful examination of the affidavits, it will be seen that this finding is neither not without any testimony to support it nor opposed to the preponderance of the testimony. It must, therefore be sustained, and this exception dismissed with-

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out further *consideration, except, it may be remarked, that it is not at all certain that the managers under the act were required to take any oath.

We think that the Circuit judge might well have found, as a matter of fact, that the other alleged irregularities had not been sustained, because it is pretty clear from testimony that all of the requirements of section 8, as to making the returns, the meeting of the managers, counting the votes, declaring the result and making the certificate, were substantially complied with; sufficiently so, at least, to have warranted him, in our opinion, in dissolving the injunction upon that ground. He assumed, however, that there may have been some irregularity; he held that yet this was merely technical, and was not of a character to invalidate the election. In this we concur. In elections the great matter is the result. When this is clearly ascertained it sweeps away all technicalities. The machinery provided should be observed, but in so far as it is not necessary to determine the result, it is directory and not mandatory. Certainly manner and form should not be allowed to defeat the undoubted will of the people clearly expressed. This would be indeed subordinating and sacrificing the substance to the shadow.

There is no allegation or pretense that, had section 8 been literally and exactly complied with in its entire particularity, the majority declared would have been diminish-

ed or the result altered in the least. What ground then is there for complaint? There seems to be no doubt that the managers desired and attempted to discharge the duty imposed upon them faithfully and fully as far as they understood it. It appears from the testimony of Mr. Kirby, the chairman of the county commissioners, that the managers met at the court house; that returns from all the precincts were received, with a tabulated statement of the same; that at said meeting the returns were recanvassed and verified; that to the best of his recollection the returns from the different precincts were duly signed by the managers thereof, and that no question as to the correctness of said returns or the general result had ever been made, suggested or heard of until this action. Under such circumstances it is needless to refer to authorities by which

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to sustain the result. *Such authorities may be found, however, abundantly, in McCra. Cont. El. §§ 123–131, 145, 175, 304, 305 and 554.

The appellants' counsel seems to admit this, but contends that this doctrine, while applying to political elections, yet that it does not apply to the exercise of a taxing power. This may be true where such power is conferred to be exercised in a certain way, and according to certain prescribed forms or conditions. Where the power is vested to be thus exercised, it is a nullity when attempted through any other channel than that prescribed, and the authorities relied on by appellants are full to this point. Burroughs Pub. Sec. 262; Dill. Mun. Corp., § 108; People v. Schermerhorn, 19 Barb. 558; Pot. Dwar. 225, note; Clark v. Crane, 5 Mich. 154; Marsh v. Chesnut, 14 Ill. 223; Head v. Insurance Company, 2 Cranch 127 [2 L. Ed. 229] and others cited in the argument of counsel.

But that is not the character of this case. Here there is no contention that the county commissioners exercised the power of issuing the bonds already issued irregularly, or that they are likely to do so as to the bonds yet to be issued. The question is, Has any power to the end of issuing the bonds at all been conferred upon them? It is not a question of the proper exercise of a power, but it is whether a power has been created. The legislature has declared by act that the power might be created by election by the qualified voters of the county, and the question is, Has such election been held and the result ascertained according to law? This question is a very different one from that raised by the appellant, and must be decided upon different principles. It is a question as to the will of the people, to be heard through the ballot-box, and we think the authorities to be found in McCrary, supra, apply.

This disposes of the case, and it is not necessary to discuss the question of estoppel.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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20 S. C. *363

*STATE v. TREZEVANT.

(November Term, 1883.)

[1. *Criminal Law* ⇐989.]

The failure of the Circuit judge to ask a prisoner convicted of murder, "If he has anything to say why judgment should not be pronounced on him," is error, and requires a resentence, although the prisoner did not demand that this question should be asked.

[Ed. Note.—Cited in State v. Jefcoat, 20 S. C. 383, 387; State v. Baker, 58 S. C. 114, 36 S. E. 501; State v. Knotts, 70 S. C. 402, 50 S. E. 9.

For other cases, see Criminal Law, Cent. Dig. §§ 2512, 2515; Dec. Dig. ⇐989.]

[2. *Criminal Law* ⇐1188.]

But as this error affected the sentence only, the prisoner is not entitled to a new trial, but must be resentenced after being so asked.†

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3224; Dec. Dig. ⇐1188.]

Before Wallace, J., Orangeburg, May, 1883.

This was an indictment against William Trezevant for murder. The opinion states the case.

Mr. Andrew C. Dibble, for appellant.

Mr. Solicitor Jervey, contra.

January 15th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The defendant was tried and convicted of murder at the May Term, 1883, in the Court of Sessions for Orangeburg county. When called for sentence, the question "whether he had anything to say why judgment should not be pronounced on him," was omitted. The appeal assigns error on account of this omission.

There is no doubt that in capital cases the practice of asking this question before sentence has been universally recognized and followed in this State from the earliest period of our judicial history. State v. Washington, 1 Bay 155 [1 Am. Dec. 601]. And it seems that it has been the practice, not simply because it was formal and seemly, but because of legal requirement founded upon wise consideration, and, therefore, necessary and indispensable. Mr. Archbold (1 Cr. Pr. & Pl. 676) says, that in capital cases, before judgment is pronounced upon the defendant,

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it is indispensably *necessary that he should be asked "if he has anything to say why judgment should not be pronounced on him," referring to 1 Chitty Crim. L. 700; West v. State, 2 Zabr. 212, and Grady v. State, 11

†See State v. Jefcoat (3), post, page 383.

Geo. 253; and, also, that this should appear upon the record to have been done. 3 Salk. 358; Mill. Comp. 157; 3 Mod. 265.

This is necessary, because, on this occasion, the defendant may allege any ground in arrest of judgment, or he may plead a pardon, &c. 4 Bl. Com. 376. He further says, that the omission to do this in cases of minor felonies is not a sufficient ground for reversing the judgment, provided it appears that the prisoner and his counsel were both in court when the sentence is pronounced, and urge nothing against the judgment or in mitigation of the defendant's guilt. Grady v. State, 11 Geo. 253. The same doctrine is found in 1 Bish. Cr. Pro., § 865, where he says that "it is now indispensably necessary, even in clergyable felonies, that the defendant should be asked if he has anything to say why judgment of death should not be pronounced on him." 4 Burr. 2086; 3 Salk. 398; 3 Mod. 265. Under this uniform practice, founded, as we have seen, upon the law, the defendant here had the right to have this question propounded to him before sentence; and, although it was not demanded, yet, in a case of such serious magnitude, the omission to have the question asked, we think, was error.

Next, as to the effect of this error. We do not see why it should affect the whole proceeding, and, therefore, render a new trial necessary. The error occurred after trial and conviction, and applied to the subsequent proceeding, to wit, the sentence only; and in reason the remedy should extend only so far as the error extended. The weight of authorities sustain this view. 1 Bish. Cr. Pro., § 1293; McCue v. Commonwealth, 78 Pa. 191; 21 Am. Rep. 7; State v. Johnson, 67 N. C. 59.

It is the judgment of this court that the judgment of the Circuit Court, as to pronouncing sentence, be reversed, and that the case be remanded for resentence after the question above is asked the defendant.

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20 S. C. *365

*PYLES v. BELL.

(November Term, 1883.)

[1. *Bankruptcy* ⇐391.]

Fifteen years after defendant filed his petition in bankruptcy, this action was commenced on a note executed prior to the filing of such petition. *Held*, that defendant had been guilty of unreasonable delay in obtaining his discharge and, therefore, the action could be prosecuted in the State courts.

[Ed. Note.—Cited in Adams v. Richardson, 30 S. C. 218, 9 S. E. 95.

For other cases, see Bankruptcy, Cent. Dig. § 648; Dec. Dig. ⇐391.]

[2. *Payment* ⇐66.]

A sealed note was given in 1858, upon which payments were made in 1859, 1863, 1873 and 1874, and action was commenced in 1883. *Held*, that the right of action was kept alive by the credits indorsed, and that the note was not presumed to be paid from the lapse of time.

[Ed. Note.—Cited in Dickson v. Gourdin, 26 S. C. 398, 2 S. E. 303; Montgomery v. Cloud, 27 S. C. 193, 3 S. E. 196; Fleming v. Fleming, 33 S. C. 511, 12 S. E. 257, 26 Am. St. Rep. 694.

For other cases, see Payment, Cent. Dig. § 186; Dec. Dig. ⇐66.]

[3. *Bankruptcy* ⇐434.]

Semble. Payments made upon a note after the maker's discharge in bankruptcy would not constitute such new promise to pay as would revive the discharged debt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 853-866; Dec. Dig. ⇐434.]

[This case is also cited in Park v. Brooks, 38 S. C. 306, 17 S. E. 22, without specific application.]

Before Witherspoon, J., Laurens, February, 1883.

This was an action by Permelia F. Pyles, as executrix of Newton Pyles, deceased, against W. B. Bell. The opinion states the case.

Mr. J. W. Ferguson, for appellant.

Under the terms of the bankrupt act of 1867, section 21, this action should have been dismissed. 1 Bank. Reg. 125, 165; 4 Id. 156; 5 Id. 125; 7 How. 627; 45 Miss. 209; 8 S. C. 315; 5 Id. 515. As touching the original contract, the bankrupt court having assumed jurisdiction, action in the State court should have been dismissed or stayed. 9 Wheat. 532; 10 How. 56; 10 S. C. 433. There is no proof of negligence. The testimony is that he applied for his discharge, but has never received it. The question may now be under consideration in that court. If these positions are correct, then action can be maintained only on a new promise, or new contract. Part payment is only evidence of a new promise. 15 Rich. 375; 18 Wall. 1; 11 Pa. 364. Action on the new promise was barred in six years. Hilliard Bankr. 265.

Messrs. Holmes & Simpson, contra.

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*This court did have jurisdiction, there having been unreasonable delay by the bankrupt. 80 N. C. 334; Bump Bankr. Pr. 356, 185, 701 and notes. This is not an attempt of the State court to reach property in the bankrupt court. Bump Bankr. Pr. 356. The State court must determine whether the right of action has again accrued to the plaintiff. 1 La. Ann. 75. Payments made by the bankrupt would revive the debt. 16 S. C. 216; 4 Den. 225; 53 N. Y. 521; Lalor Supp. Hill. & D. 371; 1 Doug. 192; 12 N. Y. 635.

February 18th, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This action was commenced January 8th, 1883, for the balance of a sealed note, given by the defendant and one J. H. Bell, as surety, to Newton Pyles, testator of the plaintiff, on July 30th, 1858, for $1,000. The following credits appeared

indorsed on the note, the last two in the handwriting of the defendant: February 3d, 1859—$165.52; April 24th, 1863—$106.95; September 8th, 1863—$162.42; March 12th, 1873—$49.77, and January 1st, 1874—$203.92, leaving a balance still due. The defense was that the defendant was declared a bankrupt in the United States Court in 1868, and that the note had been proved in bankruptcy by Newton Pyles, payee, in his life-time, and that the defendant, never having been discharged, is still in bankruptcy and the action should be "stayed" under the bankrupt law. He also pleaded that the plaintiff's cause of action was barred by the statute of limitations, not having arisen within six years previous to the commencement of the action.

Upon the trial, it appeared that the defendant was adjudged a bankrupt on his own petition in 1868; that this note of Newton Pyles was proved before the register, C. G. Jaeger, Esq., and that Bell had applied for his discharge in bankruptcy, but never received the same. It also appeared that, afterwards, the defendant, Bell, being engaged in merchandise, Pyles, the testator of plaintiff, went to settle his account with him, $203.92, and asked that it might be credited on the note. "Bell at first refused, saying the note was worthless and that he was in

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bankruptcy, *but after some conversation agreed to do so on condition that Pyles would trouble him no more about the note." Bell then placed the credit of January 1st, 1874, on the note. Judge Witherspoon held that as the defendant had not, after such a lapse of time, obtained his discharge in bankruptcy, the State court had jurisdiction and overruled the plea of the statute of limitations. The plaintiff had a verdict for the balance upon the note, and the defendant appeals to this court upon the grounds: 1. "Because his Honor erred in holding that the State court had jurisdiction; and 2. Because his Honor erred in ruling that the plaintiff's cause and right of action was not barred by the statute of limitations."

As to the first exception. There can be no doubt that the State court once had jurisdiction of the subject-matter of the action. The parties were citizens of the State and the note was a South Carolina contract. It is true that, when the defendant was declared a bankrupt in the United States Court, the jurisdiction of the State court was suspended during the proceedings in the bankrupt court, and if the bankrupt had been there discharged, that discharge would have been a bar to all proceedings to collect the note in the State court. But this assumption of jurisdiction by the United States Court, and the consequent suspension of that of the State, was for the purpose of enabling that court to dispose of the matters of bankruptcy without embarassment, and upon the faith that it would exercise reasonable diligence in proceeding with the business to final judgment. Otherwise, the simple act of going into bankruptcy would, without further proceeding or any division of the assets, operate as a perpetual injunction against all creditors.

Section 21 of the bankrupt act of March, 1867, provides as follows: "Suits at law or in equity shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge. Rev. Stat., § 5106. We suppose that the question of what is "unreasonable delay," under this provision, must be determined by the State court, which, but for the stay from the bank

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rupt court, would have jurisdiction. So *far as known to us, there is no case in our reports upon the subject, but it seems to have been held in North Carolina that a delay of five years was "unreasonable." The court say: "When there is unreasonable delay on the part of the bankrupt in obtaining his discharge, as here, five years, the stay of proceedings against him in an action to recover a debt provable in bankruptcy, will not be continued, but judgment may be rendered." Calvert v. Peebles, 80 N. C. 334; Bump Bankr. Pr. 185, 356, 701 and notes.

In this case it was fifteen years after the defendant went into bankruptcy before this action was brought in the State court, and as no discharge was obtained in that time, we cannot say that it was error to hold the delay "unreasonable," and that the original jurisdiction of the State court re-attached, as if there never had been any proceedings in the bankrupt court. The bankrupt act has been repealed, and the proceedings may be regarded as abandoned.

The statute of limitations, as such, has no application to the case. The action was not brought on any new parol promise, but on the original sealed note itself, and at the time it was executed, in 1858, there was in this State no statute of limitations as to bonds or notes under seal; but, in the absence of such a statute, the courts held that there was a presumption of payment at the end of twenty years, if there had been no fact going to show that the debtor acknowledged the debt to be in existence within that time. Willingham v. Chick, 14 S. C. 95. We may say, in passing, that if the defendant had been discharged in bankruptcy, and this action had been upon an alleged new promise to pay the note after it was discharged, we agree with the defendant's attorney, that the simple payments on the note would not have been sufficient to make out that "clear, distinct and unequivocal promise to pay" which has been held necessary to revive a debt discharged by the discharge of the debtor under the bankrupt act. Allen & Co. v. Ferguson, 18 Wall. 1 [21 L. Ed. 854]. But in this case the bank-

rupt was never discharged, and, the action being on the original sealed note, the only question was, whether it should be presumed

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to be paid from lapse of time, the note *having been given in 1858, and the action not brought until 1883—twenty-five years thereafter.

In reference to the presumption of payment arising from the lapse of twenty years, it has been held that the presumption is not one of law, and therefore conclusive, but one of fact, which may be rebutted by acknowledgments in analogy to the principles regulating admissions to take a case out of the statute of limitations. Stover & Barnes v. Duren, 3 Strobh. 450. In regard to the statute of limitations the rule is well settled, that after the debt is barred nothing short of an express promise, or what is equivalent to such promise, will suffice to take a case out of the statute; but before the bar of the statute is complete, mere acknowledgments, as shown by part payments or otherwise, are sufficient to keep the original debt alive by giving at each acknowledgment a new starting point for the running of the statute. Rucker v. Frazier, 4 Strobh. 94; Lomax v. Robertson, Dudley 367; Bowdre v. Hampton, 6 Rich. 212.

Now, apply these principles to the presumption of payment of the sealed note in this case, as if twenty years had been expressly declared by statute to be a bar. Counting from the date when the note fell due, and thence successively from each payment, had twenty years expired at any of the periods when payments were made, or at the time the action was brought? They certainly had not expired when the first payment was made, in 1859, nor at the time the second and third were made, in 1863, nor when the two last payments were made, in 1873 and 1874, after the defendant had filed his petition in bankruptcy, nor when the action was brought, in 1883. The payments, though possibly not sufficient to revive a debt already barred, were enough as acknowledgments, to keep alive a debt which was never barred.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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20 S. C. *370

*YOUNGBLOOD v. LATHEN.

(November Term, 1883.)

[1. *Bankruptcy* ⇨400.]

Certain lands of a bankrupt were excepted from the sale of his property by order of the United States District Court, but no formal assignment of such land as a homestead to the bankrupt was made by the United States Court, or by any State court, or ever filed for record with the clerk of court. Afterwards, the bankrupt sold a part of this land and then died intestate. *Held*, that the purchaser was entitled to this land, and that it could not be claimed by the widow of the bankrupt as a part of the homestead, nor by his heirs for partition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. ⇨400.]

[2. *Bankruptcy* ⇨396.]

The United States Court in bankruptcy does not assign a homestead, but only excepts from sale and conveyance such property as is exempt under the State law, leaving the title of such excepted property in the bankrupt, which he may afterwards sell if he pleases.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 664; Dec. Dig. ⇨396.]

Before Kershaw, J., Lancaster, February, 1883.

Action for partition by Mary J. Youngblood against Nancy Lathen, John F. Lathen, Harriet M. McMillan, Elizabeth A. Robinson and Sarah A. Robinson, commenced in 1882. The opinion states the case.

The Circuit decree was as follows:

The constitution of this State (Art. I., § 20,) declares that "a reasonable amount of property shall be exempted from seizure and sale for the payment of any debts or liabilities, except for the payment of such obligations as are provided for in this constitution." Article II., section 32, declares "that the family homestead of each family residing in this State * * * shall be exempt from attachment, levy or sale on any mesne or final process issued from any court," &c. The revised statutes of the United States, section 5045, re-enacting former acts, provides that "in no case shall the property hereby excepted pass to the assignee or the title of the bankrupt thereto be impaired or affected by any of the provisions of this title," &c. Among the exceptions referred to is the following: * * * "Such other property, not included in the foregoing exceptions, as is exempt from levy and sale, upon execution or other

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process, or order of any court by *the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each State as existing in the year 1871," &c.

It is contended, that if the estate of the bankrupt remained as declared in the section quoted, unimpaired or unaffected by the provisions of the bankrupt law, then he simply held his land by the former title, free from the debts provable against him in bankruptcy. In other words, that he had such title as he would have had if there had been no proceedings in bankruptcy and he was clear of debt. But this reasoning is certainly fallacious. The thing excepted in bankruptcy is that which is exempted by the constitution and laws of the State from liability to process for the collection of debts, to wit, the family homestead. The bankrupt court, having assumed jurisdiction, superseded the process of the State courts and settled the debts of the bankrupt and allowed him the same benefits which he would have been en-

titled to if the property had been subjected to the process of the State courts. In order to do this the homestead has been judicially ascertained and allotted to the bankrupt. It then acquired the specific character impressed upon a homestead by the State laws after assignment.

If that were not the case, then the exempted property never could have acquired that character, because, the debts being discharged in bankruptcy, there would be no proceedings in the State courts to enforce said debts, and consequently no proceedings to assign a homestead. The estate of homestead has been said to be not a new estate, nevertheless after its assignment it acquires certain new characteristics or incidents which largely qualify it. Among them is that it shall be the family homestead; which, though vested in the head of the family, is in him as the representative of the family; the family being the object of the protection afforded by the constitution in this respect. The subject of protection is the family, the head of the family being referred to as its representative. In re Kennedy, 2 S. C. 227; Howze v. Howze, Id. 229; Ex parte Strobel, Id. 311. The widow and children of the debtor, and even the widow without children, is entitled to this protection.

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3 S. C. 227. The head of a family *is but a trustee and the family the beneficiaries. Moore v. Parker, 13 S. C. 490.

Such being the nature of the estate, as affected by the constitution and laws concerning the homestead exemption, it follows that from the time it acquired that character by the assignment of a court having jurisdiction, it became inalienable by the head of the family, at least so far as its alienation could affect the interests of the members of the family who are the beneficiaries of the trust. The widow, if she survive the children, in this case would be the sole beneficiary, and hence the children are not entitled to partition until her death. This would have been the result even in the absence of the statutory inhibitions of alienation. A reference to these will also lead to the same conclusion. 15 Stat. 371, §§ 4 and 5; Gen. Stat., § 1997. The act of March 13th, 1872, prescribing the mode in which the homestead may be sold by the head of the family, preserving at the same time the interests of the family, very strongly sustains the view here taken. 15 Stat. 229.

It follows, from what has been said, that the attempted alienation is void, and that plaintiff is not entitled to partition of the said lands. It is adjudged and decreed that the complaint be dismissed, and that plaintiff, Mary J. Youngblood, and defendant John F. Lathen, pay the costs in equal shares, to be adjusted by the clerk and entered in the judgment.

Mr. M. J. Hough, for appellant.
Mr. R. E. Allison, contra.

February 18th, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action for partition of lands among the heirs of the intestate, C. H. Lathen, under the following circumstances: The intestate, C. H. Lathen, seized and possessed of two small tracts of land—one containing 140, and the other 130 acres—went into bankruptcy in the United States Court in 1873, and was there adjudged a bankrupt and discharged in 1874. Under some claim that, under the

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laws of *South Carolina, he was entitled to homestead in the tracts of land above described, the United States Court declined to have them sold for the payment of debts; but it seems that no actual assignment of homestead was ever made by the United States or State court, or returned for record in the clerk's office of Lancaster, as required by law. All that appears is a certificate made for use in the bankrupt court as follows:

"The real estate to be set apart to C. H. Lathen as his exempted property, under the provisions of the homestead laws of South Carolina, lying in Lancaster, on which petitioner resides, containing 305 acres more or less, we have appraised and returned at $950.

(Signed) "John J. Graham,
"James Crockett,
"David M. Crockett,
"Appraisers."

Matters stood in this imperfect condition until July, 1878, when the intestate, C. H. Lathen, conveyed the smaller tract (130 acres) to his son, John F. Lathen, who was put into possession, and still retains it under his father's deed. In November, 1878, C. H. Lathen, the father, died intestate, leaving a widow, Nancy, one son, John F. Lathen, and several daughters, viz., Mary J. Youngblood, Harriet M. McMillan, and others. All the children are of full age, and have married and left their parents. At the death of her husband, the widow, Nancy, was left alone on the 140-acre tract, of which she still retains the possession.

Mrs. Youngblood, one of the daughters, commenced this action for partition of both the tracts of land, claiming that, upon the death of her father, C. H. Lathen, both tracts descended to his heirs-at-law, and are subject to partition among them. The widow, Nancy, claimed that both tracts had been set apart for the homestead of her husband in his life-time by the bankrupt court, and that now being the head of the family she was entitled to retain them during her life as such homestead. John F. Lathen claimed that, while it was true that the United States Court refrained from selling the lands

as the property of his father on the ground that they might be assigned as his homestead under the law of the State, yet such

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homestead was never *actually assigned, and his father still had the right to convey the land, and his deed gave good title to the tract conveyed to him.

The cause was heard by Judge Kershaw, who held that the refusal of the United States Court to have the lands sold in bankruptcy was substantially an assignment of homestead to the debtor, "judicially ascertained and allotted to the bankrupt;" that from that time C. H. Lathen, as the head of the family, became a trustee for his wife and children, the beneficiaries under the homestead; that, therefore, he had no right to sell any of his land, and his deed to John F. Lathen was null and void. He held that the widow was entitled to both tracts as homestead during her life, and dismissed the complaint for partition, ordering John F. Lathen to pay half of the costs.

The defendant John F. Lathen appeals to this court upon the following grounds: "1. Because his Honor erred in holding that the alienation of C. H. Lathen in his life-time to appellant, July 19th, 1878, is void. 2. Because, although the land conveyed by C. H. Lathen to appellant may have been a part of the land allowed him as a bankrupt by the United States Court in bankruptcy, still he had a right to convey it, and his Honor should have so held. 3. Because his Honor erred in holding that Nancy Lathen was entitled to homestead as against appellant in that portion of the land conveyed by C. H. Lathen to appellant. 4. Because his Honor refused to decree specifically whether the deed of J. F. Lathen was valid, or what part, if any, of the land Nancy was entitled to as homestead. 5. Because his Honor ordered that John F. Lathen should pay half the costs."

It will not be necessary in this case to consider what powers belong to the head of a family in respect to disposing of his property which has already been regularly assigned and set apart as a homestead. The general right to homestead under the constitution and law, and the having it actually laid off and assigned by the machinery for that purpose, are very different things. In a general sense, every insolvent debtor, who is the head of a family, may be said, in a proper case, to be entitled to homestead; but the law of the State has directed certain things to be done in order to locate the right

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and give it practical vitality; *and we suppose that the shield which the homestead affords can be secured only by a compliance with these requirements. It has been held that even the assignment does not protect the property; but in order to have that effect it must be made a record of court as prescribed. Ryan v. Pettigrew, 7 S. C. 146; Choice v. Charles, Ibid. 171; Bull v. Rowe, 13 S. C. 355. The right to homestead is not a new estate taken from one man and given to another, but simply a negation of the ordinary rights of the creditor as to certain property for certain purposes—an "exemption" dealing only with the process for enforcing the contract, "but leaving the title to the property untouched."

Without now going into the question, whether the head of a family has the absolute right to dispose of property which has been regularly set apart as his homestead, it is very certain that at any time before such assignment (notwithstanding the existence of the general undefined right), the owner of the land may alien or mortgage it so as to defeat the right to homestead either on his own part or that of his family. Homestead Association v. Enslow, 7 S. C. 1; Rosenberg v. Lewi, Id. 344; Smith v. Mallone, 10 S. C. 39. It does not seem to us that these lands were regularly assigned as homestead to C. H. Lathen in his life-time. It is not even claimed that they were so assigned, according to the particular requirements of the South Carolina law, or that such assignment was ever returned for record in court, as required by that law. It is, however, suggested that when Lathen, the intestate, filed his petition for bankruptcy in the United States Court, that court assumed jurisdiction of the subject, and thereby "superseded the process of the State court, and in settling the debts of the bankrupt, allowed him the same benefit he would have been entitled to if the property had been subjected to the process of the State courts." In other words, that the refusal of the bankrupt court to include these lands in the conveyance to the assignee in bankruptcy and to have them sold in payment of the debts of the bankrupt, must be regarded as equivalent to an actual, formal assignment of homestead therein.

We do not so understand the bankrupt proceedings. It is true the bankrupt court, when informed by certificate that the lands did not exceed $1,000 in value, which the pe-

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titioner might *have assigned to him as homestead, declined to have them sold for the payment of his debts; but, as we understand, this did not amount to an actual assignment of homestead. It was merely "excepting" from sale lands which the bankrupt might have assigned to him as homestead under the South Carolina law, by which State law alone the assignment must be regulated, not only in the mere formal mode and manner of making it, "but its vitality as an existing right must depend on its conformity with all the requirements therein prescribed. * * * It would thus appear that not even the parties to the process, through which

the assignment is to be made, are bound by any action under it until it is returned for record in court," &c. Choice v. Charles, supra.

It seems to us that this view is indicated by the terms of the appraisement (the only paper on the subject before us) made for the information of the bankrupt court, which, in appraising the lands, speaks of them as "to be set apart to C. H. Lathen as his exempted property under the provision of the homestead laws of South Carolina," and also to be in conformity with the law of the United States upon the subject of State exemptions. Section 5045 of the U. S. Revised Statutes provides as follows: "There shall be excepted from the operation of the conveyance (from the bankrupt to the assignee in bankruptcy) the necessary household and kitchen furniture, &c., * * * and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of such State as existing in the year 1871," &c.

It seems to us that this provision does not mean that the court shall undertake to go in detail through the whole process of assigning homestead according to the requirements of the statutes of the State, but only directs that so much property as is liable to be assigned as homestead under the State law, shall be omitted—left untouched—"excepted" from the conveyance of the property to be administered in bankruptcy, leaving such "excepted" property entirely under the State

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law as to the *details of assignment. This construction is shown by another part of the same section of the bankrupt act of March, 1867, which goes on to declare that "these exceptions shall operate as a limitation upon the conveyance of the property by the bankrupt to his assignee; and in no case shall the property hereby excepted, pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of the title," &c.

We think it was error in the Circuit Court to hold that C. H. Lathen, in his life-time, had not the right to convey one of his tracts of land to his son, John F. In our view he had that right, and the land so conveyed was not subject, either to the widow, as part of her homestead, or to the heirs, for partition. This ruling makes it proper to relieve John F. Lathen from half the costs imposed upon him. As to the widow, Nancy, the Circuit Court held that she was entitled to homestead in the tract still in her possession, and that part of the judgment, not being appealed from, is not before us and we make no ruling upon the subject.

The judgment of this court is that, subject to the modifications herein indicated, the judgment of the Circuit Court be affirmed.

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20 S. C. 377

KINARD v. BAIRD.

(November Term, 1883.)

[1. *Judgment* ⊂⊃70.]

A. purchased from O. a land warrant and gave bond with sureties for the purchase-money, and then he confessed judgment to O. on the bond. Afterwards he assigned the warrant to B., who, finding it worthless, demanded and received from O. the amount of the original purchase-money. *Held*, that the judgment was a good and valid lien against A. for the use and benefit of O.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 104; Dec. Dig. ⊂⊃70.]

[2. *Subrogation* ⊂⊃31.]

A surety on such bond having paid a part thereof in ignorance of any defense thereto and before the repayment to B., was, without actual assignment of the judgment, subrogated to the extent of such payment to all the rights of O.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 84; Dec. Dig. ⊂⊃31.]

[3. *Subrogation* ⊂⊃31.]

The right of action by the surety to recover the amount paid would be barred by the statutory limitation, but he would still retain his right of subrogation to the security of the judgment under which his payment was made.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 83; Dec. Dig. ⊂⊃31.]

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[4. *Principal and Surety* ⊂⊃182.]

*The act of 1849 (11 Stat. 556; Gen. Stat., § 2180.) covers a case where a surety pays money on a judgment which is entered against the principal only.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 524; Dec. Dig. ⊂⊃182.]

[5. *Payment* ⊂⊃66.]

A judgment is presumed to be paid after a lapse of twenty years, but this presumption is not irrebuttable.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 179, 186; Dec. Dig. ⊂⊃66.]

Before Pressley, J., Newberry, February, 1882.

The opinion states the case. The action was commenced July 6th, 1880.

Mr. George S. Mower, for appellant.

If defendant received pay from Jones, and Jones was repaid by Lake, the bond would not be void. If it had been, this would not avail defendant. Cheves 15. Upon payment by a surety, he becomes, by operation of law, entitled to the benefit of a judgment against the principal. Actual assignment is not necessary. 11 Stat. 556; 2 Rawle 128; 3 Myl. & K. 183; 1 McCord Ch. 116, 443; 2 Id. 455; 1 Hill Ch. 250; Spears Eq. 543; 3 Strobh. Eq. 149; 5 Rich. Eq. 473; 7 Id. 112; 11 Id. 150. Lake was no longer ordinary when

he satisfied the judgment, and it had been previously paid by the sureties, nor could a payment to Lake relieve Baird of his liability to re-imburse his surety. Cheves 15. The plea of the statute of limitations cannot avail the defendant. The presumption of payment from lapse of time was not considered by the Circuit judge; if he erred, a new trial should be had, when the circumstances may be shown. But the payment by Baird, of February 8th, 1869, while ineffectual to discharge his liability, was an admission of indebtedness at that date.

Messrs. Jones & Jones, contra.

Plaintiff's claim was by simple contract, and therefore barred in four years; not having taken an assignment of the bond or judgment, he is not subrogated to the rights of the payee. 4 Mass. 276; 6 Watts & S. 190; 1 Bush. 474; 8 Watts 384; 10 Id. 148. Whether payment by a surety is purchase or extinguishment, is a question of intention,

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the latter being presumed. *Freem. Judg. § 470. The rule should be the same under the act of 1849. The facts here show an intention by the surety to extinguish. Moreover, the plaintiff is barred by lapse of time. But the entry of satisfaction, in ignorance, by Baird, of Kinard's payment, destroys the judgment. If plaintiff had any rights under this judgment, he should have ordered a levy and sale, and not brought this action.

February 18th, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. The facts of this case are somewhat obscure, but, as far as can be gathered from the brief, they are as follows:

On October 6th, 1856, Elijah P. Lake, as ordinary of Newberry county, offered for sale a land warrant, issued by the United States government to one John Jones, then deceased. Spencer P. Baird bid it off at the price of $125, for which he gave his bond to the said ordinary in the penal sum of $250, with John P. Kinard and James S. Piester as his sureties. On February 22d, 1858, the said Baird confessed judgment to Lake, ordinary, for the whole penalty of the bond, and execution was regularly issued thereon. On April 12th, 1859, John P. Kinard, one of the sureties on the bond, secured by the judgment against Baird, paid to Lake his share of the same, viz., $74.10, and took from Lake a receipt, but did not take an actual assignment of the judgment and execution against Baird to the extent of the payment. This action was brought by Kinard against Baird to be subrogated to the rights of Lake in the judgment against Baird to the amount paid as surety, and to that extent to revive the said judgment.

The defense was three-fold, and to prevent confusion, we will state the matters separately. First. That the bond given to the ordinary was without consideration, and not recoverable at law, and the payment of the surety was voluntary. It seems that after Baird purchased the warrant and gave his bond, as stated, he transferred it to one D. F. Jones, who soon discovered that it was void, having been issued to the grantee, John Jones, after his death. Upon this discovery,

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he did not go back upon his *vendor, Baird, but applied to Lake, the ordinary, for rescission, who received back the worthless warrant, and, instead of canceling Baird's bond, paid himself to D. F. Jones (June 16th, 1859) the amount for which the warrant had sold. Neither Baird nor Kinard knew of this transaction between D. F. Jones and the ordinary, or that the warrant was worthless, until lately, when this action was brought. Second. But if the bond was recoverable, and Baird bound by his confession of judgment, the plaintiff Kinard cannot be subrogated to the rights of Lake, the plaintiff in execution, for the reason that in some settlement with Baird, in the year 1869, the said Lake, in his individual capacity, made the following entry in the case on the sheriff's books: "I hereby acknowledge that I have received full satisfaction of debt, interest and costs, February 8th, 1869," signed, E. P. Lake. Third. The defendant also submitted, that the claim was barred by lapse of time and the statute of limitations.

The Circuit judge dismissed the complaint, and the plaintiff appeals to this court upon the following exceptions: "Because his Honor erred in ruling (1) That the plaintiff's cause of action was barred by the statute of limitations. (2) That the bond and confession of judgment of the defendant, not having been assigned to the plaintiff, the statute of limitations began to run against him on April 12th, 1859. (3) That the plaintiff could not recover, because of the entry of satisfaction, on February 8th, 1869, in the sheriff's execution book by E. P. Lake, in consideration of the conveyance to him by the defendant, Baird, of a tract of land. (4) That the said confession of judgment was satisfied as against the plaintiff herein. (5) That the payment to E. P. Lake would relieve the defendant of his liability to re-imburse plaintiff, as surety," &c.

It is not expressly stated, but we suppose that when Baird transferred the warrant to D. F. Jones, he received from him payment for the same. The whole transaction is unintelligible upon any other hypothesis. It could only be in this view that Jones received back the purchase-money from the ordinary, Lake. If, in the transfer, Jones had merely assumed Baird's bid, and taken his place on the bond, the simplest adjustment of the matter would have been to return the

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warrant and have the bond *canceled, thereby relieving both Baird and his sureties.

But, in the view that Baird received value for the property, and the ordinary made Jones whole, the bond was recoverable for his benefit, and the judgment a good and valid lien against Baird. In part payment of this judgment, Kinard, one of the sureties on the bond secured by it, on April 12th, 1859, paid Lake $74.50, and the question is, whether he is entitled to the use of that judgment for the purpose of recovery from Baird the money so paid as surety.

There is no doubt that the payment, in ignorance of any defense to the bond, even if there had existed one, made Baird liable to Kinard for the amount so paid. Stinson v. Brennan, Cheves 16. It is replied to this, that as a simple contract debt for money paid, it would now be barred by the statute of limitations. That may be so, but, as the debt was in judgment against the principal, has not Kinard the right to be subrogated to all the rights of Lake in the judgment to the extent of the money paid by him? It seems to us that he has that right and, although there was no actual assignment by Lake at the time of the payment, for which Kinard took his simple receipt, that he became thereby, ipso facto, the owner of the judgment to the extent of the money paid by him as surety, which right Lake, having knowledge of the payment made to himself, could not ignore or disregard.

Without going into the learning upon the subject of the nature and extent of the right of subrogation as a purely equitable doctrine, we think there can be no doubt as to the rights of a surety who has paid money for his principal on a debt in judgment against him, the said principal, since the act of 1849, which declares in terms, that "the payment by a surety of a debt secured by judgment or decree, shall not operate as a satisfaction of such judgment or decree against the principal debtor, but by such payment the said surety shall be entitled to all the rights and privileges of the plaintiff in such judgment or decree," &c. Gen. Stat., § 2180. It may be that this act was intended to provide for the case where a joint judgment was recovered against both principal and surety, and it was paid by the latter, but its terms are broad enough to embrace all sureties who come within its reason and spirit. See the case of Wilson v. Wright, 7 Rich.

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400, in which *it was held that the terms of the act are large enough to cover the case of an indorser paying a debt which was in judgment against the drawer. The act was intended to dispense with the necessity of assignment, and we think Kinard became the equitable owner of the judgment and execution to the extent of the payment made by him on the day it was made.

It is true that a judgment may be presumed to be paid in twenty years, but that presumption is one of fact, and may be rebutted by circumstances going to show that the defendant in execution, within the time, made acknowledgments, by payments or otherwise, that the judgment was a subsisting and valid lien—such acknowledgments operating to give a new starting point for the commencement of the time from which payment is presumed. This point seems not to have been considered by the Circuit judge, who ruled that the lapse of twenty years was an absolute bar. The plaintiff had the right to be heard on that subject, and the case must go back for that purpose.

It was further opposed, that the plaintiff, Kinard, can have no benefit from the judgment and execution, for the reason that Lake, the plaintiff, entered satisfaction in full upon the execution in 1869, after he had ceased to be ordinary. We incline to think that he had no right to enter satisfaction on so much of the execution as at that time, to his knowledge, belonged to Kinard, the plaintiff in this action. But Lake is not before the court, and we will not now consider that point.

The judgment of this court is that the judgment of the Circuit Court be set aside, and the case remanded for a new trial, with leave to the plaintiff, if so advised, to amend his complaint by making E. P. Lake, or his legal representative, a party defendant, with proper prayers that the entry of satisfaction on the execution of Lake, ordinary, against S. P. Baird may be set aside, and the said judgment revived against the defendant, Baird, to the extent of $70.49 and the interest thereon.

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*STATE v. JEFCOAT.

(November Term, 1883.)

[1. *Indictment and Information* ⟸159.]

Mere clerical errors, or mere matters of form, in an indictment, may be amended at any time before plea pleaded, with the consent of the grand jury.

[Ed. Note.—Cited in State v. Means, 80 S. C. 406, 61 S. E. 898.

For other cases, see Indictment and Information, Cent. Dig. § 509; Dec. Dig. ⟸159.]

[2. *Criminal Law* ⟸960.]

There is no necessity for the presence of the prisoner at the hearing of a motion made by his counsel for a new trial, or in arrest of judgment, unless he claims the constitutional right of being heard in person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2412, 2477; Dec. Dig. ⟸960.]

[3. *Criminal Law* ⟸1188.]

A prisoner before being sentenced on conviction of murder was not asked "if he had anything to say why sentence of death should not be passed upon him." *Held*, that this was error, but that the omission affected the sentence only, and did not entitle the prisoner to a new trial.

State v. Trezevant, ante p. 363 [47 Am. Rep. 840], affirmed.

[Ed. Note.—Cited in State v. Trezevant, 20 S. C. 363, 47 Am. Rep. 840; City Council of Anderson v. O'Donnell, 29 S. C. 365, 7 S. E. 523, 1 L. R. A. 632, 13 Am. St. Rep. 728; State v. Baker, 58 S. C. 114, 36 S. E. 501; State v. Knotts, 70 S. C. 402, 50 S. E. 9.

For other cases, see Criminal Law, Cent. Dig. § 3224; Dec. Dig. ⊂⊃1188.]

Before Wallace, J., Orangeburg, May, 1883.

The opinion fully states the case.

Mr. Malcolm I. Browning, for appellant.

An indictment could not be amended at common law. 1 Arch. Cr. L. 313; 4 Burr. 2529; Bac. Abr. title Indict. G. II., title Amend. C. The statute of jeofails did not apply to pleas of the Crown. 1 Chit. Crim. L. 295; 2 Mason 145; 12 Mod. 229; 6 Mod. 281; 1 Bish. Cr. Pro. 97, 98, 707, 710, 711. While amendments in the caption have been permitted, in our State amendments of the body of an indictment is unprecedented. 1 Brev. 169; 2 McCord 301. Difference between body and caption. 1 Arch. Cr. L. 240. As to the absence of the accused, at a stage of the trial, see 1 Arch. 330, note 1; Rules Circuit Court, No. XXXV.; 1 Bish. Cr. Pro. 265, 277, note 4. As to the omission of the presiding judge to demand of prisoner whether he had aught to say why sentence of death should not be pronounced upon him—this is absolutely and indispensably necessary, and it must appear on the record, to make the judgment lawful. 1 Arch. Cr. L., p. 580; 1 Chit. Crim. L., p. 700; 1 Bish. Cr. Pro. 1118, note 3; 4 Bl. Com. 370, 375; 2 Salk. 635; 3 Salk. 358;

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3 Mod. 265. The appeal presents a *series of violations of the constitutional safeguards of liberty and life. Cons., Art. I, Sec. 14. Unless this court intervenes, a man—a very humble man—it is most respectfully submitted, will be deprived of his life, otherwise than by the law of the land.

Mr. Solicitor Jervey, contra.

February 22d, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. In this case a bill of indictment charging the appellant with the offense of murder, was preferred to and presented by the grand jury as a true bill. When the arraignment of the prisoner was in progress, and before the defendant had pleaded to the indictment, the solicitor, discovering a clerical error in the indictment, asked the counsel for the prisoner if he would consent to an amendment, which being refused, the solicitor made the amendment by striking out a word improperly inserted, and without entering a nolle prosequi upon the indictment, recommitted the same indictment, with said word erased, to the same grand jury who returned it with an indorsement, "True Bill, W. W. Wannamaker, foreman," their first finding having been erased. The error in the indictment, as first found, consisted in the insertion of the word "January" after the words "in the year of" in that portion of the indictment which specified the time when the offense charged was alleged to have been committed, so as to make it read "on the sixteenth day of January in the year of January, our Lord one thousand eight hundred and eighty-three," and the amendment consisted in the erasure of the word "January" after the words "in the year of."

The trial having resulted in a conviction of the defendant, he, by his counsel, made a motion for a new trial and in arrest of judgment. The Circuit judge refused the motion for a new trial, but held the motion in arrest of judgment under advisement. Subsequently, the motion in arrest of judgment was called up, and the Circuit judge, "after hearing some further discussion by defendant's attorney, overruled the motion; during which discussion and ruling the accused was

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not present in court." When *the prisoner was called up for sentence, the Circuit Judge, without demanding of him if he had anything to say why sentence of death should not be passed upon him," proceeded to render judgment in the usual form, that the prisoner "be hanged by the neck until the body be dead," &c.

The defendant appeals upon the following grounds: First. "Because his Honor erred in overruling the motion in arrest of judgment, upon the ground that the indictment was amended by the solicitor and recommitted to the grand jury, 'nolle prosequi' not having been entered thereon. Second. Because the accused was not in court when the motion in arrest of judgment was ruled upon and decided. Third. Because his Honor, the presiding judge, did not ask the accused if he had anything more to say why sentence of death should not be pronounced upon him, before such sentence was passed."

First, as to the effect of the amendment. The authorities leave no doubt of the proposition that mere clerical errors, or mere matters of form, in an indictment may be amended at any time, before plea pleaded, with the consent of the grand jury. In 1 Chit. Crim. L. 297, it is said: "It is the common practice for the grand jury to consent, at the time they are sworn, that the court shall amend matters of form altering no matter of substance, and mere informalities may, therefore, be amended by the court before the commencement of the trial." In Stark. Cr. Pl. 287, it is said: "It is the common practice at present to amend indictments in matters of form, whilst the grand jury are before the court; for which purpose they formally give their consent that the court shall amend matters of form altering

no matter of substance." To same effect see 1 Bish. Cr. Pro. (first edit.), § 391; 2 Hawk. P. C., c. 25, § 98; and in Mill. Comp. 147, note c. (a work which is well known to have been compiled and annotated by that distinguished judge, D. L. Wardlaw,) it is said, in speaking of the grand jury, "The foreman hands the bills to the clerk and the clerk reads the title of each case and what the jury have written, taking care that the finding be written on the indictment. The clerk may then ask, 'Gentlemen, you agree that the court shall amend matters of form, altering no matter of substance?' To which the

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foreman may reply—'Yes.' This, *not usually done in this State, is always supposed to have been done, and is always done in England." In this case it is quite clear that the error which was amended, was, as Gibson, C. J., said, in Sparks v. Commonwealth, 9 Barr. 354, "One of those clerical slips which, it is well settled, the court has power, by the previous assent of the grand jury, to amend." And it is equally clear that the grand jury did, in the most formal manner possible, give their assent to the amendment. The first ground of appeal cannot, therefore, be sustained.

Next, we are to consider whether it was essential that the accused should have been present at the final discussion of the motion in arrest of judgment, and when the Circuit judge made his ruling thereon. The right of the accused to be present at every stage of his trial, is one that has long existed, and is especially guaranteed by section 13, article I., of the present constitution of this State; but a motion for a new trial, or in arrest of judgment, is no part of the trial. That must necessarily have terminated before such a motion could be made, and we are not aware of any authority, or any reason, which establishes the right of the accused to be present at the hearing of such a motion. In England, it has been held that such a motion cannot be made by the accused unless he is present before the court, for the reason, as was said in one of the cases, that "the court will be sure of him" before he will be heard by counsel on such a motion. Rex v. Spragg, 2 Burr. 930; Rex v. Hayes, 2 Str. 844; Rex v. Gibson, 2 Str. 968; Rex v. Niccolls, 2 Str. 1227. But this was a rule for the benefit of the government, and not for the accused; and it is at least doubtful whether such a rule has generally prevailed in America. 1 Bish. Crim. Pro., §§ 691, 692. We think, however, that the question which we are called upon to decide is to be determined by the same principle which governed in the case of State v. David, 14 S. C. 428, and that there is no necessity for the presence of the prisoner at the hearing of a motion for a new trial, or a motion in arrest of judgment, either in the Circuit or Supreme Court, unless he claims the right guaranteed to him by the clause of the constitution above cited, of being heard by himself as well as by counsel.

In this case it does not appear that the

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prisoner claimed any *such right, but, on the contrary, was fully heard by his counsel. The second ground of appeal cannot, therefore, be sustained.

The third ground is well taken, as was shown in the case of the State v. Trezevant, ante, p. 363 [47 Am. Rep. 840], heard at the present term of this court. But as there held, the error imputed by this ground did not affect the trial, but only the sentence, and hence the appellant is not entitled to a new trial, but simply entitled to be resentenced in conformity with the forms of law.

The judgment of this court is that the sentence in this case be set aside, and that the case be remanded to the Circuit Court for the purpose of enabling that court to sentence the prisoner according to law.

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20 S. C. 387

STATE v. JOHNSON.

(November Term, 1883.)

[1. *Fraud* ⇦68.]

Under the statute making it a misdemeanor willfully and knowingly to sell property covered by a lien without giving notice of the lien, a sale without giving notice of a lien, of which the vendor was ignorant, is no offense.

[Ed. Note.—For other cases, see Fraud, Cent Dig. § 76; Dec. Dig. ⇦68.]

[2. *Fraud* ⇦68.]

Where a vendor, ignorant of a judgment having a lien upon the land, and himself the maker of two mortgages, told the purchaser that "he would arrange to meet or pay such matters as he had put upon the land," he is not guilty under this statute, as he did not intentionally suppress notice of the judgment, and did give notice sufficient to lead to knowledge of the two mortgages.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 76; Dec. Dig. ⇦68.]

[3. *Fraud* ⇦69.]

But the vendor's ignorance of the judgment-lien being disputed, a request to charge, which ignored the lien of the judgment, was properly refused.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 78; Dec. Dig. ⇦69.]

[4. *Fraud* ⇦69.]

The offense of selling is but one offense under this act, however many liens may have existed at the time, and the judge therefore properly refused both to require the solicitor to indicate which one of the three liens he relied upon, and also a motion in arrest of judgment based upon this objection.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 78; Dec. Dig. ⇦69.]

[5. *Fraud* ⇦68.]

The lien of a judgment is as much within the meaning of this statute, as a mortgage or other lien.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 76; Dec. Dig. ⇦68.]

Before Wallace, J., Aiken, September, 1883.

This was a prosecution against J. E. Johnson for selling to G. W. Buzbee, on February 10th, 1882, a tract of land covered by liens without giving notice of such liens. On February 20th, 1883, the same land was sold by

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the sheriff to John Jordan *under a judgment and execution of 1877 in favor of Jordan against J. E. Johnson. There were also two mortgages resting upon the land at the time of sale. The balance due upon these mortgages was paid after defendant's arrest in this case, in January, 1883.

There was conflict of testimony as to G. W. Buzbee's knowledge of this judgment. The defendant testified that he "did not know that the Jordan judgment was a lien" upon the land, as he "bought the land some time after that judgment was obtained." Buzbee testified that defendant told him "there was not the scratch of a pen" against the land. Defendant denied this, and said: "I told him that there was nothing against the land, except what I had put over it, and that I was responsible for such things and would pay them." Other matters are stated in the opinion.

Mr. G. W. Croft, for appellant.

Mr. Solicitor Gantt, contra.

February 22d, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The defendant was indicted under the act of 1873, (15 Stat. 332, incorporated in the general statutes of 1882 as section 2514,) for selling certain real estate, covered by certain liens, without giving notice thereof to the purchaser. The indictment specified three liens, to which the property sold was subject, viz.: A judgment in favor of John Jordan, a mortgage in favor of C. K. Henderson, and a mortgage in favor of P. W. Ferrell. At the close of the testimony, defendant's counsel moved the court to require the solicitor "to elect which lien upon the property sold, of which the defendant did not give notice, upon which the State would ask a conviction." This motion was refused, and exception was duly taken.

The counsel for the defendant then requested the Circuit judge to charge as follows: "1. That if the jury believe that at the time, or before the defendant made his deed to G. W. Buzbee, he was not aware that the judgment of John Jordan against him constituted a lien upon the land conveyed, and

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at *such time he also notified Buzbee that he would arrange to meet or pay such matters as he (the defendant) had put upon the land, and that he has done so, then he must be acquitted. 2. That if the jury believe that the defendant, at the time or before he made the deed to G. W. Buzbee, told him that there was nothing against the land except such matters as he had put on it, and he would arrange to pay such matters, such notice was sufficient notice of any lien that the defendant himself put upon the land; and that, in such case, Buzbee cannot now complain of any mortgage that the defendant had placed on the land which had been paid; and that the defendant should be acquitted."

The Circuit judge declined to charge as requested, and the jury having rendered a verdict of guilty, the defendant moved, in arrest of judgment, upon the following ground: "That the indictment is defective, in that it contains the charges in one count of selling with more than one lien upon the same, whereas it is respectfully submitted, that for every lien upon the land, the selling of which without giving notice thereof was a separate offense, and should have been laid in separate counts." This motion was overruled, and sentence was passed upon the defendant.

The defendant appeals, substantially, upon the following grounds: 1. Because the Circuit judge refused to require the solicitor to elect which of the liens mentioned in the indictment he intended to rely upon. 2. Because of error in refusing the requests to charge as above set out. 3. Because a judgment is not such a lien as is contemplated by the statute under which the defendant was indicted. 4. Because of error in overruling the motion in arrest of judgment.

It appeared in evidence that the Jordan judgment had been recovered against the defendant before he bought the land which he sold to Buzbee, and that the two mortgages mentioned in the indictment had been put upon the land by the defendant some time before the sale, and had both been satisfied before the trial of this case, though the final payments seem to have been made after this prosecution was commenced. The land was sold by the sheriff under the Jordan judgment and bought by Jordan. The language of the statute under which the defendant is

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*indicted is as follows: "That from and after the passage of this act, any person or persons who shall willfully and knowingly sell and convey any real or personal property on which any lien or liens exist, without first giving notice of such lien or liens to the purchaser or purchasers of such real or personal property, shall be deemed guilty of a misdemeanor," &c.

The manifest object of this act is to prevent intentional fraud or deceit in the sale of property by the suppression of facts which it would be important for a purchaser to know before the sale is completed. The words of the statute are "willfully and knowingly," hence if the act intended to be prohibited is done unintentionally, or ignorantly, the offense created by the statute is not complete. A man may sell and convey property to another which is covered by a lien, of which he gives no notice to the purchaser,

and yet, unless he does so willfully and knowingly, he has not violated the statute in question. Keeping this view of the statute in mind, let us consider whether there was any error in refusing the first request to charge. That request substantially amounted to this, that if the jury believe that the defendant was ignorant of the fact that the Jordan judgment was a lien upon the land when he made the sale to Buzbee, and at the same time gave him notice that he would arrange to pay the liens—mortgages—which he himself had put upon the land, then the defendant must be acquitted.

We think there was error in refusing this request, for if the defendant ignorantly, and therefore unintentionally, made the sale without mentioning the lien of the Jordan judgment, it certainly could not be said that he did so knowingly and willfully, and hence he could not be convicted on account of that lien. And if he also brought to the attention of the purchaser the fact that he himself had put certain liens upon the land, by saying "that he would arrange to meet or pay such matters as he (the defendant) had put upon the land," it could not be properly said that he had sold the land without first giving notice of such liens as he had himself put upon the land, to wit, the mortgages. The statute, it will be observed, does not prescribe the degree or kind of notice to be given, and hence we must resort to the general rule upon the subject, and that is, that such no-

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tice *as will put a party upon inquiry is sufficient notice of every fact which such inquiry, properly prosecuted, would disclose. Now, if a purchaser is told by his vendor that he has arranged or will arrange "to meet or pay such matters as he had put upon the land" which is the subject of negotiation, he surely has such notice as would put him upon inquiry, for what else can such language mean but that the vendor had put incumbrances of some kind upon the land which he expected to remove?

The second request to charge was properly refused, as it entirely ignored the lien of the Jordan judgment. Substantially, it amounted to a request that the jury should be instructed to acquit the defendant if they believed that he had notified the purchaser of the mortgages, ignoring the necessity for any inquiry as to the Jordan judgment.

The first and fourth grounds of appeal will be considered together, as they both rest upon the mistaken idea that because the property sold was covered by three liens, three offenses should have been charged. The offense consists in selling property "on which any lien or liens exist, without first giving notice of such lien or liens." There was but the one sale, and but one offense charged. The number of liens, whether one or a dozen, had nothing whatever to do with fixing the nature of the offense, however much it might aggravate its character. By the express terms of the statute it is made "a misdemeanor" for a person to sell property covered by "a lien or liens, without giving notice of such lien or liens." As is said in 1 Bish. Cr. Pro. (first edit.), § 191: "It is not, therefore, an objection to an indictment that a part of the allegations might be lopped off and yet the indictment remain sufficient. Where, for instance, a statute forbids several things in the alternative, it is usually construed as creating but one offense; and the indictment may charge the defendant with the commission of all the acts, using the conjunction 'and' where the statute uses the disjunctive 'or'; or, on the other hand, the indictment may contain but one or two of the things at the election of the pleader. Thus, where the allegation was that the defendant sold spirituous liquors, to wit, rum, brandy, whiskey and gin, in less quantities than one quart, without license, and it was

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objected that there were here four *offenses set down in one count, the court overruled the objection, saying: 'The selling of any of the liquors named would be an offense; but there is no more reason why an offender should be indicted separately for each than there would be to charge a thief, who had stolen a suit of clothes, in separate counts for the coat, waistcoat,'" &c.

So, in this State, in the case of State v. Anderson, 3 Rich. 172, it has been held that an indictment for retailing spirituous liquors without a license is not bad on the ground of duplicity or misjoinder, because various acts of retailing to different persons are grouped together in one count as constituting a single offense, and if the proof shows a retailing to either of the persons named, the defendant may be convicted. We do not think, therefore, that there was any error on the part of the Circuit judge, either in refusing the motion to require the solicitor to elect upon which lien he would rely, or in refusing the motion in arrest of judgment.

No authority has been cited; and we know of none to sustain the third ground of appeal. Nor do we see any reason upon which such ground can be sustained. The language of the statute is very comprehensive—any lien or liens—and, as a judgment is unquestionably a lien, we are unable to see by what authority we would be warranted in so restricting the terms of the statute as to exclude a lien by judgment. But inasmuch as there was error in refusing the first request to charge, there must be a new trial.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

20 S. C. 392

STATE v. SHIRER.

(November Term, 1883.)

[1. *Criminal Law* ⟸1149.]

To quash an indictment is not a proceeding as of right; but the motion is addressed to the discretion of the court, and, generally, the decision of the presiding judge is not open to review on appeal.

[Ed. Note.—Cited in State v. Young, 30 S. C. 407, 9 S. E. 355; State v. Burbage, 51 S. C. 286, 28 S. E. 937; State v. Sheppard, 54 S. C. 180, 32 S. E. 146.

For other cases, see Criminal Law, Cent. Dig. § 3042; Dec. Dig. ⟸1149.]

[2. *Criminal Law* ⟸162.]

The provision in the United States constitution that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb" applies only to offenses and trials under the laws of the general government.

[Ed. Note.—Cited in Ex parte Schmidt, 24 S. C. 365.

For other cases, see Criminal Law, Cent. Dig. § 285; Dec. Dig. ⟸162.]

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[3. *Criminal Law* ⟸180.]

*In a trial for larceny there was a mistrial. At the next term, the former indictment was marked nolle prosequi, and a new bill found. *Held*, that defendant was not entitled to his discharge under a plea of autrefois acquit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 328; Dec. Dig. ⟸180.]

[4. *Criminal Law* ⟸186.]

Under the express terms of the constitution of this State, that "no person, after having been once acquitted by a jury, shall again, for the same offense, be put in jeopardy of his life or liberty," which provision was intended to be exclusive and exhaustive, a party cannot plead a former jeopardy in bar of the prosecution unless he has been acquitted by a jury.

[Ed. Note.—Cited in State v. Briggs, 27 S. C. 81, 84, 2 S. E. 854; State v. Wyse, 33 S. C. 589, 12 S. E. 556; State v. Cason, 41 S. C. 534, 19 S. E. 918; State v. Richardson, 47 S. C. 171, 25 S. E. 220, 35 L. R. A. 238.

For other cases, see Criminal Law, Cent. Dig. § 351; Dec. Dig. ⟸186.]

[5. *Indictment and Information* ⟸60.]

The general rule in framing an indictment is that the offense shall be so described that the defendant may know how to answer it, the court what judgment to pronounce, and that a conviction or acquittal on it may be pleaded in bar to any other indictment for the same offense.

[Ed. Note.—Cited in State v. Chiles, 44 S. C. 340, 22 S. E. 339.

For other cases, see Indictment and Information, Cent. Dig. § 182; Dec. Dig. ⟸60.]

[6. *Embezzlement* ⟸13.]

The act making breach of trust with fraudulent intent larceny, applies, not only to cases which the common law did not reach, but also to cases where a fraudulent appropriation did constitute larceny at common law, as, e. g. money taken by a clerk to whom it was intrusted, but which, technically, was in the possession of his employer.

[Ed. Note.—Cited in Murray v. Aiken Min., etc., Co., 37 S. C. 487, 16 S. E. 143; State v. Davenport, 38 S. C. 353, 17 S. E. 37.

For other cases, see Embezzlement, Cent. Dig. § 11; Dec. Dig. ⟸13.]

[7. *Embezzlement* ⟸30.]

In an indictment for breach of trust with fraudulent intent, ownership of the property must be alleged with the same accuracy and after the same rules as in common law larceny; this was substantially done in this indictment.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 44; Dec. Dig. ⟸30.]

[8. *Embezzlement* ⟸28.]

In describing the money taken as "the sum of three hundred and ninety-five dollars, lawful currency of the United States, of denomination and issue to the jurors aforesaid unknown," the indictment sufficiently individualized the transaction, although it omitted to charge the "kind of currency."

[Ed. Note.—Cited in State v. Pentacost, 87 S. C. 405, 406, 69 S. E. 880.

For other cases, see Embezzlement, Cent. Dig. § 42; Dec. Dig. ⟸28.]

[9. *Criminal Law* ⟸1158.]

In criminal cases, this court cannot review questions of fact passed upon in the court below.

[Ed. Note.—Cited in State v. Vari, 35 S. C. 177, 14 S. E. 392.

For other cases, see Criminal Law, Cent. Dig. §§ 3061–3066, 3070, 3071, 3074; Dec. Dig. ⟸1158.]

[10. *Embezzlement* ⟸27.]

[Gen. St. § 2493, declares that any person committing a breach of trust with a fraudulent intent shall be held guilty of larceny. *Held*, that an indictment was sufficient which charged that defendant "did unlawfully and feloniously commit a breach of trust with fraudulent intent in this," and then stated the facts.]

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 40; Dec. Dig. ⟸27.]

Before Wallace, J., Orangeburg, May, 1883.

This was a prosecution against George S. Shirer for breach of trust with fraudulent intent, and larceny, in taking money out of the safe of Banks & Smith, by whom defendant was employed. The defense was, that defendant was called out of his house after midnight, and then taken and tied by two men, who forced him to tell them the combination of the safe-lock. The opinion states the case.

The ruling of the presiding judge upon the motion to quash and the motion for new trial and in arrest of judgment and upon the demurrer, need not be given. His charge to the jury was as follows:

We have a statute that is in these words:

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"Any person com*mitting a breach of trust with a fraudulent intent, shall be held guilty of larceny." The defendant stands charged under that statute. He stands further charged with the offense of larceny at common law. You have heard the testimony. You have heard that testimony discussed by experienced and able counsel. You are to collect from that testimony the truth of the facts. It is for that purpose in our courts that juries are organized. The law devolves upon me the duty of explaining to you the nature of the offenses with which the defendant stands charged. Then your duty is to apply the truth of the facts to those rules that I will state to you and to draw your conclusion

whether, or not, those offenses have been committed by this defendant.

There are four counts in the indictment. The first count charges a breach of trust under the statute that I have read to you. Now, what is a breach of trust? Before there can be a breach of trust there must be a trust. Now what is a trust, in the sense in which that word is used in this statute? A breach of trust is where personal property of appreciable value and of which larceny may be committed is put into the possession of another; and when it is so put into his possession it becomes a trust, and while it so remains, if he conceives the purpose to convert that property to his own use, and does it with intention to deprive the owner of the use of that property, then that is a breach of trust with a fraudulent intent.

Now I will point out to you presently how that differs from stealing—from larceny at common law. There must be in the possession of the defendant charged, a sum of money in this case, either bank bills, or gold, or silver coin, or both, the property of Messrs. Banks & Smith. It must be in his possession—in his entire and complete possession. He must not share the possession with anybody else. If you should find, in this case, that money belonging to these prosecuting witnesses was in the possession of this defendant, and that he converted it to his own use, intending to deprive them of it, then that would be a breach of trust with fraudulent intent.

Now, in any one of the stores in this town, there may be proprietors and clerks—there may be in the store-room where the money is put, a drawer, and to which everybody,

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who has a *right to be there and participate in the transactions of the business, has a right to go. That money is not in the possession of the clerks, but in the possession of those to whom it belongs. But if those to whom it belongs should take that money or any part of it and put it in the hands of the clerk and send him to Charleston to buy goods with it for them, then it is in the possession of the clerk, and if under those circumstances he converts it to his own use, that is a breach of trust. You will see, therefore, to sum up on this subject, that there must be money in the possession of this defendant, belonging to these prosecuting witnesses, and that after it is in his possession he has converted it to his own use in order to find a verdict of guilty on the first count. Do the facts as ascertained from the testimony satisfy you, beyond a reasonable doubt, of the existence of that state of things? If so, you must find the defendant guilty on the first count. If not so, you must acquit him on the first count.

Now there are three other counts, all relating to the crime of larceny at common law. What is larceny at common law? It is the taking and carrying away of the goods or chattels of another with the intention to convert them to the taker's use. In that case, he takes goods that are not in his possession at the time of the conception of the fraudulent intention, and that is the distinction between larceny and breach of trust. In one case the goods are already in his possession and in the other case, to make out larceny, the goods are not in his possession until he feloniously takes them. Did this defendant do that? Are you satisfied from the testimony that he did do it—that he feloniously took the money, either greenbacks, gold or silver coin, or both, from the possession of Messrs. Banks & Smith, and converted it to his own use. If so, convict him of larceny. If you are not so satisfied, acquit him of larceny.

You will observe that in regard to the facts in this case I have not said one word to you. To say what degree of force and effect to attach to the statements of the witnesses—to say what is credible and incredible, is a matter which the law devolves entirely upon you, and prohibits the presiding judge to give his opinion on that subject. My duty is to declare the legal rules involved in the charges. You decide from the

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testimony *whether those charges have been made out to your satisfaction beyond a reasonable doubt. If they have been, you must convict the defendant. If they have not been, you must acquit him. Whenever a defendant is charged in this court with a crime against the laws of this State, he comes into court under the presumption of innocence. Whenever he is arraigned at that bar he is under the legal presumption of innocence, and he stands an innocent man and must go an innocent man, unless that presumption is removed by the testimony adduced against him, to the extent of satisfying the jury beyond a reasonable doubt, of his guilt. He does not have to establish his innocence. There could be no phase of any criminal case in South Carolina where the obligation is upon the defendant to establish his innocence. He is an innocent man and is entitled to an acquittal until the testimony establishes his guilt beyond a reasonable doubt. But whenever the testimony reaches that point of establishing his guilt beyond a reasonable doubt, then all presumptions of innocence fade out of the case and stand no longer as a shield and protection against the charge of the crime.

So if you should think the defendant is guilty of a breach of trust committed with a fraudulent intent, if the testimony satisfies you of that beyond a reasonable doubt, say guilty on the first count. If you are not so satisfied, say not guilty on the first count. If you are satisfied from the testimony that the defendant is guilty of grand larceny—

that is, of having stolen money, either bills or coin, or both, to an amount above $20, say guilty of grand larceny. If the proof does not satisfy you that he is guilty beyond a reasonable doubt of either breach of trust or larceny, say not guilty generally.

The jury having failed to agree, and being sent for by the court, were asked if they desired to have the testimony read to them or any further instructions as to the law. At the request of jurors, extracts of testimony were read, and, in response to a request from a juror for further instruction as to the difference between breach of trust and larceny, the court charged as follows: If Mr. A. is in possession of personal property of his own, and B. takes the property away from A., intending to convert it to his own use, that is larceny. If A. owns

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property and puts it *in the hands of B. for B. to go to Charleston to buy goods with, and after he starts or while he is in Charleston, if it occurs to him that he will take that money and apply it to his own use, that is a breach of trust, because A. has trusted him and created a trust in his hands, and after that is done he conceives the intention of making use of the property put into his hands. He could not commit a larceny of property placed in his hands, for a larceny is to take, originally, and carry away the property of another with the intention to convert to the taker's use. In this case, if Mr. Shirer had put in his possession money belonging to Mr. Banks and Mr. Smith, and he had it in his possession, and after he had it in his possession he held it as a trust, and he conceived the idea of taking that money and appropriating it to his own use, and deprive Banks & Smith of it, that would be a breach of trust; but if it was not in his possession, and was in the possession of Banks & Smith, and he took it, it never having been intrusted to him, that would be a larceny.

Suppose that money was in this safe, and that Mr. Banks and Mr. Smith, either or both of them, as partners, had access to that money whenever they pleased, and Mr. Shirer, to enable him to carry out the purposes of his employment, had access to it too, then you see it is no more in the possession of Mr. Shirer than it is in the possession of Banks & Smith. If that should be the state of facts, Mr. Shirer could not commit a breach of trust with that money, because it was not exclusively in his possession. But Mr. Banks and Mr. Smith, having equal access and control of that money, in legal contemplation it was in their possession, and he could not commit a breach of trust of that money, for no trust of that money existed. But he could commit a larceny of that money, because, it being in the possession of Banks & Smith, if he took it out of their possession and appropriated it to his own use, that was larceny. Now, if Mr. Shirer had money belonging to Banks & Smith in his possession, by their consent, to which they did not have equal access with him, that was in his possession and put there separate and apart by him, and he appropriated that money to his own use, intending to deprive the real owners of their money, that was a breach of trust with a fraudulent intention.

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*By a Juror—Do you mean to say that that money was in the drawers of that safe, and Mr. Shirer had the keys and took the money out of those drawers, and if he did that it was larceny?

By the Court—No; I mean to say that that is a matter of fact for you. The question of possession is a matter of fact for you to determine. If there was money in that safe, to which Mr. Banks and Mr. Smith had access just as much as Mr. Shirer had, and Mr. Shirer took it out of the safe, intending to divert it to his own use, that was larceny. If Mr. Shirer was arrested and tied by two men, and, under the threats of these men, surrendered the combination by means of which the safe was unlocked and those men went and took the money, then those men committed the larceny and Mr. Shirer did not. If Mr. Shirer took the money and then tied himself down there, then he committed the larceny, or the breach of trust, as you may determine. You must decide from the facts whether the money was in the possession of the defendant or in the possession of the real owners. If Mr. Banks and Mr. Smith had access to that money whenever they pleased, just like the proprietor of a store has access to his cash-box, and like the clerks have access to it, then the possession of that money was not in Mr. Shirer but in Messrs. Banks & Smith. But if that money was intrusted into the absolute possession of Mr. Shirer, and they did not have such an access, then the trust was created.

Mr. Samuel Dibble, for appellant.

The indictment should allege ownership with the same particularity as in larceny. Russ. & R. C. C. 23; 3 Bos. & P. 106; 2 East P. C. 576; 2 Leach C. C. 932. This was not done here. There is a lack of particularity in the description of the articles alleged to have been fraudulently converted; the kind of currency should have been stated. 20 Gratt. 716; 47 Ala. 53; 3 Heisk. 333; 45 Ala. 66; 41 Tex. 164, 232; Const. of S. C., Art. I., § 13. Breach of trust, made larceny by statute, applies only to cases which the common law did not reach as larceny. Russ. & R. C. C. 160; 5 Car. & P. 143; 9 Id. 27; 4 Taunt. 304; 1 Dears. & B. 431; Crim. L. Mag., Sept., 1880; 9 Metc.

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(Mass.) *142; 9 Cush. 284; 99 Mass. 429;

Rosc. Cr. Ev. 600; 2 Arch. Cr. Pl. 343; 2 Whart. Cr. L., § 1941. After jury are charged on a valid indictment, it cannot be withdrawn and new bill given out. Cooley Const. Lim. 328; 1 Bish. Cr. L., § 1013. Whenever a jury is charged the prisoner's jeopardy begins, and it continues until that case is ended, by acquittal or nolle prosequi. A new bill substitutes another peril. The point suggested in 48 Cal. 331, was an obiter dictum of Judge McKinstry. See 4 Crim. L. Mag., July, 1883; 9 Bush 333; 1 Bailey 657.

Mr. Solicitor Jervey, contra.

February 23d, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. The defendant, George S. Shirer, was indicted in the Court of General Sessions for the county of Orangeburg, at the October Term, 1882, under the statute of 1866, which declares that "any person committing a breach of trust with a fraudulent intent shall be held guilty of larceny," re-enacted in general statutes as section 2493. Upon motion of defendant's counsel, the presiding judge, Pressley, quashed the indictment upon the grounds, principally, that the facts set forth did not constitute a breach of trust, but simple larceny, and that the ownership of the property was not sufficiently alleged.

At the January Term of 1883 he was again indicted upon the same transaction, in four counts; one for fraudulent breach of trust, and three with some variations for grand larceny. Judge Cothran granted a motion to quash the first count for fraudulent breach of trust, leaving only the three larceny counts. Upon these the defendant pleaded "not guilty;" and a jury being charged with the issues, failed to agree upon a verdict, and were discharged by the court, and the cause was continued.

At the May Term, 1883, the solicitor entered a nolle prosequi upon this indictment without the consent of the defendant, and gave out a new bill based upon the same transaction, which contained a count for fraudulent breach of trust, and three counts for larceny as before. The first count charged as follows: "That the said George S.

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Shirer, on the 20th day of June, *1882, with force and arms at Orangeburg, in the county of Orangeburg and State aforesaid, did unlawfully and feloniously commit a breach of trust with fraudulent intent, in this, that the said George S. Shirer, being then and there a clerk and in the employment of one Hugh R. Banks, and one T. Ogier Smith, trading as copartners under the firm name of Banks & Smith, by virtue and reason of such employment was authorized and empowered to collect, receive and keep certain sums of money then and there due unto and owned by the said Banks & Smith; and that the said George S. Shirer, by virtue of said employment, was furthermore intrusted with the key of the office whereat the said Banks & Smith did business, and in possession of the combination by which the safe of the said Banks & Smith was locked and unlocked, and of two keys by which were locked and unlocked two drawers within said safe; that the said George S. Shirer, by virtue of the employment and authority aforesaid, on the said twentieth day of June in the year aforesaid, at Orangeburg, in the county and State aforesaid, did receive and had in his custody and possession the sum of $395, lawful currency of the United States, of denomination and issue to the jurors aforesaid unknown, of the value of three hundred and ninety-five dollars, which said sum of money he, the said George S. Shirer, then and there had and held in trust for the use of the said Banks & Smith, and to pay the same over to the order and under the direction of the said Banks & Smith. And the jurors aforesaid, &c., do further present that the said George S. Shirer, then and there having in his custody the sum of money aforesaid, which he held upon the trust aforesaid, did fraudulently and feloniously take, use, divert and convert to his own use," &c.

Upon arraignment, a motion was again made to quash the count for fraudulent breach of trust above given; but the motion was refused by Judge Wallace. The defendant then pleaded "former jeopardy" for the same offense; claiming that the jury having been charged with the trial of the cause, and a mistrial entered at the previous term, the entry of a nolle prosequi afterwards was equivalent to an acquittal, and entitled the defendant to his discharge. To this plea the

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solicitor demurred, and the *presiding judge sustained the demurrer and overruled the plea. The defendant then pleaded "not guilty," and the trial was had.

Among other things, it appeared that Banks & Smith were in the rice milling business at Orangeburg; that they had an office in which the business was conducted, and the defendant Shirer was employed by them as a general office clerk. Smith had general charge of the outdoor work, and Banks looked after the finances and office work. Shirer and Banks together kept the books of the concern; Shirer had charge of the cash on hand; that there was a safe in the office, with a combination lock, of which no one had knowledge but the partners and Shirer. All could enter the office and the safe; but inside the safe there were two drawers, to which Shirer alone had access. The use of these had been assigned to him for the purpose of keeping at night the cash received during the day. Shirer alone had the key to these drawers; and the allegation was that, on the night of the larceny, he had in this drawer $394, money belonging to the

proprietors, Banks & Smith, which said money he, Shirer, in breach of the trust reposed in him, fraudulently appropriated to his own use.

Under the charge of the judge the jury rendered a verdict of "guilty on the first count" (for breach of trust with fraudulent intent), and "not guilty on the other count" (for grand larceny). The defendant, by his counsel, moved in arrest of judgment, and, failing in that, for a new trial. The presiding judge refused both motions, and sentenced the defendant to twelve months imprisonment at hard labor in the State penitentiary, and he appeals to this court upon the following grounds:

1. "Because his Honor, the presiding judge, erred in denying the motion of the defendant to quash the first count of the said indictment.

2. "Because the said count, upon which the judgment was pronounced, is fatally defective in this, that it does not comply with the requirements of article I., section 13, of the constitution of this State in the description of the offense charged; and his Honor erred in refusing so to rule.

3. "Because the said count is not sufficient

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in respect to the *allegation of the ownership of the property alleged to have been feloniously converted; and his Honor erred in refusing so to rule.

4. "Because the said count is insufficient in this, that it lacks particularity of description of the property alleged to have been feloniously converted; and his Honor erred in declining so to rule.

5. "Because the said count is insufficient in this, that it does not allege facts and circumstances which constitute the statutory offense designated breach of trust with fraudulent intent; and his Honor erred in declining so to rule.

6. "Because, in two successive indictments against this defendant for the same offense as that charged in the said first count, and under the same prosecution, at two successive terms of the said Court of General Sessions, a count for a breach of trust with a fraudulent intent has been quashed by the judges presiding at said terms upon defects appearing in the said first count of the present indictment and contained in the foregoing exceptions; and his Honor erred in disregarding the said previous decisions in this cause.

7. "Because his Honor erred in overruling this defendant's plea of former jeopardy, and in sustaining the demurrer of the State thereto.

8. "Because his Honor erred in overruling the defendant's motion in arrest of judgment, and in denying his motion for a new trial, and in overruling each and every of the grounds submitted in support of the said motions, which grounds were as follows, to wit: (1) Because the matter alleged in the said first count of the indictment does not constitute the offense of breach of trust. (2) Because the said count does not state that the property alleged to have been feloniously converted was of the proper moneys of the said Banks & Smith, or of any other person or persons. (3) Because there is no sufficient allegation of ownership of the property alleged to have been feloniously converted. (4) Because there is no sufficiently particular description of the property alleged to have been feloniously converted. (5) Because the defendant's plea of former jeopardy is good and sufficient in law. (6) Because there is

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entire failure of *proof of breach of trust. (7) Because there is no proof that the property stolen was out of the legal possession of Banks & Smith; but all the proof shows that the defendant had the care, charge and custody thereof, but had not the legal possession. (8) Because there is no proof of any sum of money received by the defendant for Banks & Smith from any third person. (9) Because there is no proof of the receipt and conversion of lawful currency of the United States as alleged in the indictment. (10) Because there is no proof to correspond with such allegation on the subject of ownership of the property alleged to have been converted as may be found in the indictment.

9. "Because, in refusing said motions, his Honor erred in ruling as follows: (1) That 'if certain moneys were in the custody of the defendant, but in the legal possession of his employers, any fraudulent conversion of the moneys so held by him was breach of trust, which the statute declares to be larceny. (2) That it was not necessary that it should be in proof that the money was out of the legal possession of Banks & Smith. (3) That it was not necessary that there should be any proof of any sum of money received by the defendant for Banks & Smith from any third person. (4) That in case a servant or clerk is intrusted with funds of the employer, and the servant or clerk subsequently converts those funds to his own use, in fraud of the rights of his employer, he is guilty of larceny; and 'that our act and the common law are in exact accord upon that subject.' (5) That our act which declares that 'any person committing a breach of trust with a fraudulent intention shall be held guilty of larceny,' is nothing more than the declaration of the principles of the common law in cases of this nature."

We will not attempt to consider the numerous exceptions seriatim, but to dispose of the points made in their regular order. First. The first and sixth exceptions allege error on the part of the Circuit judge, in refusing the motion of defendant to quash the first count of the indictment. We cannot say that this was error of law. To quash an indictment is not a proceeding as of right, but the

motion is addressed to the discretion of the court. In ordinary circumstances, and according to what is believed to be the more common practice, the decision of the presid-

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ing judge *is not open to review by a higher court. 1 Bish. Crim. Pro., § 701. The modern practice is not to resort to the process of quashing except in extreme cases. At all events the same objections were afterwards urged on the motion in arrest of judgment and will be considered when we come to that subject. It may be proper to state, however, that the count for fraudulent breach of trust, which Judge Wallace refused to quash, differs in several particulars from the count in former indictments, which were quashed successively by Judges Pressley and Cothran.

Second. Exception seven complains that the Circuit judge committed error in sustaining the demurrer to the defendant's plea of former jeopardy. The precise point made is, that the defendant, having been put to answer a former indictment which resulted in a mistrial, and the solicitor having entered a nolle prosequi on that indictment and given out another based upon the same transaction, is entitled to his discharge precisely as if the jury, on the former trial, had acquitted him. In some aspects this question is not free from difficulty. It is believed that in all civilized countries it is recognized as a fundamental principle of justice, that a man ought not to be twice punished for the same offense, but in carrying out the principle the authorities are not in accord; more particularly as to whether mere jeopardy shall be regarded as punishment, and, if so, as to when that jeopardy is to be considered as commencing and ending. "It is the universal maxim of the common law," says Blackstone, "that no man is to be brought into jeopardy of his life more than once for the same offense." 4 Bl. Com. 335. The constitution of the United States declares, "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Article V. of Amendments. There was no express law in this State upon the subject until 1868, when our present constitution declared that "No person after having been once acquitted by a jury, shall again for the same offense be put in jeopardy of his life or liberty." Section 18, Article I.

It seems to be now settled after some conflict in the authorities, that the provision in the constitution of the United States applies only to offenses and trials under the laws of the general government. 1 Bish. Crim. L.

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981, and note. This being the *case, the courts in this State, up to 1868, could only conform to the doctrine as announced by the common law, which held that legal jeopardy was equivalent to punishment, and that necessarily brought along with it all the embarrassing questions as to when jeopardy attached and when it ended. Of course, by the very terms in which the rule is announced, both the first and second jeopardy had to be in regard to "the same offense;" and it will be observed that in this case the defendant, on the occasion of the mistrial, could not have been in jeopardy in regard to the offense of breach of trust, of which he was convicted on the last trial, for there was no such count in the indictment on which he was then committed to the jury. In reference to the question whether the offense is the same, the test is, "whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction. Where there could, the second could not be maintained; where there could not, it can be." 1 Bish. Crim. L., § 1062. We take it that there could not have been a conviction on the first trial for larceny, upon proof only of what was set out in the count for breach of trust in the second indictment.

But it is claimed that the effect of the demurrer was to admit technically the statement of the plea that the offenses charged were the same, and we will let that matter pass. Taking it to be "the same offense," then, even in the view that the jeopardy attached as soon as the jury was charged with the trial, several exceptions had to be made from the necessity of the cases, in order to prevent a flagrant failure of justice. Our court held, in the case of State v. McKee, 1 Bailey 654 [21 Am. Dec. 499], that "a jury, after they are charged, can be discharged and the prisoner tried a second time for the following causes only: first, the consent of the prisoner; second, illness of one of the jury, the prisoner, or the court; third, absence of one of the jurymen; or fourth, the impossibility of their agreeing on a verdict." The case under consideration comes within the last exception. The jury could not agree and the judge had the right to discharge them and set down the case for a new trial.

So far there is clear precedent; but it is earnestly urged that this authority for a second trial was necessarily limited to a trial

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*on the very same indictment, and that the withdrawal of that by the entry of a nolle prosequi and the substitution of another, entitled the defendant to his discharge. Why so? The doctrine underlying these exceptional cases seems to be, that there never was any real, but only apparent jeopardy "whenever, either in felony or misdemeanor, the judge discovers anything which will render the verdict void, or subject to be avoided by the prisoner, or will render it impossible that a verdict should be rendered—anything, in other words, establishing that no jeopardy has really attached to the prisoner—and that any further proceeding in the trial will be fruitless, he may adjudge the fact, put the adjudication on record and discharge the jury." 1 Bish. Crim. L., § 1036.

Besides, there can be no doubt that even

after trial, an indictment may be withdrawn, if it is discovered to be insufficient. There can be no legal jeopardy upon a bad indictment. 1 Bish., § 1021. Nothing appears upon the subject of the sufficiency or insufficiency of the indictment here, but we suppose that there was some objection to it or it would not have been withdrawn. Be that as it may, it would seem that setting down a case for further proceedings, would give all the rights incident to such position, one of which is, that the solicitor may enter a nolle prosequi and give out a new bill, at any time before the jury is charged with the case. State v. Gulden, 2 McCord 524; People v. Hunckeler, 48 Cal. 334. In the case last quoted, as stated by the Circuit judge, Judge McKinstry substantially held, that the reason for the exceptions named, including the case of a mistrial, was that in these cases there never had been a real, but only an apparent jeopardy. We do not, however, think it necessary to make that ruling.

But there is another view. Our State constitution has a provision on the subject, which, in terms, differs both from that of the constitution of the United States, and from the maxim of the common law as announced by the learned judges. The words are: "No person, after having been once acquitted by a jury, shall again for the same offense be put in jeopardy of his life or liberty." We do not understand that this constitutional provision is to be considered as merely declaratory of the common law, but, on the contrary, as superseding and repealing it,

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*wherever the two are inconsistent with each other. "In England the common law maxim is a mere deduction made by some judge or text-writer from the adjudications, which must govern, if found in conflict with it; but with us the constitutional provision is supreme, and it must be the controlling power, though the result should be to overturn decisions." 1 Bish. Crim. L., § 982. We cannot doubt that this provision in the constitution, which deals with the subject and touches the very essence of the matter, was intended to be exclusive and exhaustive—indeed, our only law upon the subject.

If we are right in this, our duty in the premises is simply to give to the provision proper construction, according to its terms. It will be observed that it makes no reference to a first and second jeopardy, but in lieu of the first, under the old doctrine, substituted the words, "after having been once acquitted by a jury," thus, as it seems to us, cutting off all the difficult and intricate questions as to the first jeopardy, what it is, when it arises and where it ends, &c. This provision of the constitution declares, explicitly, where a party shall not be put in jeopardy again for the same offense, and this declaration involves the idea as to when he may be so put in jeopardy. In other words, the provision presents a proper case for the application of the maxim, "expressio unius est exclusio alterius," the expression of one thing causes the exclusion of another. That is to say, the provision that "no one shall be put in jeopardy again for the same offense after having been acquitted by a jury," causes the exclusion of those from that immunity who have not been so acquitted. See Pott. Dwar. Stat., p. 321, where it is said, "As exception strengthens the force of law in cases not excepted, so, according to Lord Bacon, enumeration weakens it in cases not enumerated." In this view, the Circuit judge was right in overruling the plea of former jeopardy, for, although the defendant had been previously put upon his trial, he had not been acquitted by a jury, and he was not therefore within the express terms of the constitutional provision.

Third. The 2d, 3d, 4th and 5th exceptions and the 1st, 2d, 3d and 4th grounds in arrest of judgment, allege that the count on which the defendant was convicted is fatally defective in many particulars therein indicated.

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Section 13 of the declaration of *rights in the constitution declares that "No person shall be held to answer for any crime or offense until the same is fully, fairly, plainly, substantially, and formally described to him." The requirements of an indictment are comprehensively stated in the case of State v. Schroder, 3 Hill 65, where it is said, "The general rule in framing an indictment is, that the offense shall be so described that the defendant may know how to answer it, the court what judgment to pronounce, and that a conviction or acquittal on it may be pleaded in bar to any other indictment for the same offense." Taking this as our guide, was the indictment in this case sufficient?

1. It is first said the count is insufficient, in that it does not allege facts and circumstances which constitute the statutory offense, designated as "breach of trust with fraudulent intent." We are not sure that we clearly understand this objection. The statute does not describe or define the offense. The indictment charges the offense in the very words in which it is stated: "That the said Shirer, &c., did unlawfully and feloniously commit a breach of trust with fraudulent intent in this," &c., then stating the facts. But if it is meant that, in analogy to some of the English acts which create the offense familiarly known as embezzlement, the defendant being a clerk, could not be convicted under our statute for larceny by breach of trust, in taking money which had reached the possession of the proprietor, and had been delivered to him, coupled with the trust of his calling, and was in his drawer under his exclusive control, then we think the objection cannot be maintained.

As we understand it, we have no law cre-

ating the special offense known as embezzlement, and the object of our act was simply to enlarge the field of larceny, removing what before might have been a defense for those who received property in trust and afterwards fraudulently appropriated it. See State v. Thurston, 2 McMull. 395. The question under our act is, whether the party charged received the property in trust, which he afterwards violated, without depending at all upon the inquiry as to how the trust was created, or by whom, or what may be the character of the person so intrusted. There may be some danger of confusion, or of con-

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founding the offense with that of *embezzlement, where its application is made to a servant or clerk, whose possession, for certain purposes, is regarded as the possession of the proprietor; but we think the Circuit judge committed no error when he said "that in case a servant or clerk is intrusted with funds of the employer, and the servant or clerk subsequently converts these funds to his own use, in fraud of the rights of the employer, he is guilty of larceny, and that our act and the common law are in exact accord upon that subject." That is to say, as to that class of persons who, although committing larceny by breach of trust, may yet be convicted of simple larceny, by virtue of the legal fiction that their possession is that of the employer. As to this class of persons who can be so convicted there may have been less use for the act, but property may be delivered in trust to those who are neither servants nor clerks, and for this class, especially, the act was necessary.

We do not understand, however, that our act was intended to apply only to cases where the common law could not reach. On the contrary, its terms are general, applying to all. "Any person committing a breach of trust with a fraudulent intent, shall be held guilty of larceny." We do not see why a clerk, who has received into his possession money of his employer in trust, and having it in his exclusive custody, appropriates it fraudulently to his own use, may not be indicted under the act for larceny by breach of trust, although for the same offense he might be indicted for simple larceny at common law. Indeed, since the statute, indictment under it would seem to be the proper proceeding, for, while a conviction for simple larceny possibly might be obtained by the aid of the fiction as to possession, the facts stated would make a case in precise accordance with the terms of the statute. As said by Mr. Bishop, "The statute declares that if one (any person) does so and so, his act shall be deemed simple larceny. Now, suppose the words are broad enough to embrace some things which were simple larceny before, are these things, in reason, less within the statute than those which were not larceny? I can see no reason whatever for the distinction. To make it is to violate analogies running through the entire field of the criminal law and the entire field of the law

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of statutory *interpretation." 2 Bish. Cr. L., §§ 328, 329 and 367, and authorities in note to the section last quoted.

2. It is further objected, that the indictment was not sufficient in respect to the allegation of ownership of the property alleged to have been converted. The statutory offense charged in the count on which the defendant was convicted, is nearly akin to that of larceny—indeed, is larceny committed in a particular manner—and we suppose that the ownership of the property must be alleged with the same accuracy and after the same rules as in common law larceny, in which the indictment must aver the ownership of the stolen property as a part of its description and to assist in its identification. We do not understand that there is any set form in which it must be done, but the fact must be stated substantially. The whole scope and tenor of this indictment indicate, unmistakably, who were the owners of the money alleged to have been converted; but in the count for breach of trust, now in contention, it is not stated as clearly in form and manner as it might have been.

The authorities say that "bank bills and promissory notes are not technically goods and chattels," and therefore they should not be laid as "the goods and chattels of," &c. Some other terms must be used to express their ownership. The count referred to does not use the words "goods and chattels," which are usually employed in expressing "ownership." It charges "That the said George S. Shirer, being then and there a clerk in the employment of one Hugh R. Banks and J. Ogier Smith, trading as copartners under the firm name of Banks & Smith, by virtue and reason of such employment, was authorized and empowered to collect, receive and keep certain sums of money then and there due unto and owned by the said Banks & Smith. That the said Shirer did receive and had in his custody and possession the sum of $395, which said sum of money he, the said George S. Shirer, had and held for the use of the said Banks & Smith," &c. Taking the different parts and considering the whole count together, we think the ownership was substantially alleged to be in Banks & Smith, and we cannot therefore say that the judge erred in holding "that the ownership was stated clearly enough for the defendant to understand what he was called upon to answer."

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*3. It is still further urged, that the aforesaid count is defective in this, that it lacks particularity of description of the property alleged to have been converted. The words are, "the sum of $395, lawful currency of the United States, of denomination and issue to

the jurors aforesaid unknown." The precise point of objection is, that the description is not full enough, in omitting the words "kind of currency" to the jurors unknown. The indictment must state with reasonable certainty what it was that was stolen, in order to individualize the transaction; and this object of the description should indicate how definite it must be. We do not see that the formal insertion of the words, "and kind of currency," would really have contributed anything in the way of individualizing the transaction. It would only have added another particular "to the jurors unknown."

When property is stolen it may be impossible to describe it fully. As was said by Judge Evans, in the case of State v. Smart, 4 Rich. 363 [55 Am. Dec. 683], "The law in relation to larceny requires nothing more than a general description, because often the thing stolen is never reclaimed from the thief, and a minute description would be impossible." This is especially true where the thing stolen is money, as to which few persons take any account, except, perhaps, as to the amount and denomination. Our statute makes it larceny to steal "any bond, warrant, bill or promissory note for the payment or securing the payment of any money, notwithstanding any of the said particulars are termed in law a chose in action." Gen. Stat., § 2486. In the case of State v. Evans, 15 Rich. 33, it was held sufficient to describe the article stolen as "a ten-dollar bill of the currency of the country, commonly called paper money." It seems to us that the phrase, "lawful currency of the United States, of denomination and issue to the jurors unknown," described the subject of the larceny with as much certainty as the nature of the case admitted. 1 Bish. Cr. L. 171.

All the other exceptions relate to questions of fact—mostly alleged insufficiency of proof as to the receipt of the money by the defendant, its being in his exclusive custody when taken, and as to the existence of the trust and its breach. These were all questions of fact decided by a jury after a clear and full charge. They were properly presented to the

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Circuit judge, *upon the motion for a new trial, and we have no doubt were there fully argued by the zealous, able and indefatigable counsel for the defendant, but, as often before ruled, this court is not allowed to consider them.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

20 S. C. 412

RICHARDSON v. DAY.

(November Term, 1883.)

[1. *Appeal and Error* ⟸1008.]

Findings of fact by the Circuit judge on written testimony reported to him, approved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3960, 3962–3969; Dec. Dig. ⟸1008.]

[2. *Principal and Surety* ⟸83.]

Where an intestate's wards, who were also her heirs-at-law, asserted a liability against a surety on the guardianship bond and accepted a settlement from such surety—in action afterwards brought by the surety to subject the lands of the deceased guardian to the repayment of the amounts so paid by him, these wards and heirs-at-law are estopped from objecting that the surety was not liable until after an accounting by the guardian.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 129; Dec. Dig. ⟸83.]

[3. *Trusts* ⟸102.]

Where money of wards is used in paying for land previously acquired by the guardian, there is no resulting trust in favor of the wards.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 153; Dec. Dig. ⟸102.]

[4. *Trusts* ⟸84.]

Nevertheless, wards may claim the ownership of property paid for by their guardian, out of their estate, if they so elect, but having received money in settlement of the debt due by their guardian, they cannot afterwards claim the land also.

[Ed. Note.—Cited in Phillips v. Yon, 61 S. C. 437, 39 S. E. 618.

For other cases, see Trusts, Cent. Dig. § 125; Dec. Dig. ⟸84.]

[5. *Tenancy in Common* ⟸55.]

Tenants in common cannot say that they are not in possession of the land in controversy, and, therefore, demand a dismissal of the complaint as to them, if their co-tenants are in possession.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 142; Dec. Dig. ⟸55.]

[6. *Appeal and Error* ⟸1010.]

[A finding or judgment by the court on the facts will not be disturbed if sustained by sufficient evidence, or substantially supported by the evidence.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. ⟸1010.]

Before Wallace, J., Abbeville, February, 1883.

Hon. J. B. Kershaw, Circuit Judge, sat in the place of Mr. Justice McGowan, who had been of counsel in the cause.

This action was commenced April 18th, 1881. The Circuit decree, omitting so much as is repeated in the opinion of this court, was as follows:

This cause was heard before me, February Term, 1883, on the pleadings and testimony, without a report by the master on the issues involved, which was not required by the order of reference. * * *

The testimony taken by the master has ref-

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erence principally to *the terms of the compromise and settlement between the plaintiff and defendant, S. D. Day, and is directly contradictory. The plaintiff, Richardson, testifies that the first agreement for compromise of his claim against estate of Elizabeth Day was such as stated by defendant, Day, but that Day subsequently refused to abide by this settlement, and the second compromise and settlement was entered into, which is set

forth in the receipt of date December 7th, 1880. The testimony of Richardson seems to me to be corroborated by the witnesses, Huff and Wright.

After a careful consideration of the whole evidence in the case, I am satisfied that the parties made the agreement and compromise set forth in the receipt and assignment and that plaintiff did pay to the defendant, Day, the sum of $400 specified in the receipt, in satisfaction of his liability as surety for the deceased guardian, Mrs. Day, and received from him the assignment of his interest, and that he paid to Mrs. Mary Sheppard, late Jackson, the sum specified in the receipt given by her on August 24th, 1880.

It is, therefore, adjudged and decreed that the plaintiff is entitled to the relief prayed in his complaint, and to subject the real estate of Elizabeth Day, deceased, to the payment of the liability incurred by him as surety for said Elizabeth Day. It is further ordered and decreed, that the master of this court do proceed to sell the real estate of the said Elizabeth Day, for the repayment of the sums paid by plaintiff, on her said guardian bonds, with interest from the respective days of payment at public outcry, &c. * * * It is further ordered that, if the said S. D. Day, or the heirs of said Elizabeth Day, pay the said claim of the plaintiff, with interest and the costs, the master forbear to make the sale herein above ordered.

Messrs. Perrin & Cothran, for appellant.

There was no liability on the surety until his principal's default had been established. 13 S. C. 580. There is no evidence of default: on the contrary it is shown that the guardian invested the money of her wards in this land. Plaintiff's payments were therefore voluntary, and cannot be recovered—at least in

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this *form of action. By the assignment, plaintiff took only the ward's rights and interest, which were to call on the sureties for the guardian's default when established. Richardson is estopped from denying Day's title. 13 S. C. 370, 375. This land belonged to the wards. Harp. Eq. 239; 2 McCord Ch. 265; Rich. Eq. Cas. 172; 2 Hill Ch. 426; 1 Strobh. Eq. 112; 3 Id. 134. The wards could elect to take the money or the land. 11 Rich. Eq. 408.

Mr. W. H. Parker, contra.

Respondent's only defense was on questions of fact decided against him by the Circuit judge. He cannot now assert other and affirmative defenses. Code, § 171; Pom. Rem., §§ 617, 690, 701, 706; 4 S. C. 48; 9 Id. 282; 12 Id. 8; 15 Id. 10; 16 Id. 255; Greenl. Evid., Part IV., § 157. The answer admits title to have been in Mrs. Day; the subsequent application of the ward's money to this land did not create a resulting trust. 19 S. C. 126. But if purchased with their money it only gave the wards a lien on the land, if they so elected. Perry Trusts, §§ 128, 458; 1 Rich. Eq. 448. Having elected to take money, they cannot now claim the land. Big. Estop. 503. There has been accord and satisfaction. 13 S. C. 370. Also an assignment. The possession of S. D. Day was the possession of all the heirs of Mrs. Day until actual ouster.

February 23d, 1884. The opinion of the court was delivered by

Mr. Justice KERSHAW. This action was brought by the plaintiff to subject a tract of land, in the possession of the defendants, to the payment of an alleged debt of their ancestress, Elizabeth Day, deceased. The demand was stated in the complaint to have arisen out of the following facts, in effect: That Elizabeth Day had been the guardian of Mary Jackson, her granddaughter, and S. D. Day, her son, and received their estates; that T. S. Powers, John Day and plaintiff were sureties on the guardianship bond, of whom plaintiff alone survived; that she made no settlement with her wards, and died

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on or about *November 1st, 1874; that in 1879, Mary Sheppard, nee Jackson, one of said wards, came of age and instituted suit against the plaintiff, as surviving obligor on the guardianship bond, to recover the balance of her estate in the hands of her late guardian; that plaintiff effected a settlement with her for the sum of $260, which was paid August 24th, 1880, and a receipt given in full satisfaction of her said claim by the said Mary Sheppard; that S. D. Day was also about to commence suit against the plaintiff for the recovery of the balance due him by his late guardian, when, on December 7th, 1880, a compromise was made between him and the plaintiff for the sum of $400, which was also paid, and a receipt in writing given by S. D. Day to the plaintiff acknowledging full satisfaction of plaintiff's liability on the guardianship bond, together with an assignment by S. D. Day of all his interest in the bond to the plaintiff. The complaint demanded judgment for the amount so paid by plaintiff, with interest, and that the land described be subjected to the payment of the same.

B. F. Day and Rebecca Moore answered the complaint, denying that they were in possession of the land, and demanded, for that reason, that the action be dismissed as against them. Mary Sheppard did not answer, and S. D. Day alone resisted the demands of plaintiff. There was no personal property left by Elizabeth Day, and there has been no administration on her estate.

The answer of S. D. Day raised no issues upon any of the matters alleged in the complaint, except that he denied information as to the alleged payment to Mary Sheppard, and set up a defense in regard to the effect of the compromise made between him and the plaintiff, denying the allegations of the complaint in relation thereto. His answer states that the compromise of the indebted-

ness of the plaintiff was as follows: "The plaintiff was liable as surety on the bond of Mrs. E. Day, as guardian of the defendant, on which there was due the sum of $741.63, with interest from January 1st, 1872. This indebtedness the defendant agreed to compromise for the sum of $400, to be made up to him as follows: The plaintiff was to pay the said defendant $50 in cash, and the bal-

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ance, $350, was the sum agreed upon *between the plaintiff and defendant as the value of the plaintiff's claims on said tract of land, in consideration of which the plaintiff agreed to release to the defendant the said tract of land from all the claims he had or might have by reason of his payment or surety on the guardianship bond of Mrs. E. Day. In consequence of said compromise, the said defendant went into possession of the said tract of land, and still claims the possession thereof; and the defendant further alleges, that he has never received from the plaintiff but $40 in money on said compromise."

Upon these issues the cause was heard and determined by the Circuit Court in favor of the plaintiff, who was adjudged entitled to the relief prayed, and the land was ordered to be sold for the payment of his demands. The defendants appealed from this decision, upon the grounds stated in the brief, as follows: "1. Because his Honor erred in ordering the tract of land, containing forty acres, in the possession of S. D. Day, to be sold to refund the amount paid by plaintiff on his liability on the bonds of Mrs. Day, as guardian of S. D. Day and Mary Sheppard. 2. Because his Honor erred in not holding that the said tract of land was part of the estates of the said wards, and not subject to sale for Mrs. Day's debts. 3. Because his Honor should have dismissed the complaint, as the defendants were not in the possession of any descended estate from Mrs. Day."

The Circuit Court has determined the questions of fact raised by the pleadings in favor of the plaintiff. The decision is well sustained by the evidence, and will not be disturbed by this court. From the facts so determined, it follows that the plaintiff has a valid demand against the estate of Elizabeth Day for the sums of money paid him as surety in settlement of her liabilities as guardian.

It is claimed by appellants that no valid claim was established by the plaintiff, for the reason that there must have been an accounting first had before the payment by the surety of the alleged liability of the guardian could operate to charge the latter. There is no doubt that such is the general rule, and if the defendants here were only heirs-at-law, there might have been, under other circumstances, some ground for its application. But the liability of Elizabeth

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Day, discharged by the plaintiff, *was to Mary Sheppard and S. D. Day, who united in themselves the character of both heirs-at-law and creditors of the estate. They, themselves, asserted against the plaintiff the very liability which they now demand should be established by an accounting, and accepted a settlement with the plaintiff upon that basis. They are estopped to deny the liability, and the other defendants have admitted it by their failure to deny the allegation of the complaint in regard thereto.

As for the liability of the land. Appellants insist that Elizabeth Day, their guardian, invested the funds of her wards in the purchase of the lands in question, taking titles of the same in her own name, and that a trust resulted to them, in consequence, by virtue of which they claim the land, not as heirs-at-law, but in their own right under this trust. This ground was not taken in the Circuit Court, and there is no foundation for it in the pleadings, and objection is made by the counsel for the respondents, that the questions so raised cannot now be considered. The authorities cited in support of the objection would seem to support it, but we prefer to dispose of the subject upon its merits. The evidence upon this point, as contained in the "Case," is as follows: "That Elizabeth Day executed her note on December 4th, 1860, to Walter S. Richardson, agent for James Richardson, for the sum of $1,278.-75, for the purchase-money of the land in question, with T. S. Powers and John Day as sureties; that she took title to herself and lived on the land till her death in 1874; that she was appointed guardian of her wards, and gave bond February 28th, 1861; that among other things, W. S. Richardson testified that he knew that Mrs. Day had invested in the land, said forty-four acres, her wards' money; that S. D. Day and Mary Jackson lived with their mother and grandmother, on the land, till her death; that Mary Jackson, now Sheppard, continued to do so till her marriage in 1880, when she left, and that S. D. Day has, since the death of his mother, continued to live on the land, and is now in possession of it."

It will be seen that the purchase of the land was made by Mrs. Day, and the title vested in her before she became the guardian of defendants. This, therefore, is not a case

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of a trust *resulting from the purchase of the land, and the taking of title in her own name, by one person, and the payment of the purchase-money by another. In cases of that kind, the payment or advance of the money before, or at the time of the purchase, is indispensable to the creation of the trust. "The resulting trust, not within the statute of frauds, and which may be shown without writing, is when the purchase is made with

the proper money of the cestui que trust and the deed not taken in his name. The trust results from the original transaction, at the time it takes place, and at no other time, and it is founded on the actual payment of the money, and on no other grounds. It cannot be mingled with any subsequent dealings whatever." Botsford v. Burr, 2 Johns. Ch. 414; Rogers v. Murray, 3 Paige 390; Ex parte Trenholm, 19 S. C. 126.

Nevertheless, it appears that this land was paid for, in part at least, with money of the wards of Mrs. Day. Under such circumstances the cestui que trust is entitled to the money or the land, at his option. Lench v. Lench, 10 Ves. 517; Lewis v. Madocks, 17 Id. 58. Says Mr. Story: "In cases of this sort the cestui que trust is not at all bound by the act of the other party. He has, therefore, an option to insist upon taking the property, or he may disclaim any title thereto, and proceed upon any other remedies to which he is entitled, either in rem, or in personam. The substituted land is only liable to his option. But he cannot insist upon opposite and repugnant rights." 2 Eq. Jur. 1262.

From the facts here, it appears that the defendants, Mary Sheppard and S. D. Day, elected to proceed against the surety on the guardian's bond, and have received from that source satisfaction of their claims. It is manifest that this exercise of their right of choice operates to confirm the title of Mrs. Day, and to divest it of the trust which they might otherwise have enforced against the land. Their possession, therefore, is as heirs-at-law and not under the alleged trust. This being the nature of their possession, they hold as tenants in common with their coheirs, and the plea of B. F. Day and Rebecca Moore, denying that they are in possession, is negatived, for the possession of one tenant in common is the possession of all.

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Jefcoat v. Knotts, *13 Rich. 60. There would have been no propriety, therefore, in dismissing the complaint as to them, as claimed by the third ground of appeal.

We perceive, therefore, no error in the judgment of the Circuit Court. It having been established that the plaintiff had a valid demand against the estate of Mrs. Day for money paid by him as surety on the guardianship bond in discharge of her liability as guardian; and it also having been established that the land in question was vested in her, and descended to the defendants as heirs-at-law, the judgment of the Circuit Court could not have been otherwise.

It is ordered and adjudged that the appeal be dismissed; that the judgment of the Circuit Court be affirmed, and the case remanded to that court in order that the judgment of the same may be carried into effect.

20 S. C. 419

STATE v. HATHCOCK.

(November Term, 1883.)

[*Highways* ⊂⊃151.]

Laborers employed in working upon the road-bed of a railroad company, which was engaged in carrying freight, passengers and mail, were summoned to work upon the public highways, but failed to appear. Upon being prosecuted for such failure, they interposed their daily and constant employment at that time as a justifiable excuse, which defense was overruled by trial justice and Circuit judge. *Held*, that there being no definition of what was a justifiable excuse in such cases, this court could not declare the ruling below to be error of law.

[Ed. Note.—Cited in State v. Carroll, 30 S. C. 89, 8 S. E. 433, 14 Am. St. Rep. 883; Town Council of Chesterfield v. Ratliff, 52 S. C. 566, 30 S. E. 593, 41 L. R. A. 503.

For other cases, see Highways, Cent. Dig. § 410; Dec. Dig. ⊂⊃151.]

Before Fraser, J., Fairfield, September, 1883.

These were prosecutions against Oliver Hathcock, Walter Kelly, George McConnell, James McConnell and Rhett Jordan—five cases heard together, the same point being involved in all. In dismissing the appeal to the Circuit Court, the presiding judge said:

The defendants were convicted and sentenced to pay each a fine of $5 or be imprisoned ten days in the county jail. The defendants appeal on the grounds—1. That

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their employment, as *above stated, in the service of the railroad company is a "justifiable excuse." 2. That being so employed, they are not liable to road duty.

These defendants are not the employés of the government, either State or Federal. They have no claim on the government, and are in no way responsible to it. They are employed, and I take it, paid, and can be dismissed by the railroad company at its pleasure. Except that they are paid for the time they work and not by the job there is no difference between them and those who get out cross-ties, bridge and trestle timber, and fire-wood. I see nothing in the nature of their connection with the railroad company which exempts them from road duty. They are not exempt by statute as a class.

What is a justifiable excuse is not defined in the acts. I think, however, that it must be something in the nature of an emergency, which cannot, with reasonable care, be provided against as sickness or death in one's family or even of a near neighbor or friend, where the common interests of humanity demand that business shall be laid aside for the care of the sick and dying. Some heavy loss from fire or flood might be sufficient to excuse the sufferer during the temporary pressure on him. I take it that any sudden and unexpected demand on the railroad company to repair damages from a freshet or some accident on the railroad, might excuse

the railroad hands. There is nothing of the sort in this case—nothing which could not have been provided for. The railroad company only employed hands enough to do their work, while it would have been easy to have employed sufficient force to do its work, making proper allowance for that which the State demands. I do not think that any class of persons not named as exempt in the act can plead their employment or occupation as ipso facto a valid or justifiable excuse for failure to do road duty.

The judgment of the trial justice in these cases is therefore confirmed.

The defendants' exception to this judgment was as follows:

For that his Honor did not hold that while a track-hand was working upon the track of

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a railroad, then in operation, at a *time when his so working was necessary for the safe transportation of merchandise, passengers and the United States mail, his being so employed constituted a "justifiable excuse" for not working upon the dirt highways of the State at that time.

Mr. J. H. Rion, for appellant.

This is a criminal action; hence, a different construction as to what will be a justifiable excuse must obtain from what would be construed such excuse in a civil action for a penalty. Railroads are public highways. Gen. Stat., § 1550; Cheves 96; 16 Wall. 663, 685. The defendants work on these public highways every week-day in the year, and were so working on the day they failed to appear, doing work required by the charter. Railroads in operation in the United States are postroads. U. S. Rev. Stat., § 3964. Carrying the mails is a great public duty; and a right granted by charter. 11 Stat. 536, § 10. Taking these hands away would be impeding the operation of a constitutional power. 4 Wheat. 317; 2 Black 631. But these defendants cannot be convicted if they have a justifiable excuse. Gen. Stat., § 1085. They were keeping this great public highway and the bridges, &c., in safe condition, and employed in a public duty as to State and United States. Governors, judges, sheriffs &c., are not exempt under the letter of the statute, but if then engaged in public duties, they would have a justifiable excuse. Other hands employed instead of these would be likewise summoned. See 1 Bailey 170. In the case from Cheves 95, the railroad was not completed, nor in operation; they were not railroad hands, nor then engaged in work at the time necessary for safe transportation. Exemption is not claimed for these defendants; but that their employment on the same day was a justifiable excuse sufficient to prevent a conviction in a criminal case. Under act of 1825, white persons could not be imprisoned. The case in Cheves 210, would hardly be so ruled now. See, also, 2 McCord 401; 1 Bailey, 168, 169, 170.

Mr. Solicitor Gaston, contra.

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*February 29th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The defendants were employed by the Charlotte, Columbia and Augusta Railroad Company to work on the road-bed of said railroad, and it is said "that they were engaged on said work every day in the year, Sundays excepted, constantly employed in keeping said road-bed in condition, and that no more hands were employed than necessary for this purpose." While thus employed, they were warned to work on a public highway near by. This notice they disregarded, and failed to appear. Being indicted before a trial justice, they interposed the defense of "justifiable excuse," founded upon the facts above stated.

The act under which the defendants were indicted is found in general statutes, section 1085. It provides, "that if any person of legal age shall neglect to appear, or shall refuse to work upon the highways or roads (having no justifiable excuse), according to the directions of the overseer, he shall be deemed guilty of a misdemeanor," &c. The defense thus interposed was overruled by the trial justice, and also by the Circuit judge upon appeal to the Circuit Court. The appeal here raises the question again, Should the facts, as stated, have been held to constitute a justifiable excuse?

The act, as it will be seen, simply provides that a justifiable excuse in such cases will prevent conviction, but it nowhere defines or declares what is meant by the term "justifiable excuse," nor have we ever been able to find any case where a principle has been established by which the meaning of these terms can be determined as matter of law. [State ex rel. Luten v. Commissioners of Roads for St. George's Parish] Cheves 95; [State ex rel. Campbell v. Commissioners of Roads for Laurens District] Id. 210. The cases relied on by the respondent, found in Cheves' reports, do not touch this question. The first case decides that railroad hands are not exempt from highway duty, and the second, that postmasters are not exempt. The question here, however, is not whether the defendants were exempt, but whether, being otherwise liable to do road duty, they could be excused in this instance on the ground that their employment as railroad hands constituted a justifiable excuse.

It is the province of this court under the

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constitution, to cor*rect errors of law in cases at law brought before it by appeal. The difficulty in this case is, that we find no law, either statutory or otherwise, declaring what facts will constitute a justifiable excuse in cases like these, and, consequently, we have no rule by which to test the facts

relied on by the appellants, and to determine whether or not, as matter of law, they make out a justifiable excuse. In the absence of such rule, whatever might be our individual opinions as to the sufficiency of the excuse, as a matter of justice or expediency, yet we cannot say that the court erred as matter of law in disregarding it. The legislature, in failing to define, either generally or specifically, what facts in law would amount to a justifiable excuse, seems to have left this matter to the judgment and discretion of the tribunal before which the parties might be brought, and such being the fact, it does not appear that any question of law can be involved, except that the accused has the right to interpose such a defense. If the court below had held that the defendants had no right to rely upon a "justifiable excuse" as a defense, this would have been in direct conflict with the act, and would have been error of law, subject to correction by this court; but, holding that a certain state of facts did not constitute this excuse, we fail to see what principle of law he disregarded.

It is urged by the appellants' counsel, that this is a criminal case, and hence, "a different construction as to what will be a justifiable excuse must obtain from what would be construed such excuse in a civil action for a penalty." This may be so, and yet the difficulty still remains. We are considering the question, whether the Circuit judge committed error of law in his ruling, and we cannot say that such error exists until we find some law defining the term "justifiable excuse," and none has been referred to as applicable either to a civil or criminal case.

It is said that railroads are public highways; that they carry the mails, which is a great public duty, and that hands employed by them to keep the road-bed in repair, for the safe transportation of the mails and the goods and merchandise of the people, are employed in a great public work; that they stand like the governor, the judges and other

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State officers while in the dis*charge of their official duties, and therefore should not be disturbed. We do not think that defendants occupy the position claimed for them. The railroads may in some sense be highways, but hands employed in keeping these roads in repair, by contract and under wages, are not giving their labor to the public under the road law, as other citizens are required to do. Neither are they public officials. On the contrary, they are ordinary employés engaged in work of an important character, it is true, but a work, so far as they are concerned, entirely of a private nature and for their own individual profit, not differing from any ordinary employment—on the farm or workshop. But, be that as it may, the question again recurs, Where is the law which holds that even a public officer could interpose his public duties as a justifiable excuse, under this act, if he is otherwise liable? No doubt, in the case of a public officer discharging important public duties, such a defense would avail, but if it was disregarded, in reference to one not exempted by the road law when properly construed, could this court hold that it was legal error? We think not, except by judicial legislation. See Harrington's Case, 2 McCord 401; Martindale's Case, 1 Bailey 168, 170.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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20 S. C. 424

LORICK & LOWRANCE v. McCREERY.

(November Term, 1883.)

[1. *Equity* ⊂⊃410.]

When a master's report is adverse to defendant upon some of the issues raised, but on the main issue is favorable, and recommends a dismissal of the complaint, still, proper practice requires defendant to except to such adverse findings if he wishes to have them further considered in the cause.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 910; Dec. Dig. ⊂⊃410.]

[2. *Execution* ⊂⊃65.]

A judgment was obtained in Richland county and transcript filed in Newberry county; execution was then issued by the clerk of Richland to the sheriff of Newberry, and made returnable "in 60 days," and levy thereunder was made within sixty days. *Held*, that a sale of land in Newberry under this execution was valid.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 49½, 151; Dec. Dig. ⊂⊃65.]

[3. *Execution* ⊂⊃278.]

An interest in land being purchased at sheriff's sale by the plaintiff in execution to whom the money was due, the purchaser may bring action for partition without making payment of his bid and before receiving a title-deed from the sheriff.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 802; Dec. Dig. ⊂⊃278.]

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[4. *Deeds* ⊂⊃120.]

*A distributee, L., having an interest in G.'s intestate estate, executed under her hand and seal, in the presence of two witnesses, an instrument of writing in words following, to wit: "For value received, I hereby assign, set over and deliver to S. all my right, title and interest, as legatee of the estate of G." *Held*, that S. became thereby entitled to L.'s life-interest in a tract of land of which the intestate died seized and possessed, but the fee remained in L.

[Ed. Note.—Cited in Navassa Guano Co. v. Richardson, 26 S. C. 407, 2 S. E. 307; Bryce v. Massey, 35 S. C. 142, 14 S. E. 768.

For other cases, see Deeds, Cent. Dig. § 386; Dec. Dig. ⊂⊃120.]

[5. *Partition* ⊂⊃16.]

Such remainder was subject to levy and sale under execution against L., and the purchaser became thereupon entitled to maintain an action for partition, if such partition could be had consistently with the interests of all parties.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 52; Dec. Dig. ⊂⊃16.]

[6. *Appeal and Error* ⊂=501.]

[In the argument on appeal, both parties discussed an alleged irregularity, notwithstanding the fact that no questions have been raised thereto by exceptions appearing in the "case." *Held* to be irregular, and not to be encouraged, but disposed of in this particular case.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2300; Dec. Dig. ⊂=501.]

Before Wallace, J., Newberry, November, 1882.

This was an action by Lorick & Lowrance against L. C. McCreery, Sarah E. Blackwell and others, for partition. The opinion states the case. The exceptions raised the points stated in the opinion to have been interposed by defendants in their joint answer, as a defense.

Messrs. Jones & Mower, for appellants.
Messrs. Moorman & Schumpert, contra.

February 29th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This appeal involves the question whether a paper, of which the following is a copy:

"Columbia, S. C., March 27th, 1874.

"For value received I hereby assign, set over and deliver to Sallie E. Blackwell, all my right, title and interest, as legatee of the estate of John Glymph.

"Witness my hand and seal.

(Signed,) "Laura E. Blackwell. [L. S.]

"Thomas Rawls,

"William J. Van Ingen,"

can operate as a deed conveying real estate, as against a purchaser of the said Laura E. Blackwell's interest therein at sheriff's sale by execution issued on judgment against her, obtained after the execution of said paper.

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The Circuit judge held, that *this paper was a good conveyance, and dismissed plaintiff's complaint, who brought the action below for the land, relying upon his purchase at the sheriff's sale aforesaid, and this appeal now raises the question stated above.

The facts of the case, upon which this question is raised, are as follows: John Glymph, late of Newberry county, died intestate, seized and possessed of a tract of land situate in Newberry county, containing some 200 acres. He left surviving him the defendants, his heirs-at-law. His personal estate was administered upon by the two defendants, David and Alfred, his sons. On March 27th, 1874, the paper above referred to was executed by the defendant, Laura E. A short time after this, the plaintiffs brought action against the said Laura, in Richland county, and recovered a judgment for $209.23, besides costs, which was duly entered and a transcript thereof filed in the clerk's office for Newberry county, in June, 1874. Execution on this judgment was issued from clerk's office in Richland, and delivered to the sheriff of Newberry, returnable within sixty days. This execution was entered in sheriff's office June 29th, 1874, and levied in July, 1874. The sheriff, however, failing to sell, on account of notice of adverse claims, a rule was issued against him in July, 1877, which, being heard by Judge Kershaw, an order thereon was issued directing the sale within sixty days, or that the rule be made absolute. Accordingly, the sale was made on September 3d, 1877, notice of the claim of Sarah E. Blackwell being given at said sale. The interest of Laura was bought by the plaintiffs at $60. The purchase-money was not paid in cash, as the sale was made under plaintiffs' execution.

In October, 1877, the action below was commenced by the plaintiffs against the defendants, as heirs-at-law of John Glymph, for partition. This action was commenced before the sheriff executed titles to plaintiffs, the complaint being heard on October 3d, and the deed of the sheriff executed on the 17th of the same month. The defendants answered, interposing as a defense: 1. The invalidity of the sale: (a) Because no transcript of the judgment against Laura had been filed in the office of the clerk of Newberry; (b) Because the execution was returnable in sixty days, and hence was without

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legal force when the sale was made. *2. Because at the time appellants commenced their action, they had not paid the purchase-money, nor had they received titles. And, 3. Because Laura E. had transferred her interest in said land by the written assignment set forth above, before the sale. The case was referred to the master, who reported the facts as above stated, holding that the sale, notwithstanding the irregularities as to the execution complained of, was valid and legal, and, further, as matter of law, that the assignment referred to, transferred all interest of Laura E. to her sister, Sarah, which being done before plaintiffs' judgment, that plaintiffs took nothing by his purchase. He therefore recommended that the complaint be dismissed.

No exception was taken to this report by the defendants. Plaintiffs, however, excepted to so much as held that the assignment operated to transfer the interest of Laura E. to her sister, Sarah E. His Honor Judge Wallace overruled plaintiffs' exceptions and dismissed the complaint.

In the argument on appeal, both parties have discussed the alleged irregularity of the sale by the sheriff, notwithstanding the fact that no questions have been raised thereto by exceptions appearing in the "Case." This is irregular, and should not be encouraged, but in this case it may be proper that the points involved therein should be disposed of, especially as the defendants, having been successful on the main question, were not in

condition to appeal on this ground; and further, as both appellant and respondent seem to have regarded this question as involved in the appeal.

It appears, as matter of fact, that a transcript of the plaintiffs' judgment was properly filed in the office of the clerk of Newberry county. This is so reported by the master. Therefore, this objection must be overruled.

There is nothing in the objection that the execution was issued by the clerk of Richland county, or that it was made returnable within sixty days. The fact is, it was levied within the sixty days, and the law fixed the time for its return. Code, § 310.

Nor does the fact that plaintiff had not paid the purchase-money, or that the deed of the sheriff had not been executed before action commenced, fatally affect the proceed-

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ings. The *ruling of the Circuit judge, as to these questions, is fully sustained by the cases of Cobb v. Pressly, 2 McMull. 416, and Small v. Small, 16 S. C. 70. In the latter case, this court held, that in an action for partition, very similar to this, the equitable title of the plaintiff was sufficient, equity regarding that as done which ought to have been done.

So that, at last, this appeal must turn upon the construction which shall be given to the assignment. This paper is certainly a very informal and perfunctory paper. It is true, that it was executed under seal and in the presence of two witnesses; but it has not the other requisites of a conveyance of real estate. No land is described, nor even is its location, if any, State or county, mentioned, except inferentially. There is no habendum, tenendum or warranty clause. Yet, notwithstanding this, inasmuch as the intention of parties should prevail, it is proper to examine this paper, and to enforce it according to the intent legally reached. No doubt it is a valid paper as a bargain and sale as to any realty which it may cover, although informal. Sanders v. Hartzog, 6 S. C. 483; Sally v. Gunter, 13 Rich. 72; Chancellor v. Windham, 1 Rich. 161, and note [42 Am. Dec. 411]; Craig v. Pinson, Cheves 273.

But the question is, Did it cover the realty? It is reasonably certain that Laura Blackwell intended to convey something to her sister. The terms used are, "all my right, title and interest as legatee in the estate of John Glymph." At the time, Laura had an interest in the estate of John Glymph, both personal and real—in the first as a distributee, and in the latter as an heir-at-law; but she had no interest therein as a legatee. The term "legatee," as is well understood, technically describes the beneficiary of personalty under a will, and if this term is strictly construed here, inasmuch as Laura had no such interest, nothing would be conveyed. This would be manifestly against the true intent and meaning of the parties, and we must conclude that this term was not used in its strict technical sense, and we should attach to it some other meaning, if any, if this can be done without violating the rules of construction.

Now, some of the most important principles which govern in the construction of deeds, are as follows: the whole deed should

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*be considered together and effect be given to every part, if all can stand consistently with law; that an exposition favorable to the intention should be made, if not contrary to law; that the intentions should be regarded as looking rather to the effect to be produced than the mode of producing it; that too minute a stress should not be laid on particular words, if the intention be clear, and that, if the deed cannot operate in the manner contemplated by the parties, it should be construed in such manner as to operate, if possible, in some other way. Chancellor v. Windham, 1 Rich. 167 [42 Am. Dec. 411].

As we have said, when this paper is considered as a whole, we cannot doubt that the maker intended to convey some interest. This being the intention, the question is, What was this interest? The terms are, "all my right, title and interest" (as legatee) in the estate of John Glymph. If the term "legatee" was not incorporated, there would be no difficulty, because then the term "all," qualifying right, title and interest in the estate of John Glymph, her whole interest in said estate would pass. Shall the incorporation of the term "legatee," with its technical meaning attached, destroy the paper, and thus entirely defeat it? We think not. This would be laying too great stress upon a particular word to the overthrow of the manifest intent of the paper, considered as a whole, and is not demanded by the rules of construction. We must suppose that the term "legatee" was used in the sense of a party entitled to an interest in the estate, without regard to the manner in which this interest had vested. This supposition is necessary to sustain the paper as to any of its parts, or in any form, and it accords with the manifest intent arising from the paper in its entirety.

We think, therefore, that such interest of Laura in the estate of her father, real and personal, as the paper legally construed could convey, passed to her sister by its execution and delivery. As to the objection that there is no description of the land, it may be said, that is certain which may be made certain, and there is enough in the paper to show what land was intended.

But this does not dispose of the case, because the further question now arises, What estate in the land in question was conveyed to Sarah? That is a matter which must be

determined by the terms of the conveyance.

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The conveyance is a deed of bargain *and sale, and there are no words of limitation. The deed is to Sarah E. Blackwell, without the word "heirs," or any equivalent word. In such case, nothing but a life-estate is conveyed, the fee remaining in the grantor. This was subject to levy and sale under the execution of the plaintiffs, and passed to the plaintiffs by their purchase at said sale, and entitled them to institute the action below for partition, if said partition can be made consistently with the interests of all parties and without detriment to the interests and claims of the life-tenant. We think it was error, therefore, to dismiss the complaint.

It is the judgment of this court that the judgment below, dismissing the complaint, be reversed, and that the case be remanded for adjudication in accordance with the principles hereinabove announced.

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20 S. C. 430

McCONNELL v. KITCHENS.

(November Term, 1883.)

[1. *Contracts* ⇐339; *Trial* ⇐25.]

Where a defendant in his answer asserts that there are stipulations in the contract other than those stated in the complaint, he does not admit the plaintiff's cause of action as stated in the complaint, and, therefore, is not entitled to open and reply.

[Ed. Note.—Cited in Mitchell v. Fowler, 21 S. C. 300; Carroll County Savings Bank v. Strother, 22 S. C. 557; Sanders v. Sanders, 30 S. C. 209, 9 S. E. 94; Addison v. Duncan, 35 S. C. 170, 14 S. E. 305.

For other cases, see Contracts, Cent. Dig. § 1711; Dec. Dig. ⇐339; Trial, Cent. Dig. § 63; Dec. Dig. ⇐25.]

[2. *Agriculture* ⇐7.]

Under the acts of 1872 (15 Stat. 33) and 1879 (17 Stat. 72), the sale of commercial fertilizers is forbidden unless the regulations prescribed by those acts were complied with—those requirements not being solely for revenue, but to protect the public from imposition and fraud, and their violation being declared a misdemeanor and punishable by recurring penalties.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. § 14; Dec. Dig. ⇐7.]

[3. *Contracts* ⇐105, 107, 138.]

The general rule is, that a contract to do an act which is prohibited by statute, or which is contrary to public policy, is void and cannot be enforced in a court of justice, and such prohibition may be implied from the imposition of a penalty.

[Ed. Note.—Cited in Fairly v. Wappoo Mills, 44 S. C. 252, 22 S. E. 108, 29 L. R. A. 215; Packard & Field v. Byrd, 73 S. C. 5, 51 S. E. 678, 6 L. R. A. (N. S.) 547; Rountree v. Ingle, 94 S. C. 235, 77 S. E. 931, 45 L. R. A. (N. S.) 776.

For other cases, see Contracts, Cent Dig. §§ 477–497, 681; Dec. Dig. ⇐105, 107, 138.]

[4. *Contracts* ⇐107.]

Commercial fertilizers sold in this State must bear a tag stating the several particulars required by the statutes, one of the most important of which is "the constituent elements" of the fertilizer; and this is necessary whether the chemical ingredients specified in the statute are present or not; but if asserted to be present, then the percentage of such ingredients.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 479, 491; Dec. Dig. ⇐107.]

[5. *Agriculture* ⇐7.]

Where a merchant sold prepared agricultural lime in this State without a tag stating the chemical composition of such fertilizer, and the date of analysis, and took a note for the purchase-money—*held*, in action on this note, that the action was forbidden by statute, illegal and void, and the complaint was dismissed.

[Ed. Note.—Cited in Durham Fertilizer Co. v. Pagett, 39 S. C. 74, 17 S. E. 563.

For other cases, see Agriculture, Cent. Dig. § 14; Dec. Dig. ⇐7.]

[This case is also cited in Cooke v. Pool, 25 S. C. 598; Tate, Muller & Wittichen v. Pegues, 28 S. C. 465, 6 S. E. 298; Martin v. Suber, 39 S. C. 534, 18 S. E. 125; Fairly v. Wappoo Mills, 44 S. C. 253, 254, 255, 22 S. E. 108, 29 L. R. A. 215; Thomas v. Atkinson, 94 S. C. 128, 77 S. E. 722, and distinguished therefrom.]

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*Before Kershaw, J., Chester, March, 1883.

Action by W. H. McConnell against Addison F. Kitchens. The opinion fully states the case.

Messrs. Jno. M. McNeel and G. G. Dent, for appellant.

Messrs. J. & J. Hemphill, contra.

The contract was not illegal and void. 17 Stat. 75. The chemical composition is not to be stated unless certain specified ingredients are asserted to be present. The tax was for purposes of revenue, and, therefore, its nonpayment would not vitiate the contract. 14 Mees. & W. 452, 463; 11 East 180. As matter of fact it was paid, and receipt was exhibited at the trial. A sale without compliance with the requirements, is nowhere prohibited in the statute, and, therefore, the contract was not void. 26 Am. Rep. 149; 25 Id. 677. There are varying degrees of penalties for the several omissions; if the contract is void, there would be same for all. Absence of a tag would be as severely punished as a false analysis. The act of 1880 (17 Stat. 414), passed after these sales, provides for a forfeiture, thus showing that none previously existed. See 12 How. 85; 75 Va. 239 (40 Am. Rep. 720); 106 Mass. 435 (8 Am. Rep. 346).

March 1st, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action on a contract in writing, under seal, dated March 4th, 1880, by which the defendant promised to pay the plaintiff $310.50 on or before November 1st, 1880. The consideration expressed in the writing was eleven and a half tons of Lee's P. A. lime (meaning Lee's prepared agricultural lime). The defendant, in his answer, alleged that the contract upon which the action was founded was different

in form, and contained other material stipulations from that described in the complaint, and set up two distinct affirmative defenses—one of failure of consideration, and the other that the contract was illegal, being made in violation of certain statutes hereinafter quoted.

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*The defendant claimed the right to open and reply, both in evidence and argument, which was refused and exception duly taken. Testimony was offered to sustain both of the defenses set up in the answer. To so much of the charge as relates to the defense of failure of consideration, no exception was taken. "On the second point made by the defendant, viz., the plea of illegality of the consideration and of the contract, the following facts were proven: First. That the plaintiff sold to the defendant a commercial fertilizer, known as Lee's prepared agricultural lime, on March 4th, A. D. 1880; that the amount sold and delivered to the defendant was eleven and one-half tons, put up in bags, each one of which weighed one hundred and twenty-five pounds; that the bags had on them the name, location and trademark of the manufacturer, but did not have the chemical composition of the contents of the bags, or the date of its analysis, or that the privilege tax had been paid, or any tags at all. The plaintiff admitted the fertilizer was sold and delivered to the defendant in this condition, but proved that he had never asserted or claimed that this lime had any of the chemical ingredients named and specified in section 18 of the act of assembly creating the department of agriculture, approved December 23d, 1879, and was ready and offered to prove a receipt showing that the privilege tax had been paid to the department of agriculture, which was ruled out by the judge, said receipt being without date, and did not show when the privilege tax was paid. The further fact was shown that the note sued on for $310.50 was given by the defendant to the plaintiff on March 4th, A. D. 1880, for the fertilizer sold and delivered as described aforesaid."

The Circuit judge held that the contract was not illegal and could be enforced, to which exception was duly taken. The jury rendered a verdict for the plaintiff for the sum of $250, and judgment being entered thereon, the defendant appeals upon two grounds, substantially as follows: 1. That the Circuit judge erred in holding that the plaintiff was entitled to open and reply. 2. Because the Circuit judge erred in holding that the contract sued upon was not illegal, and could be enforced by an action at law.

The question as to which party is entitled

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to open and reply *depends upon an inspection of the pleadings only, and must be determined without any reference to the testimony which may be subsequently offered. The rule seems to be that when the defendant admits upon the record the plaintiff's cause of action, as stated in the complaint, and relies solely upon an affirmative defense based upon new matter stated in the answer, he is then entitled to open and reply, as the plaintiff in such a case would have nothing whatever to prove, and the defendant would assume the burden of proving his affirmative defense, and thus in reality become the actor. But unless this is done, the plaintiff is bound to establish his cause of action, and, therefore, entitled to open and reply. Brown v. Kirkpatrick, 5 S. C. 267; Burckhalter v. Coward, 16 S. C. 435; Kennedy v. Moore, 17 S. C. 464; Boyce v. Lake, 17 Id. 481 [43 Am. Rep. 618]. In this case the plaintiff, in his complaint, stated as his cause of action a certain contract in writing containing certain terms and stipulations, while the defendant, in his answer, in effect denied that the contract was properly described in the complaint, and, on the contrary, alleged that the contract really contained other terms and stipulations, as appeared by a copy thereof set out in the answer. It cannot, therefore, be said that the defendant admitted the plaintiff's cause of action, as stated in the complaint, and hence, under the rule above stated, he was not entitled to open and reply.

For a proper understanding of the question raised by the second ground of appeal, it will be necessary to consider the terms of the statutes which it is alleged were violated in the contract sued upon. The first statute upon the subject is the act of February 2d, 1872, (15 Stat. 33,) the language of which is as follows: "All commercial fertilizers manufactured, sold or kept for sale in the State of South Carolina, shall have affixed to every bag, barrel or parcel thereof a written or printed label, which shall specify the names of the manufacturer and seller, their respective places of business, and the constituent parts thereof. Section 2. Whoever manufactures, sells or keeps for sale any commercial fertilizer or fertilizers, not labeled in accordance with the provisions of the preceding section, * * * shall be punished by a fine of twenty dollars for the first of-

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fense, and *a fine of forty dollars for the second and every subsequent offense," &c.

The next legislation upon the subject will be found in sections 18 and 19 of "An act to create a department of agriculture, defining its purposes and duties, and charging it with inspection of phosphates and regulation of sales of commercial fertilizers," approved December 23d, 1879, (17 Stat. 72.) The language used in those sections is as follows: "Section 18. That all persons or companies engaged in the manufacture or sale of fertilizers or commercial manures shall pay to the commissioner of agriculture twenty-five cents per ton for every ton of such fertilizer or commercial manure sold or offered for sale

in this State, the said amount to be paid into the State treasury for the exclusive use and benefit of the department of agriculture. Any person, or officer or agent of any corporation, neglecting to pay the sum provided in this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in the discretion of the court, which fine shall be paid into the State treasury for the exclusive use and benefit of the department of agriculture. Section 19. That every bag, barrel or other package of such fertilizers or commercial manure, as above designated, offered for sale, or delivered after sale in this State, shall have thereon a plainly printed label or stamp which shall truly set forth the name, location and trade-mark of the manufacturer, also the chemical composition of the contents of such package and the real percentage of any of the following ingredients, asserted to be present, to wit: soluble and precipitated phosphoric acid, soluble potassa, ammonia or its equivalent in nitrogen, together with the date of its analysis, and that the privilege tax, provided for in section 18, has been paid; and any such fertilizer as shall be ascertained by analysis not to contain the ingredients and percentage set forth, as above provided, shall be liable to seizure and condemnation, and when condemned shall be sold by the board of agriculture for the exclusive use and benefit of the department of agriculture. Any merchant, trader, manufacturer, agent or person who shall sell or offer for sale, or deliver after sale, or receive any commercial fertilizer without having such labels and stamps, as hereinbefore

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provided, attached *thereto, shall be liable to a fine of ten dollars for each separate bag, or barrel, or package sold or offered for sale, to be sued for before any trial justice, and to be collected by due process of law. The amount so recovered, after paying costs, shall be equally divided between the party or parties suing and the department."

It will thus be seen that by the act of 1872, which had not been repealed at the time the cause of action in this case arose, except in so far as any of its provisions conflicted with the subsequent act of 1879 (and the only conflict was as to the amount of the penalty and the mode of its enforcement), it was made a misdemeanor, punishable by fine, for any person to sell or keep for sale any commercial fertilizer which did not have a label affixed to each bag or other package, specifying three things: (1) The names of the manufacturer and seller; (2) their respective places of business; (3) the constituent elements of such fertilizer. By the subsequent act of 1879, every person engaged in the manufacture or sale of commercial fertilizers was required: First. To pay to the commissioner of agriculture twenty-five cents per ton for every ton sold or offered for sale in this State, under a penalty of being deemed guilty of a misdemeanor and subjected to a fine at the discretion of the court. Second. That every bag or other package of such fertilizer offered for sale or delivered after sale in this State, should have attached thereto a label setting forth five things: (1) The name, location and trade-mark of the manufacturer; (2) the chemical composition of the contents of such package; (3) the real percentage of certain specified ingredients, if such ingredients are asserted to be present as part of the chemical contents of such package; (4) the date of the analysis; (5) that the privilege tax of twenty-five cents per ton, above provided for, has been paid. Third. That any person who shall sell or offer for sale, or deliver after sale or receive any commercial fertilizer without having such a label attached thereto, shall be liable to a fine of ten dollars for each separate bag or other package sold or offered for sale, to be sued for and recovered before any trial justice.

Now, while it is true that the legislature has not, in so many words, declared that it shall not be lawful to sell any commercial

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*fertilizer in this State, unless the regulations above prescribed have been complied with, or that a contract for the sale of such fertilizer, without complying with such regulations, shall be illegal and void, yet it seems to us manifest that the real object of the legislation set out above was to prohibit the sale of commercial fertilizers unless the prescribed regulations are complied with, in order to protect the farming interest from deceit or imposition in the sale of an article which has come to be so extensively, if not universally, used by the farmers of the country, as commercial fertilizers.

In 2 Benj. Sales, § 825, the writer, after commenting at length upon the cases, deduces the following rules therefrom: "First. That where a contract is prohibited by statute it is immaterial to inquire whether the statute was passed for revenue purposes only or for any other object. It is enough that parliament has prohibited it, and it is therefore void. Secondly. That where the question is whether a contract has been prohibited by statute, it is material in construing the statute to ascertain whether the legislature had in view solely the security and collection of the revenue, or had in view, in whole or in part, the protection of the public from fraud in contracts or the promotion of some object of public policy. In the former case the inference is that the statute was not intended to prohibit contracts; in the latter that it was. Thirdly. That in seeking for the meaning of the law-giver, it is material also to inquire whether the penalty is imposed once for all on the offense of failing to comply with the requirements of the statute, or whether it is a recurring penalty, repeated as often as the offending party may have dealing. In the latter case the statute is intend-

ed to prevent the dealing, to prohibit the contract, and the contract is therefore void; but in the former case such is not the intention, and the contract will be enforced."

Testing the legislation in question by these rules, it is obvious that, though the sale of commercial fertilizers without a compliance with the prescribed regulations is not, in express terms, forbidden, the legislature did not have in view "solely the security and collection of the revenue," but, on the contrary, the purpose was to protect the public from

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fraud in such sales, and therefore *the inference is that the legislation was intended to prohibit sales of commercial fertilizers except where the prescribed regulations were complied with. It is quite clear that the act of 1872 contains nothing whatever to indicate a purpose to secure the collection of revenue, as there is not a word in it which looks to the imposition or collection of any tax whatever.

It is equally clear to our minds that the subsequent act of 1879 discloses no such purpose. So far from there being anything in this act which indicates that the sole purpose of the legislature was to secure the collection of revenue, the only thing which even looks that way is the provision in section 18, requiring the payment of twenty-five cents per ton for every ton of commercial fertilizers sold or offered for sale in this State, which, in section 19, is denominated a "privilege tax." But this was manifestly designed, not as a source of revenue to the State, but simply as a fund to meet the expenses incurred in enforcing the other regulations of the act, for though this tax, if it may be so called, was required to be paid into the State treasury, it was not put there like the other taxes of the State, but was placed there expressly "for the exclusive use and benefit of the department of agriculture," which by this act was specially charged with the enforcement of the regulations for the sale of commercial fertilizers.

Again, it will be seen that by the terms of both these acts, the penalty for failing to comply with the requirements of these acts is not imposed once for all, but is a recurring penalty, repeated as often as the offending party may have dealings. In the act of 1872 the penalty is "a fine of twenty dollars for the first offense, and a fine of forty dollars for the second and every subsequent offense;" and in the act of 1879 the penalty is "a fine of ten dollars for each separate bag, or barrel, or package sold or offered for sale." So, that, testing the legislation of this State upon the subject by the rules laid down by that eminent jurist, Mr. Benjamin, the conclusion is unavoidable that the object of the legislature was to prohibit the sale of commercial fertilizers in this State unless the requirements of the statutes are complied with.

The general rule, undoubtedly is, that a

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contract to do an act *which is prohibited by statute, or which is contrary to public policy, is void, and cannot be enforced in a court of justice. It seems, too, to be equally well established that it is not necessary that the act should be prohibited in express terms, but that a prohibition may be implied from the imposition of a penalty, because, as Lord Holt says: "A penalty implies a prohibition, though there are no prohibitory words in the statute." Miller v. Post, 1 Allen 434; Pray v. Burbank, 10 N. H. 377; Law v. Hodson, 11 East 300; Kleckley v. Leyden, 63 Ga. 216; Johnston v. McConnell, 65 Ga. 129; Dillon v. Allen, 26 Am. Rep. 145, (46 Iowa 299); Woods v. Armstrong, 25 Am. Rep. 671, (54 Ala. 150). The cases above cited from Alabama and Georgia arose upon statutes regulating the sales of commercial fertilizers, and the contracts were held void for noncompliance with the prescribed regulations. Especial attention is invited to the notes appended to the case of Woods v. Armstrong, by the editor of the American Reports, as containing a full collection of the authorities.

The cases of Harris v. Runnels, 12 How. 79 [13 L. Ed. 901], and Niemeyer v. Wright, 40 Am. Rep. 720 (75 Va. 239), mainly relied upon by respondent's counsel, do not, in our judgment, sustain his position. Both those cases recognize the doctrine that a contract founded on an act prohibited by statute is void, and that it makes no difference whether the prohibition is expressed or is to be implied from the imposition of a penalty. They, however, maintain the doctrine that whether a prohibition is to be implied from the imposition of a penalty is a question of legislative intent, to be ascertained by an examination of the various provisions of the statute in question, and where there are any terms in the statute which indicate that the legislature did not intend to avoid a contract made in contravention of it, such a contract may be enforced. But, to use the language of Mr. Justice Wayne, in Harris v. Runnels, which seems to have been the authority upon which the case of Niemeyer v. Wright was mainly based, "When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

In both of the cases the court went on to

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show that there were *other provisions in the statutes there brought under review, which, to their minds, indicated a purpose on the part of the legislature not to declare contracts made in contravention of the terms of such statutes void, but simply to impose a penalty for a failure to comply with the statutory regulations. So that, even if we should adopt the views announced in these cases, the conclusion which we have reached would not be affected, for in the statutes which we

are called upon to construe, there is not only no provision which would indicate that the legislature did not intend to declare a contract for the sale of commercial fertilizers void, unless the regulations prescribed by statute were complied with, but on the contrary we are satisfied that the main object of this legislation was to protect the farmers from fraud and imposition in the sale of commercial fertilizers, and absolutely to prohibit such sales unless the regulations prescribed are complied with.

Indeed, aside from any authority, it would seem to us altogether anomalous, not to use any harsher term, to hold that a court of justice should enforce a contract founded upon an act which is absolutely forbidden by the law-making department of the government. As was well said in Bank v. Owens, 2 Pet. 539, "No court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they, then, become auxiliary to the consummation of violations of law? * * * There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." Or, as is said in O'Donnell v. Sweeney, 5 Ala. 468, "It would indeed be a strange anomaly if a contract, made in violation of a statute, and prohibited by a penalty, could be enforced in the courts of the same country whose laws are thus trampled on and set at defiance."

The only remaining inquiry is, whether the sale, upon which the contract sued upon in this case was based, was made in violation of the law regulating the sale of commercial fertilizers. The undisputed facts set out in the "Case," show beyond all question that it was. It is conceded that the bags in which the fertilizer was put up, "had on them the

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name, location, and trade-*mark of the manufacturer, but did not have the chemical composition of the contents of the bags, or the date of its analysis, or that the privilege tax had been paid." They, therefore, lacked at least one thing, and, perhaps, the most important, required by the act of 1872—the constituent elements of such fertilizer; and at least three things required by the act of 1879, to wit: (1) The chemical composition of the contents of the package; (2) The date of the analysis; (3) That the privilege tax had been paid.

It is true that the counsel for respondent has contended that the act of 1879 does not require the chemical composition of the contents of the package to be stated, except where certain ingredients specified in the statute are asserted to be present, and that in this case no such ingredients were asserted to be present, but we do not so understand the terms of the act. On the contrary, we think the true reading of the act is, that in all cases the label or stamp shall set forth the chemical composition of the contents of the package, and if any of the particular ingredients mentioned in the statute are set forth as part of the chemical composition of the contents of a package of fertilizers, then the real percentage of such ingredients, as set forth or asserted to be present, must likewise be stated.

It seems to us that the chemical composition of a fertilizer is the important matter to be known, and to read the statute as if it dispensed with this important requirement, except where certain specified ingredients were asserted to be present, would not only emasculate the statute, but would pervert its language from its plain meaning. So, that, even if we should hold, as contended for by respondent, that the mere absence of a label showing that the privilege tax had been paid, would not invalidate the sale, (about which, however, we are not now called upon to express any opinion,) we would still be compelled to hold that the sale was illegal, as there was a failure to comply with other fundamental requirements of the law.

Inasmuch as we have seen that the object of the legislation under review was not to secure the collection of revenue, we have not deemed it necessary to consider the question, about which there seems to be some conflict

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of authority, whether a *sale made in violation of statutory regulations designed to secure the collection of the revenue, would be illegal and void. See Brown v. Duncan, 10 Barn. & C. 93; Johnson v. Hudson, 11 East 180; Cope v. Rowlands, 2 Mees. & W. 157; Griffith v. Wells, 3 Den. 226; Smith v. Mawhood, 14 Mees. & W. 452; Larned v. Andrews, 8 Am. Rep. 346, (106 Mass. 435).

We are therefore of opinion that the contract sued upon in this case is illegal and void, and that the Circuit judge erred in instructing the jury otherwise.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the complaint be dismissed.

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20 S. C. 441

STATE v. COLEMAN.

(November Term, 1883.)

[1. *Jury* ⇐131.]

The examination of a juror on his voire dire should properly be conducted by the court.

[Ed. Note.—Cited in State v. Nance, 25 S. C. 171; State v. Hayes, 69 S. C. 297, 48 S. E. 251.

For other cases, see Jury, Cent. Dig. § 570; Dec. Dig. ⇐131.]

[2. *Jury* ⇐103.]

It is for the Circuit judge to decide whether a juror is indifferent or not. In this case, the judge did not abuse his discretion in permitting to be sworn a juror, who stated on his voire dire that he had read the newspaper accounts of

the crime—had neither formed nor expressed any opinion of the guilt or innocence of the prisoner at the bar, but had said that "any man who commits such a crime should be hanged," and, further, "that a man committing so shocking a crime as this was reported to be, did not deserve a trial by jury."

[Ed. Note.—Cited in State v. Prater, 26 S. C. 202, 2 S. E. 108; State v. Williams, 31 S. C. 257, 9 S. E. 853; State v. James, 34 S. C. 53, 12 S. E. 657; State v. Haines, 36 S. C. 507, 15 S. E. 555.

For other cases, see Jury, Cent. Dig. § 475; Dec. Dig. ⟸103.]

[3. *Criminal Law* ⟸487.]

The trial-judge refused to permit defendant's counsel, in a murder trial, to read to an expert what had been said by a physician proved to be high authority on the subject of transitoria mania, as found in a medical journal, and then to ask such witness whether he concurred in those views, but counsel was permitted to frame from such publication questions for the witness as to his own opinions, and also to read to the jury at pleasure from standard authors upon medical jurisprudence. *Held*, that there was no error in the judge's ruling.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1077; Dec. Dig. ⟸487.]

[4. *Criminal Law* ⟸484.]

It is not proper to ask physician-experts their opinion of the prisoner's sanity from the testimony given in the case on trial, but they may be asked their views generally, or with reference to a similar case hypothetically stated.

[Ed. Note.—Cited in State v. Senn, 32 S. C. 400, 11 S. E. 292; Price v. Richmond, etc., R. Co., 38 S. C. 213, 17 S. E. 732; Easler v. Southern Railway Co., 59 S. C. 318, 37 S. E. 938.

For other cases, see Criminal Law, Cent. Dig. § 1072; Dec. Dig. ⟸484.]

[5. *Criminal Law* ⟸772.]

The judge refused to charge the jury "that if they believe that the prisoner had no motive for killing the deceased, as shown by words or deeds previous or subsequent to the act, then they must acquit him on the ground of want of criminal intent," and instead charged "that the intent must exist and be shown to exist, but the motive may not be discovered; the absence of a motive revealed is a circumstance to be duly considered in weighing the question of guilt." *Held*, that in this there was no error.

[Ed. Note.—Cited in State v. Workman, 39 S. C. 152, 17 S. E. 694; State v. Aughtry, 49 S. C. 303, 26 S. E. 619, 27 S. E. 199.

For other cases, see Criminal Law, Cent. Dig. § 1816; Dec. Dig. ⟸772.]

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[6. *Criminal Law* ⟸778, 782, 789.]

*The judge refused to charge the jury "that it is the duty of the State to prove that the prisoner was of sound mind when he committed the act, and if, from the evidence, the defense create a reasonable doubt about the prisoner being sane, you must give the prisoner the benefit of that doubt," but on the contrary charged "that the burden of proving soundness of mind is not, in the first instance, on the State; it is a defense, and if established, will prevail when interposed by defendant; the jury must be satisfied of defendant's sanity before they can convict; the defendant is entitled to be acquitted if reasonable doubt of his capacity to commit crime is raised in the minds of the jury, but that the doubt to be raised in favor of the prisoner must be a serious, well-founded, substantial doubt." *Held*, that in this there was no error.

[Ed. Note.—Cited in State v. Robinson, 27 S. C. 618, 4 S. E. 570; State v. Alexander, 30 S. C. 83, 8 S. E. 440, 14 Am. St. Rep. 879; State v. Summer, 55 S. C. 33, 32 S. E. 771, 74 Am. St. Rep. 707; State v. Powers, 59 S. C. 215, 37 S. E. 690.

For other cases, see Criminal Law, Cent. Dig. §§ 1851, 1912; Dec. Dig. ⟸778, 782, 789.]

[7. *Criminal Law* ⟸740.]

The Circuit judge is authorized to send to the asylum any person who, upon trial before him, proves to be of unsound mind, but he is not required to do so.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1712; Dec. Dig. ⟸740.]

[8. *Criminal Law* ⟸879.]

Where insanity is the defense, the judge did not err in instructing the jury that if a reasonable doubt is raised in their mind as to defendant's capacity to commit crime, their verdict must be "not guilty," but not necessarily "by reason of insanity."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2103; Dec. Dig. ⟸879.]

[9. *Homicide* ⟸179.]

The mere plea of insanity does not render the atrocity of the deed evidence of the insanity of the perpetrator.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 380; Dec. Dig. ⟸179.]

[10. *Criminal Law* ⟸311, 331.]

[Cited in State v. Bundy, 24 S. C. 442, 58 Am. Rep. 263, to the point that the presumption is that all men are of sufficient capacity to be responsible for crime; therefore the prisoner must establish his insanity.]

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 742; Dec. Dig. ⟸311, 331.]

[11. *Criminal Law* ⟸570.]

[If a defendant set up insanity as a defense to an indictment, he must show it beyond a reasonable doubt.]

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1286; Dec. Dig. ⟸570.]

Before Hudson, J., Richland, April, 1883.

This was an indictment against James Coleman for the murder of Sarah Willis, in the city of Columbia, on December 28th, 1882. The facts of the case are thus reported by the presiding judge:

The testimony disclosed the fact that the defendant was the husband of a sister of Sarah Willis; that he was in the habit of visiting the house of Sarah, and was, by her and her husband, received with the freedom and confidence usually accorded to a brother-in-law. With Sarah there lived an unmarried sister, by name Mattie Faust, a young and comely, bright, colored woman. On December 28th last, Sarah's husband was absent on a visit to relatives in the county of Barnwell. On the evening of that day the defendant called at her house, in the yard of Professor Davis of the South Carolina college, just as Sarah and her sister were about to go out to attend a fair in the city. The defendant was kindly welcomed, and gladly requested to remain and care for the house during the absence of Sarah and her sister, which he consented to do.

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*They were at the fair until after midnight, and on returning found Coleman

awaiting them. The unmarried sister, feeling fatigued, retired to bed, leaving Sarah and the defendant sitting by the fire, she having slipped off her shoes and unbuttoned her dress. The sleep of Mattie Faust was so profound that the noise which must have attended the killing of her sister did not awake her. About two or three o'clock a. m. she was aroused from sleep by finding a man in bed with her. She asked who it was, and the reply was, "It is Tom Brown." At this she cried aloud for her sister, when he seized her by the throat and threatened to kill her if she made further noise. She became passive, and he had connection with her. Having discovered that it was the defendant, she inquired for her sister, and was told that she was in the adjoining room with a man. Mattie attempted several times to quit the bed to find her sister, but he prevented her doing so, and several times himself arose and stepped out the door, when she could hear him scraping on the ground. The house had two rooms, each of which was entered from a door opening on the yard. On returning to the bed the defendant betrayed restlessness and said that he felt as if he was going to be hanged, and that she, Mattie, would be the cause of it.

Time passed on in this way until about dawn, when Coleman having again arisen and stepped out, Mattie sprang out of the house and saw him rapidly retreating. Looking into the next room through a window she saw her sister lying on the floor dead. The alarm was given, and upon the arrival of others the shocking scene was revealed. From the pool of blood in the room where Mattie slept, and the wounds upon the head of deceased, it was evident that with an axe or hatchet the defendant had cut Sarah down in the presence of the sleeping sister, and had then dragged the dead body into the yard, and thence along the ground to the next door of the house, and then lifted or dragged it into the adjoining room and there left it. Her head was deeply cut in several places. Having done this horrid deed, fiend-like, he repaired to the bed of Mattie and had carnal knowledge of her forcibly and against her will, all stained with the blood of his innocent victim, whom,

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in all probability, he *slew in cold blood for refusing to prostitute herself to his brutal lust.

Such is a brief narrative of this revolting homicide. So clear and convincing was the proof that the defendant after arrest and imprisonment did not, could not deny it, but freely and voluntarily confessed it, and said that he had no excuse for the act, except that he was instigated thereto by the devil. The attorney for the prisoner very prudently made no effort to deny nor disprove the fact of the killing, nor the circumstances attending it; but relied on the defense of transitory or temporary insanity. To establish this, he placed witnesses on the stand, including the parents and relatives of the defendant, who gave a history of his ills and ailments from childhood up to manhood.

The purport of this testimony was that James had, in boyhood, been at times affected with a strange hurting in his head, when he would pull his hair and complain of something moving in his head. He would, at times, awake at night with a scream, as if in a nightmare, and be much frightened. He talked in his sleep, and often in the daytime would talk to himself. At times he walked in his sleep. While a youth, he once lived at a Mr. McTeer's in Hampton county, when he became ill, and for a week was, in the opinion of Mr. McTeer, not in a sound state of mind. At school he was taciturn, and not inclined to play with the other children; but he learned as other children, and kept well up with his classes. On one occasion, during his career, he manifested a desire to get hold of a gun, to kill either himself or some one else. Such was the current of testimony regarding the defendant's mental condition and manifestations, running through a period of some years from boyhood to manhood. He is apparently twenty-four or twenty-five years of age.

Several eminent medical experts were examined by the defense upon the subject of insanity in general, and particularly transitory insanity. They were present throughout the trial, and heard all the testimony for the State and the defense, and gave the trial, in its progress from beginning to end, very close attention, and closely observed the defendant. These experts are Drs. Trezevant, Taylor, Talley, Green and Heinitsh.

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All these *to whom the question was put very promptly stated that they could discover nothing in all the testimony indicating that the defendant was subject to transitory insanity, and without hesitation gave it as their opinion that at the time he committed the homicide he was sane and morally responsible. The jury, with little hesitation, arrived at the same conclusion, and found the defendant guilty. I have no hesitation in saying that I fully concur in the correctness of the verdict, as the defendant signally failed to make out his defense of insanity.

Other matters are stated in the opinion of this court.

Mr. D. A. Straker, for appellant.

The juror should have been excluded. Hamilton's Metaphysics, 133, 424; Reid, 331, 337; 74 Pa. 458; Thomp. & Mer. Jur. §§ 214-217; Whart. Cr. L., § 2981; Burr Tr., vol. I., p. 416; 4 Wend. 241; 1 Johns. 316; 12 Geo. 444; Prof. Jury Tr., §§ 176, 181, 183. Error in the use of discretion by the Circuit judge is reviewable. 16 S. C. 460; Rap. & Law, L. Dict., tit. Discretion; 18 S. C. 315;

Thomp. & Mer. Jur., §§ 206–211; 5 Cal. 347; 13 Sm. & M. 189. In excluding the extract from the medical journal, the judge erred. Whart. & S. Med. Jur., §§ 266, 279; Whart. Ev., § 438; Beck Med. Jur. 969. Exceptions three and five are well taken. The words "motive" and "intent" are synonymous in their relation to crime. 1 Bish. Cr. L., § 370; 1 Arch. Cr. Pl. 801; 49 N. Y. 137; Whart. & S., §§ 710, 711; 43 Conn. 514. If not guilty by reason of insanity, the verdict should have been so expressed. Gen. Stat., § 1589; 50 N. H. 369. The plea of insanity being interposed, the burden of proving soundness of mind was on the State. 31 Am. Rep. 360; 1 Arch. Cr. Pl. 35, note 1; 16 N. Y. 58; 31 Ind. 485; 17 Mich. 9; 31 Ill. 393. The judge erred in drawing a distinction between a reasonable doubt, and a serious, well-founded, substantial doubt. Cent. L. J., Nov. 28th, 1883, p. 408. In charging upon the atrocity of the deed, the judge charged on the facts. 15 S. C. 392; 1 Bish. Cr. L., § 482.

Mr. Solicitor Bonham, contra.

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*As to first exception, he cited 8 S. C. 239; 17 Hun 410; 48 Iowa 530; 19 Hun 424; 66 Ind. 94. The question to Dr. Green was properly ruled out. 54 Wis. 528; 48 Mich. 490; 41 Am. Rep. 61; 42 Id. 477; 60 Cal. 581. There is a great difference between "motive" and "intent." The defendant has no reason to complain as in his fifth exception. 2 Crim. L. Mag. 44; 4 Id. 32; 63 Ala. 307; 10 Cl. & F. 200; 1 Car. & K. 130; Russ. Cr. & M. 525; Rosc. Cr. Ev. 975; Whart. Cr. Ev., § 340; Whart. Hom., § 668; 2 Greenl. Evid, § 373. As to exception sixth, see Arch. Cr. Pl. 30; 10 Cl. & F. 200; 12 Ohio 483; 1 Strobh. 479; 87 N. Y. 377.

March 1st, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. The defendant Coleman was indicted for the murder of one Sarah Willis. In impaneling the jury for the trial of the cause, one P. F. Toland, upon being presented, was ordered by the State to stand aside. When the panel was exhausted, he was recalled and again presented, the State and the prisoner having in the meantime exhausted their peremptory challenges. Upon the second presentation the juror, at the request of the prisoner's counsel, was sworn and examined upon his voire dire. The judge reports that "the prisoner's counsel was allowed to examine him, and proceeded to do so. The juror admitted that he had read the newspaper accounts of the crime shortly after it occurred, but said that he had neither formed nor expressed any opinion of the guilt or innocence of the prisoner at the bar. The counsel then asked him if he had not said that 'any man who commits such a crime should be hanged.' The juror replied that he had. I remarked at this point that the question was an improper one, and that any other answer would have been improper, because, had the juror answered that he had said that one committing murder should not be hanged, he would have been disqualified. The juror here volunteered the remark that he had said that a man committing so shocking a murder as this was reported to be, did not deserve a trial by jury. The defendant's counsel said, 'You are in favor, then, of lynch law.'

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He replied, 'Yes, when the *circumstances demanded it.' In answer to questions by the court, the juror stated very positively and earnestly that he had no bias for nor prejudice against the prisoner; that he stood entirely indifferent—would be governed altogether by the law and the testimony, and could and would give him a fair trial." The judge directed him to be sworn, and the defendant's counsel excepted.

After the evidence for the State was closed, the defendant's counsel announced that the defense was insanity; that the prisoner was of unsound mind at the time of committing the offense. In order to make out this defense, he offered as a witness Dr. Frank Green, and proceeded to interrogate him as follows: "Q. Are you a practicing physician? A. Yes. Q. How long have you been practicing medicine? A. Ten years. Q. During that time, had you made the study of the mind a specialty? A. Yes. Q. Have you been connected with any institution for the insane enabling you to do so? A. Yes—for several years in an insane asylum at New York; also for two years I have been connected with the asylum for the insane in the city of Columbia, South Carolina. Q. Will you say whether or not transitoria mania or impulsive insanity is recognized by the best medical authorities? A. It is. Q. Do you regard Drs. Ray, Hammond, Beauford, Debergie and Jarvis as recognized authorities on the subject of transitoria mania? A. Yes. Q. I will read what Dr. Jarvis said in the American Journal of Insanity, July, 1869, and published at Utica, on this question; say whether or not the same is your view?"

Just here the solicitor interposed objection, on the ground that a printed pamphlet could not be read in the manner proposed because there was no proof of its authenticity. The judge reports: "I refused to allow such a course of examination for many reasons too obvious to dwell upon. I remarked that in such a course of examination the counsel would make the testimony of the New York expert in that case testimony in the one before the court; that the question was leading, as it plainly suggested the answer, and that for these and other reasons he could not be allowed to read the extract. I informed the counsel that he might use the pamphlet

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for the purpose of framing *therefrom proper questions, but that all questions must be framed with a view to elicit from the witness what he (the witness) knew, and not with a view to tell the witness what other experts had said, in order to get the witness to concur. By such a course a very unlearned expert could be made to give very profound and learned answers to questions on insanity. I also informed the counsel that, in addressing the court or jury, he would be permitted to read at pleasure from standard authors upon medical jurisprudence, their views upon insanity, and the law applicable thereto. That such works were authority in our courts." The counsel excepted.

After the testimony was offered the counsel for the prisoner made many requests to charge, all of which received careful consideration and were ruled upon. Some of them were charged as proposed, some were charged in modified form, and others were refused. Under the charge, the jury found the defendant "guilty," generally, and he appeals to this court upon various grounds, which are all fully set out in the "Case," and need not incumber this opinion by being repeated here. It will only be necessary to notice such of them as are formally embodied in the exceptions. We will not take up the exceptions in the order in which they are stated, but, to avoid repetition, dispose of the points made, in what seems to us their proper order.

First. Exception one alleges that it was error of law in the Circuit judge to admit Toland to be sworn as a juror in the case. It is not alleged that there was any cause for his exclusion, unless it arose out of his own statements when examined on his voire dire. This court has held that "whether a juror is indifferent in a cause is a matter of fact to be finally determined by the Circuit judge. As a matter of law, a juror is not incompetent who has formed an opinion from what he has read in the newspapers, or heard, but whose mind would not be thereby influenced, who is not sensible of any bias or prejudice, and would be governed by the evidence." State v. Dodson, 16 S. C. 453; State v. Coleman, 8 S. C. 239. This would seem to dispose of the question made here, but as the case is a capital one and the counsel for the prisoner earnestly urged that the ruling

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of the *judge below was an abuse of the discretion allowed him to the extent of being a violation of law, we will consider it.

It was formerly held in this State that the prisoner did not have the right to examine a juror on his voire dire to ascertain whether he had formed or expressed an opinion as to his guilt. His right to twenty peremptory challenges was regarded in practice as a very adequate security against being tried by a jury which had prejudged his guilt. State v. Baldwin, 1 Treadw. Con. R. 289; State v. Sims, 2 Bailey 33. But, to give effect to the declaration of the constitution, that every person shall have the right to a trial "by an impartial jury," the act of 1871, re-enacted in the general statutes as section 2261, provides that "The court shall, on motion of either party in suit, examine on oath, any person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he shall be placed aside as to the trial of that cause," &c.

The object of the act was manifestly to secure "an impartial jury," and the method adopted to ascertain whether the juror stands indifferent was for the judge to interrogate him on certain points and decide the question. As was said by the court in the case of State v. Coleman, supra, "The presiding judge must determine on the character of the questions proposed and when the examination shall cease. In fact, the allowance of the examination by the counsel in place of the court, was an indulgence." It seems to us important, for several reasons, that this requirement should be observed in practice. When should one summoned as a juror, be held as disqualified for having formed or expressed an opinion as to the guilt of the prisoner? Hawkins states the rule thus: "When he hath declared his opinion beforehand that the party is guilty, or will be hanged, or the like." Mr. Bishop says this rule has been more or less expounded and qualified in the States. "It has therefore no form which may be fitly termed the modern American doctrine. * * * In

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the nature of things *it is impossible, in any case, to obtain a jury, the mind of every one of whom shall be free from all that might incline it more to the one side than the other. Hence, in looking for rules, the court shall be guided as well by the consideration of what can be as by the dictates of abstract justice. It may only demand that a disqualification, to prevail, should be of some standard magnitude, dictated by practical wisdom. Now, the terms of our constitutions differ, so that what would be admissible under one may not be under another. But in none is it declared that the jury shall be an impossible one—of perfect men," &c. 1 Bish. Cr. Pro., §§ 909 and 910.

The juror in this case admitted he had said that "any man who commits such a crime should be hung," and "that a man committing so shocking a murder as this is reported to be, did not deserve a trial by jury."

These are strong expressions, not, however, directly in reference to the prisoner's guilt, but on the contrary, general, and pointing rather to the horrible character of the crime as stated. Considered in reference to the prisoner personally, they may be regarded as hypothetical in character; that is to say, if the facts are as stated, and the deed was done by one responsible for his act. Thus understand, they did not necessarily disqualify the juror. "A mere hypothetical opinion or impression, proceeding from no ill-will, is not alone cause for rejecting a juror." People v. Symonds, 22 Cal. 349. "An opinion merely hypothetical, and depending on the truth of rumors, or information, does not disqualify." Epes' Case, 5 Gratt. 676. "A juror, on a trial for murder, stated on his voire dire that he had not heard the matter talked over outside of his family; but he had read newspaper accounts of it, from which he had formed an opinion, which he then held, and which it would require evidence to remove; but that, notwithstanding such opinion, he could hear the evidence and try the case fairly and impartially. Held, that a challenge for cause was properly overruled. Manke v. People, 17 Hun 410, (and see a number of cases from most of the States in note to § 912, 1 Bish. Cr. Pro.)

In all these cases, there is concurrence in the view, that the Circuit judge is "the trier"

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to decide the question, and we can*not say that in admitting Toland to be sworn, the Circuit judge abused that discretion in this case.

Second. Exception two charges error "in not allowing the prisoner's counsel to read extracts from medical authorities on insanity as found in a printed pamphlet, and to propose questions to medical experts thereon." There seems to be some misapprehension on this subject. The Circuit judge reports that he refused the counsel permission to read what was said by a distinguished expert upon the trial of Fanny Hyde, charged with the murder of George W. Watson before a court in New York, and having read his testimony, to ask the witness whether he concurred in those views. The judge says: "I informed the counsel that he might use the pamphlet for the purpose of framing therefrom proper questions, but that all questions must be framed with a view to elicit from the witness what the witness knew, and not with a view to tell the witness what other experts had said, in order to get the witness to concur. I also informed the counsel that, in addressing the jury, he would be permitted to read at pleasure from standard authors upon medical jurisprudence their views upon insanity and the law applicable thereto," &c.

It thus appears from the official report, which alone must be our guide, that in fact the only cause of complaint relates to the manner of conducting the examination and interrogating the witness. Permission was given to use the pamphlet for the purpose of framing proper questions, but not to read what was said and then ask the witness whether or not he concurred in those views. It is elementary that, "in the direct examination of a witness, it is not allowed to put to him what are termed leading questions, that is, questions which suggest to the witness the answers desired. * * * Questions are also objectionable as leading, which, embodying a material fact, admit of an answer by a simple negative or affirmative." 1 Greenl. Evid., § 434. We understand that an expert may be examined as to how far standard works sustain or conflict with his opinion, but we do not see that such indulgence dispenses with the necessity of reaching his own opinion in the regular way. People v.

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*Wheeler, 60 Cal. 581; People v. Hall, 48 Mich. 490; 42 Am. Rep. 477.

While upon the subject of the testimony of scientific experts it may not be improper to say, that their testimony consists of judgment in relation to matters not supposed to be familiar to the jury, and should be given in the abstract rather than in the concrete upon the facts proved, and not the general merits of the case, though they may give an opinion upon a similar case, hypothetically stated. 1 Greenl., § 440. It was, therefore, not in accordance with the strict rule applicable to such testimony, when Drs. Trezevant, Taylor, Talley, Green and Heinitsh, who heard all the facts developed on the trial, stated "That they could discover nothing in all the testimony indicating that defendant was subject to transitory insanity, and, without hesitation, gave it as their opinion, that at the time he committed the homicide he was sane and morally responsible." The subject of the mind and its influence upon the body, is very difficult and obscure, to the most learned—a region of twilight, subjecting the wise and the unwise, the philosopher and the judge alike to a reverential humility, and we think it would have been safer for the experts to have given their views generally, or with reference merely to a hypothetical case. But no objection or exception was made at the trial to the manner in which the evidence was stated, and it is referred to here only through abundance of caution.

Third. Exceptions three and five complain that the judge refused to charge the jury as requested, "That if they believe that the prisoner had no motive for killing the deceased, as shown by words or deeds previous or subsequent to the act, then they must acquit him on the ground of want of criminal intent," but instead charged the jury "That the intent must exist and be shown to exist, but the motive may not be discovered; the absence of a motive revealed is a circumstance to be duly considered in weighing the question of guilt." There is no necessity

for confounding the terms "intent" and "motive." We suppose there can be no doubt about the prisoner's "intent" to kill the deceased. He did it with an axe, in the most brutal manner, in her own house, dragged off

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the body and then fled. *It would be going very far to assume that in this sense the "intent" did not exist—that he did not intend what he actually did. But can it be supported, either by reason or authority, that such intent to kill, carried into effect, must be held to be wanting in criminality if, so far as can be shown by words or deeds, there was no rational motive for the killing? There may have been some motive deep down in his heart.

It would be alarming, indeed, if no one could be found guilty for committing the most horrible deed, unless some external evidence could be shown of the motives which prompted him. If one, not shown to be insane, were to shoot into a crowd and slay another who was a stranger to him, he would certainly be convicted of murder, on the ground of malice against all mankind. Blackstone says: "Malice prefence, malitia precogitata, is not so properly spite or malevolence to the deceased, in particular, as any evil design in general—the dictate of a wicked, depraved and malignant heart." The whole class of cases in which malice is implied rests on the principle that "all homicide is presumed to be malicious, until the contrary appeareth upon evidence." We suppose that the perpetrator of every great crime, at the moment of the act, is, in one sense, more or less insane—demented by some raging passion or driven by some wicked impulse; but such want of self-control alone may not amount to that incapacity to distinguish between right and wrong, which the law humanely recognizes and covers with its mantle of charity. Upon this subject we think there was no error below.

Fourth. Exceptions four, six and seven complain that the judge refused to charge as requested, "that it is the duty of the State to prove that the prisoner was of sound mind when he committed the act, and if the defense, from the evidence, create a reasonable doubt about the prisoner being sane, you must give the prisoner the benefit of that doubt;" but, on the contrary, he charged "That the burden of proving soundness of mind is not, in the first instance, on the State. It is a defense, and, if established, will prevail when interposed by defendant. The jury must be satisfied of defendant's sanity before they can convict. * * * That the defendant is entitled to be acquitted if reasonable doubt of his capacity to commit

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crime is raised in *the minds of the jury. * * * But that the doubt to be raised in favor of the prisoner must be a serious, well-founded, substantial doubt," &c.

As we understand it, these rulings were not inconsistent with the requests of the defendant. There seems to be a difference in the authorities as to the nature of the issue when the defense of insanity is made, whether the defendant must make out his insanity or the State must prove his sanity beyond a reasonable doubt. But all the authorities agree that every man is presumed to be sane, and that, as a consequence, it is not incumbent on the State at the outset to prove it. Some of them, however, hold that, once the issue is made and evidence offered tending to shake the presumption, then the State must establish sanity like any other material point in dispute. This view the Circuit judge adopted. He held that, on account of the presumption of sanity, the burden of proving soundness of mind is not, in the first instance, on the State, but that insanity, if established, will prevail. He reports that he charged, "That the jury must be satisfied of defendant's sanity before they can convict him [and must give him the benefit of every reasonable doubt on this point]. The works in brackets are not on my notes, but they were spoken, and defendant's proposition was charged in full against a strong New Jersey case, cited by the solicitor to the contrary, in which the learned judge holds that insanity must be fully established in order to prevail as a defense. I held with defendant's proposition, that if the evidence of insanity was such as to create a reasonable doubt of the sanity of the prisoner, he should be acquitted." This ruling was certainly more favorable to the prisoner than that in our own case of State v. Stark, 1 Strobh. 506, which was a very remarkable case, somewhat like this but stronger. It was there held, after mature consideration, "That the positive existence of that degree and kind of insanity that shall work a dispensation to the prisoner, in a case of established homicide, is a fact to be proved, as it is affirmed by him, to the satisfaction of the jury, who are the safest and proper arbiters of the question."

As to the form of the verdict, section 1589 of general statutes does "authorize" a judge "to send to the lunatic asylum any person who shall, upon trial before him, prove to be

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non compos *mentis." This is not mandatory, and we know of no law or practice which would permit this court to hold a Circuit judge in error for charging a jury to render a general verdict of guilty or not guilty of the offense charged, or for instructing them that the phrase "reasonable doubt," used in the books, means a "serious, well-founded, substantial doubt."

Fifth. Exceptions five and eight complain that "the judge erred in charging 'That the atrocity of the deed was presumption of malice, as where a person kills a child, or one unoffending, the law presumes malice. The law truly applied to a case in which the evi-

dence shows, or even the plea of insanity is set up, makes the reverse of his Honor's ruling only true. The atrocity of a deed may be commented on as matter of law, but the deed and its character was a fact for the jury. Moreover, the general rule will not apply, for the atrocity of the deed, when the plea of insanity is set up, is presumptive of innocence and not of malice, for the law presumes no sane man to act but according to the ordinary course of human conduct." Bish. Cr. L., § 482.

It may be true that, where there is evidence of insanity at the time of the commission of the act, the atrocity of that act may not, as in the ordinary case of a sane man, afford evidence of malice. But it seems to us that it would be a dangerous doctrine to allow the mere plea of insanity to reverse, entirely, the general well-established rule, so as to make the atrocity of the deed itself evidence of the innocence of the perpetrator. In this respect, also, the case is like that of State v. Stark, supra. In its circumstances that case was, if possible, more wanton, unnatural and atrocious than this. Stark inhumanly butchered his unoffending wife and his two little children, and then made an unsuccessful effort to cut his own throat. In that case, as well as in this, the argument was most earnestly made that insanity was shown by the very wickedness and unexampled barbarity of the deed, but the court held that "Where no more than the homicide is proved the overwhelming barbarity of the act will not be admitted as a presumption of insanity; for, then, the more unnatural and brutal the crime, the stronger would become the ground of defense."

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*As I can say nothing more appropriate to the present case, I shall close this opinion in the touching words of Judge Withers, who delivered the judgment of the old Appeal Court in that case: "But, upon a review of the whole case, what are the considerations really relied on to establish the insanity of the prisoner? 1. The overwhelming barbarity of the act. The prisoner has put to death the unoffending mother of his children, and those children themselves still more unoffending. It is quite clear that if we admit the dispensing power of such reasoning, no man can ever be convicted for the murder of his family, if no more can be proved than the homicide itself, for the more atrocious and brutal the crime, the stronger would become the ground of defense. Nor should we find encouragement for this in the courts of England, for it is but recently (see the case of Regina v. Higginson, 47 Eng. Com. L. 129,) a prisoner was on trial for the murder of his little son, and the question being whether he had first killed him or had buried him alive, he rose in court and said, 'I buried him alive.' No presumption of insanity was urged, and he was convicted. * * * Our painful conclusion is, that there is nothing to justify the interference of this court, and that, though we can not certainly prove the prisoner's sanity, the jury have found it; and having had a fair trial, with all the humane allowances of the law, before a jury of his peers, their solemn arbitrament must seal his fate."

The judgment of this court is that the judgment of the Circuit Court be affirmed, and that the case be remanded to the Circuit Court for the purpose of enabling that court to assign a new day for the execution of the sentence heretofore imposed.

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20 S. C. 456

STATE v. GADSDEN.

(November Term, 1883.)

[*Trespass* ⇐⇒80.]

A., the owner and cultivator of a field, gave to B. a verbal, vague and voluntary permission to plant therein a patch of turnips, without consideration, or particular mention of any part of the field, and afterwards the wife of A., with his consent, cut the turnips up. *Held*, that B. did not have such possession of real property as would support an indictment against the wife of A. for malicious trespass under the statute. Gen. Stat., § 2501.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 170; Dec. Dig. ⇐⇒80.]

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*Before Aldrich, J., Georgetown, March, 1883.

The opinion fully states the case.

Mr. R. Dozier, for appellant.

No counsel contra.

March 1st, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an indictment for malicious trespass under the act of 1857, Gen. Stat., § 2501. Billy Gadsden, the husband of the defendant, owned a field and worked it, but it seems that he gave to one Moses Myers permission to plant a patch of turnips in it. There was no writing and there was conflict of testimony as to whether permission was given. If so, it certainly was a mere verbal, vague, voluntary permission, without consideration or particular mention of any part of the said field. Myers did plant turnips in a part of it, and in October, Silvy Gadsden, the wife of Billy, the owner, and with his consent, cut them up; and for that act Myers indicted her for a malicious trespass.

The counsel for the defendant requested the judge to charge, "That if they come to the conclusion that Myers only had permissive use of the land to plant, without contract or consideration, such use was what is known in law as 'leave and license,' and the party giving it, or one with his consent,

could put a stop to it at any time without being liable to a criminal prosecution under the statute." The judge refused the request, but charged, "That if they believed Moses Myers had permission from Billy Gadsden to have the land from the first of March until the crop was made and moved, and in consequence thereof he had expended his time and labor in preparing the land and in planting and cultivating the crop, then he had the possession mentioned in the statute, and the act complained of was the trespass contemplated by the law—that he could not be removed from the land until the crop was removed."

The jury found the defendant "guilty," and she appeals to this court and makes substantially these points: First, that "the possession of real property," necessary to sus-

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tain a criminal prose*cution under the act, is that actual, exclusive possession of the soil, or some part of it, which would authorize an action of trespass, q. c. f., against an intruder thereon; and second, "that the evidence showed that the prosecutor, Myers, had no such possession of any part of the field, but at most had only a vague, verbal license to plant turnips, which, being without consideration, was revocable at the pleasure of the owner; or, if not so revocable after the turnips had been planted, that for a revocation or interruption of it his only remedy was a civil action for damages."

Before the act of 1857, a mere trespass upon property, real or personal, was not a criminal offense punishable with fine and imprisonment, and therefore, when one is indicted under that statute, it is necessary to show that the act complained of is covered and provided for by the statute. It is not pretended that this case falls within section 2500 of general statutes, for "cutting, shooting or maiming" live stock or personal property of that kind; but the claim is that the facts bring it within section 2501, which provides as follows: "Whoever shall willfully, unlawfully and maliciously cut, mutilate, deface, or otherwise injure any tree, house, outhouse, fence or fixture of another, or commit any other trespass upon real property in possession of another, shall be guilty of a misdemeanor," &c. It cannot be claimed that the defendant Silvy defaced or injured any house, fence or other fixture of Myers, so that the only question is, whether, in cutting up the turnips on her husband's land, she committed a trespass upon "real property in the possession" of Myers.

What was meant by the phrase, "real property in the possession of another"? There are several kinds of possession of land described in the books: constructive, virtual and actual, and sometimes these different kinds overlap each other and conflict. McColman v. Wilkes, 3 Strobh. 465 [51 Am. Dec. 637]. But it is clear that, in no point of view, can Myers be considered to have constructive or virtual possession. He held no such relation to the property as to give him such possession. If he did not have actual possession he had none. As the field belonged to Gadsden, and was cultivated by him, Gadsden had actual, or, at least, virtual possession of the whole, which excluded the

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actual possession of *another unless that other could show that some particular part of it had been placed in his exclusive possession, as in the case of the owner putting another into possession of a house on his land. Caldwell v. Julian, 2 Mill. Con. R. 294.

The question then is reduced to this, Did the permission to plant turnips on the land amount to a verbal leave of so much of it as Myers chose to plant, or only a license to plant turnips on the land in the possession of Gadsden? Whether it was a leave or a license depends upon the intention of the parties, and all the circumstances would seem to indicate that it was a mere license, and gave no exclusive possession to any part of the field itself. A license is defined to be "an authority to do an act which would otherwise be a trespass. A license passes no interest, and, therefore, if A. grants to B. a right to fasten barges to moorings in a river, this does not amount to a demise, nor give the licensee an exclusive right to the use of the moorings, nor render him liable to be rated as the occupier of part of the bed of the river; hence, also, if a person by deed grants an exclusive license for the use of land, this may amount to a lease or to the grant of an incorporeal hereditament." 2 Rap. & Lawr. Dict. 753, title "License." "A right to erect a mill upon the land of another is an incorporeal hereditament." Trammell v. Trammell, 11 Rich. 471. So, also, is a grant of the use of timber on the grantor's land, and trespass quare clausum fregit will not lie for injury done to an incorporeal right. Clark v. Way, Id. 621; Vance and Wife v. Beatty, 4 Rich. 104.

We do not decide the question as to whether the license was revocable after Myers had so far executed is as to plant the turnips. If it was then irrevocable, the remedy of the party was by civil action for damages. We only hold that there was no such possession in Myers as to sustain an indictment for malicious trespass under the act.

The judgment of this court is that the judgment of the Circuit Court be reversed.

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*BISCHOFF & CO. v. BLEASE.

(November Term, 1883.)

[1. *Partnership* ⟸213.]

In action brought by A., B. and C., styling themselves in the title as A. & Co., the complaint alleged that defendant had executed his notes to A. & Co., and that plaintiffs were the owners and holders thereof, but it did not allege a partnership between A., B. and C. *Held*, on demurrer, that the complaint did not state facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 408, 409; Dec. Dig. ⟸213.]

[2. *Partnership* ⟸213.]

Where plaintiffs sue as partners, their right to sue as such depends upon the existence of a partnership, which therefore is an issuable fact, and must be alleged in the body of the complaint.

[Ed. Note.—Cited in Kerr & Co. v. Cochran, 29 S. C. 62, 6 S. E. 905; Lookout Mountain Medicine Co. v. Hare & Co., 56 S. C. 462, 35 S. E. 130.

For other cases, see Partnership, Cent. Dig. §§ 408, 409; Dec. Dig. ⟸213.]

[3. *Partnership* ⟸216.]

The notes being payable to a partnership, only the members of the partnership can sue thereon; therefore, the existence of the partnership, and that plaintiffs are members thereof, are material and essential facts to the plaintiffs' cause of action.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 409, 412, 416–418; Dec. Dig. ⟸216.]

[4. *Partnership* ⟸213.]

The allegation that plaintiffs were the owners and holders of the notes sued on, did not show that they had the right to sue in the character of partners, as stated in the title of their complaint.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 408; Dec. Dig. ⟸213.]

[5. *Bills and Notes* ⟸487.]

The demurrer to this complaint being sustained, plaintiffs should have leave to amend.

[Ed. Note.—Cited in Miller v. Stark, 29 S. C. 328, 7 S. E. 501; Munroe v. Williams, 35 S. C. 578, 15 S. E. 279; Kentucky Refining Co. v. Saluda Oil Mill Co., 70 S. C. 94, 48 S. E. 987; Lawrence v. Lawrence, 81 S. C. 130, 62 S. E. 9.

For other cases, see Bills and Notes, Cent. Dig. § 1580; Dec. Dig. ⟸487.]

[This case is also cited in Good v. Jarrard, 93 S. C. 237, 76 S. E. 698, 43 L. R. A. (N. S.) 383, as to distinction between partnership entity and individuals composing firm, and in Kennerty v. Etiwan Phosphate Co., 21 S. C. 227, 242, 53 Am. Rep. 669, and Walter v. Godshall, 32 S. C. 188, 10 S. E. 951, and distinguished therefrom.]

Before Pressley, J., Newberry, February, 1882.

This was an action against H. H. Blease. The opinion states the pleadings and the exceptions. The order of the Circuit judge was as follows:

This is an action on three promissory notes. The complaint in its caption sets out "Henry Bischoff, C. Wulbern and J. H. Peiper, trading under the name and style of Henry Bischoff & Co.," as the plaintiffs. Each allegation on the separate notes states that "defendant gave his promissory note in writing, whereby he promised to pay the plaintiffs, Henry Bischoff & Co.," the sum stated. There is no statement whether they sue as partners under the name of "Bischoff & Co.," or only as joint owners of said notes, using the name of Bischoff & Co. in that particular transaction. Defendant demurs on the ground that the complaint does not state facts sufficient to constitute a cause of action.

My judgment is, that the complaint does allege that the persons named as plaintiffs

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in the caption are the Henry Bischoff & *Co. to whom said notes were given, and to whom defendant promised payment of the amount of said notes. To maintain their action, it is not necessary that they allege or prove whether they are partners or only joint owners of said notes. Proof that the notes were given to them under that name by the defendant, would clearly entitle them to recover, and that proof would be clearly admissible under said allegations.

The demurrer is overruled, and plaintiffs have leave to enter judgment and issue execution for the amount of said notes, with interest and costs.

Messrs. Jones & Mower, for appellant.

Averment is necessary in the body of the complaint that plaintiffs are partners. 2 Wait Pr. 373; 58 How. Pr. 1. The complaint should state every fact which plaintiff must prove to enable him to maintain his suit, and which defendant has a right to contradict in his answer. 7 N. Y. 478; 10 Id. 363; 3 Duer 632; 9 Barb. 158; 20 Barb. 455. Allegation that plaintiff is owner and holder is surplusage. Voorh. Code (10th edit.) 163, note f.; 7 Abb. Pr. (N. S.) 146; 33 Mo. 364; 32 Cal. 569; 40 Id. 440. The defects here are substantial and are reached by this demurrer. 5 N. Y. 357; 22 How. Pr. 30; Wait Anno. Code 238. The defendant should have been allowed to answer.

Messrs. Moorman & Schumpert, contra.

The title of the cause is a part of the complaint, and the names of the plaintiffs should there be stated. Code, § 163. A copartnership as such cannot sue, but the members thereof may sue jointly; they do so, however, as individuals and in their individual names. 6 S. C. 173; 2 Wait Pr. 370. Therefore, the authority cited, 2 Id. 373, does not apply. Besides, the allegations, with the copies of the notes sued on, imply that plaintiffs are the owners and that the notes are due. Code, § 183; 2 Wait Pr. 315–327. But the notes being given to Bischoff & Co., testimony would be admissible to show that the notes were given to plaintiffs under the name of Bischoff & Co. 2 Wait Pr. 310, 333,

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453. The facts stated could be put in *issue only by a denial in an answer. Id. 416. No

motion was made for leave to answer, and such leave was within the discretion of the Circuit judge. Id. 455.

March 3d, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The action below was upon three notes executed by the defendant to Henry Bischoff & Co. The complaint, in its caption or title, named Henry Bischoff, C. Wulbern and J. H. Peiper, trading under the name and style of Henry Bischoff & Co., as plaintiffs. In its body it stated as to each of those notes, that the defendant had made his promissory note in writing, whereby he promised to pay to the plaintiffs, Henry Bischoff & Co., or order, &c., the amount specified in each. It was also alleged, that said plaintiffs were now and ever had been, the legal owners and holders of said notes, copies of which were attached, and judgment was demanded for the amount of each, besides interest, costs and disbursements. The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. This was overruled, and plaintiffs were granted judgment, with leave to issue execution. No motion seems to have been made by defendant for leave to answer.

The appeal raises two questions: First. Whether the demurrer should have been overruled. Second. Being overruled, whether the defendant should have been permitted to answer over. As to the first question, it is urged: 1. That if the plaintiffs sued as partners, the complaint is defective in the fact that a partnership is not alleged in the body of the complaint, and, consequently, no testimony could be offered as to that fact. 2. If they sued as individuals, and not as partners, that the complaint does not state facts showing title as individuals, as the notes in their terms are made payable to Henry Bischoff & Co., and not to the parties named. Upon these grounds it is contended that the demurrer should have been sustained.

The code requires that the names of the plaintiffs shall be set out in the title of an action, and when this is done, it is familiar law and practice that such name should not be repeated in the body of the complaint; because having once given the names

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*and styled themselves plaintiffs, all that is necessary afterwards, is simply to refer to themselves as plaintiffs. 2 Wait Pr. 370. This is so when the plaintiff sues in his individual capacity. When, however, he sues in a representative capacity, such as executor, administrator, guardian and the like, where his authority or right to sue arises only from his representative character, the statement in the title that he occupies such a position will not in itself be a sufficient statement, nor will it dispense with an allegation of that fact in the body of the complaint, because the right to the character in which the party sues in such case becomes one of the facts upon which his action depends, and, like the other material facts, it must be proved, and to authorize testimony thereto it must be alleged in the body of the complaint, as no testimony can be offered as to facts not thus alleged.

This is the doctrine laid down in 2 Wait Pr. 373, and in other writers on the code, the reasons for which are obvious when applied to parties suing in a representative capacity. The title informs the defendant of the character in which the plaintiff sues. If that character be any other than his natural and individual character, the facts by which he has become entitled to such character are issuable facts, and must be alleged in a formal way in the complaint; otherwise, it fails to state facts showing a right of action and would, therefore, be subject to demurrer. Now, the title in this case stated the names of the plaintiffs, and that they were partners trading under the name of Henry Bischoff & Co. These statements notified the defendant that the plaintiffs were suing as partners. But there is no allegation in the complaint that a partnership existed between these parties, and that, therefore, they were entitled to sue as partners, and if it was necessary that a partnership should have existed so as to entitle them to sue as such, (of which there can be no doubt,) then it was necessary that this fact should have been alleged in the body of the complaint; otherwise the defect would be fatal. It would then be like the case of an executor who styled himself as executor in the title and failed to allege his right to that character in the complaint,

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in such way as to give *the defendant an opportunity to demand proof thereof by denial or otherwise.

But was it indispensable in this case that a partnership should exist in order to enable the plaintiffs to sue in their names as styled in the title? There can be but little doubt of this. True, there is no difference between a contract made with individuals by name and a partnership by its name, so far as the obligation of the maker is concerned or the right to enforce is involved, but there is a difference between them as to the facts by which the plaintiffs become entitled to enforce. In the first case, the contract itself shows on its face with whom it is made and to whom it belongs, and, therefore, nothing is necessary in the complaint beyond the fact that it was made with the plaintiffs named in the title; but in the latter, the plaintiffs become entitled to sue, not because they are named in the contract, for they are not thus named, but because they are members of a firm which is named therein; and it is only on account of this fact that they can main-

tain the action. It is only through the partnership that they have any standing in court; hence the existence of the partnership and that the plaintiffs are members thereof, are material and essential facts to the plaintiffs' cause of action, and must be alleged and proved; otherwise, no cause of action is stated.

This distinction will, perhaps, be more clearly seen by again considering the distinction between suits by executors, administrators, receivers, and such like officials in their own right as individuals and those in their official and representative capacity. Where they sue as individuals, they need only state their names in the title as plaintiff and then in the body of the complaint make reference to themselves simply as plaintiff; but where they sue in their representative character and they are entitled to the action in that character only, the facts by which they have become clothed with such character must be alleged in an issuable form.

This case is distinguished from Scranton v. Farmers and M. Bank, 33 Barb. 527; Smith v. Levinus, 8 N. Y. 472, and Fowler v. Westervelt, 40 Barb. 374, in the fact that in those cases words were used in the com-

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plaint which in substance alleged the *character in which plaintiff sued, while in this case no such words are employed. This case is like Gould v. Glass, 19 Barb. 179, where the complaint was defective because there was nothing therein indicating that the action was brought by the plaintiff in the character represented in the title. In the title the words "commissioners of highways" were added to the names of the plaintiffs, but there was no averment in the complaint showing that the plaintiffs occupied such a position. So, in this case, in the title it appears that these plaintiffs sue as partners, but the complaint fails to allege a partnership and composed of the plaintiffs.

The allegation that the plaintiffs were the owners and holders did not cure the defect. This had reference to the character in which they were plaintiffs, as styled in the title, to wit, as partners, but still there was nothing in the complaint showing that they were entitled to assume that character.

According to strict rule, the demurrer should have been sustained, but we think, in such event, the plaintiffs should have leave to amend so as to incorporate the averments as to partnership in the body of the complaint, should they desire to do so. 2 Wait Pr. 455.

It is not necessary to discuss the second question, as the matter already considered disposes of the case.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and the case remanded, with leave to the plaintiffs to amend their complaint in accordance with the opinion herein.

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20 S. C. 465

STATE v. MOSES.

(November Term, 1883.)

[1. *Costs* ⇐51; *Pleading* ⇐239, 272.]

Pending trial on a clerk of court's official bond at the suit of the State, verdict was rendered in another action on a second bond of the same officer, and the Circuit judge then granted leave to defendants to amend their answer by pleading such verdict. *Held*, that the motion was in effect for leave to plead puis darrein continuance, and leave so to plead will generally be granted on a proper showing, but it should always be upon the payment of costs.

[Ed. Note.—Cited in Matthews & Co. v. Cantey, 48 S. C. 596, 26 S. E. 894.

For other cases, see Costs, Cent. Dig. § 220; Dec. Dig. ⇐51; Pleading, Cent. Dig. §§ 630, 824; Dec. Dig. ⇐239, 272.]

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[2. *Judgment* ⇐715.]

*The record in the action on the second bond may have been admissible in evidence in this action, but if breaches were established under the first bond, as e. g. failure to deposit the official funds in bank, the State would be entitled to judgment for the penalty for the use of such persons as were damaged by such breaches, notwithstanding judgment had been recovered on the second bond for the same defaults continued after its execution.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1244; Dec. Dig. ⇐715.]

[3. *Clerks of Courts* ⇐74.]

Where two bonds are successively given by a clerk of court during the same term of office, both sets of sureties may be liable to the State and to the aggrieved parties, provided defaults occur under both bonds and damages result therefrom.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 127–134; Dec. Dig. ⇐74.]

[4. *Clerks of Courts* ⇐75.]

[In an action on the bond of a clerk of a common pleas court, the breach alleged was that he had received money in certain specified cases, which he had neither deposited in bank, as required by law, nor turned over to his successor, nor paid to the parties entitled to it. *Held*, that a verdict for plaintiff against such clerk and the sureties on a second bond given by him was not a bar to such action, under Act March 24, 1875 (15 St. at Large, p. 942), providing that the sureties on the first bond shall be released from responsibility for all acts or defaults of such officer which may be done or committed subsequent to the approval of such new bond.]

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 135; Dec. Dig. ⇐75.]

Before Kershaw, J., Newberry, November, 1880.

The opinion fully states the case.

Messrs. Jones & Jones and George S. Mower, for appellant.

Messrs. Moorman & Simkins, contra.

March 4th, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The defendant Moses, having been appointed clerk of the Court of Common Pleas for the county of Newberry, on February 16th, 1875, entered into bond to the plaintiff, with the defendants Michael Foot and John P. Kinard, and William Mayes, the intestate of the defendant, Nancy Mayes, as his sureties, conditioned for the faithful performance of the duties of said office. On March 10th, 1877, the defendant Michael Foot applied to the county commissioners to be relieved from his suretyship upon said bond, and thereupon the said Moses, on April 4th, 1877, executed a new bond, with Catherine Moses, D. R. Phifer, Thomas P. Lane, P. Oliver and H. B. Scott, as his sureties.

On October 1st, 1879, this action was commenced on the bond first above stated, sundry breaches of which were assigned; among others, that the said Moses had received large sums of money in certain cases specified, which he had neither deposited in bank, as required by law to do, nor turned over to his successor, nor paid the same to the parties entitled thereto. Pending the trial of this case, and before the close of the testimony, the jury returned a verdict for the

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plaintiff in another case *brought by the plaintiff against said Moses and his sureties on the bond second above mentioned. Thereupon, an order was asked for and granted, permitting the answers in this case to "be so amended as to plead in bar to this action the recovery and verdict this day rendered," upon the second bond above mentioned. To which plaintiff's counsel duly excepted.

The Circuit judge was requested by the plaintiff's counsel to charge the jury as follows: "(1) That if the funds in the hands of defendant H. Claremont Moses, as clerk, are not found on deposit, as required by law, the presumption arises that the funds are no longer in his hands as clerk thereby constituting a breach of the bond in suit. (2) That if they should find that a breach of the bond of H. C. Moses, Michael Foot and others was committed prior to April 4th, 1877, then the plaintiff is entitled to a verdict for the penalty of the bond. (3) That a failure by H. C. Moses to deposit the funds in his hands, as clerk, in some national or State bank in the Seventh Judicial Circuit, would constitute a breach of the bond in suit, if such failure occurred before April 4th, 1877. (4) That the verdict in the suit on the bond on which Mrs. Catherine Moses, David R. Phifer, Thomas P. Lane, Peter Oliver and Harry B. Scott are sureties for H. C. Moses, as clerk, does not bar this action."

These requests were refused, and the jury were instructed: 1st. That the verdict in the action on the second bond barred a recovery in this action. 2d. "That they were to inquire whether, as a fact, there had been any substitution of a new bond for the bond under consideration; and, if so, they were to find, from the evidence, the date of such substitution. That if it be true that there was a substitution, the effect was to release the old bond from all liability for acts subsequent to date of such substitution. 3d. That a recovery on the second bond, upon a claim for damages, founded on certain allegations, barred a recovery on the first bond upon a like claim for same damages, founded upon the same allegations. That if the breaches and damages resulting therefrom, set forth in this action, were the same as those for which a recovery had already been obtained in the other action, then there should not be a recovery in this action. That the case might be different had some damages other than

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those for *which a verdict had already been rendered, been alleged and proved as resulting from a breach or breaches of the bond. That this being a civil action, it was not sufficient for a recovery that there had been some technical breach of the bond prior to April 4th, 1877, as, for instance, a failure to make regular returns to the court, or to deposit funds in a national or State bank. It was necessary for the plaintiff to go further, to allege and prove some specific damages resulting from such breach or breaches, and such damages must be other than those for which a recovery had already been had."

To this charge and the refusal to charge, the plaintiff's counsel duly excepted, and a verdict having been rendered in favor of defendants, and judgment entered thereon, the plaintiff appeals upon numerous grounds set out in the record. We do not deem it necessary to state, specifically, the various grounds of appeal, but will consider the several questions made by the appeal, except that made by the second ground, which has been abandoned: 1st. As to the order granting leave to amend the answers. 2d. As to the admissibility of the verdict in the action on the second bond, and its effect. 3d. As to the effect of the failure to deposit the money collected by Moses, as clerk, prior to the execution of the second bond, in bank, as required by law.

We cannot say that there was any error in law on the part of the Circuit judge in granting the defendants leave to amend their answers by pleading the verdict recovered in the action on the second bond in bar to a recovery in this action, unless it be in failing to annex terms—the payment of the costs accrued up to that time. But, under the view which we take of the case, this is not a matter of practical importance, and does not warrant any extended observation or call for any specific ruling. The application was, in effect, for leave to plead puis darrein continuance, and such leave will generally be granted upon a proper showing, but it should always be upon the payment of costs.

Nor can we say that the record in the action on the second bond was not admissible

in evidence, as it might be competent for certain purposes. The main question, however, is as to the effect of it. Did it bar a

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recovery in this action? This, it will *be observed, is an action brought by the State to recover judgment for the penalty of an official bond, and if it is established that there has been a breach of the condition of such bond, the judgment must go for the penalty, which will stand as a security for all persons who may be able to establish any damages which they have sustained by reason of such breach of the condition of the bond, according to the practice indicated in State v. Moses, 18 S. C. 366. This is in strict accordance with the terms of the contract of the parties. The obligors bind themselves, under a designated penalty, that the officer shall perform all the duties required of him by law; and if he fails to perform any one or more of such duties then the contract is broken and the obligee (the State) is entitled to judgment for the amount agreed upon as the penalty for the breach of such contract. What amount of damages any aggrieved person may be entitled to by reason of the breach of the condition of the bond, given for the protection of the public generally, is a totally distinct and different question, to be determined in the mode above indicated.

If, therefore, the defendant Moses had received money, as clerk, and failed to deposit it in bank, as required by law, before the execution of the second bond, or, if before that time he had committed any other breach of the condition of his official bond, then the plaintiff unquestionably was entitled to judgment against him for the penalty of his bond, even though judgment had been recovered on his second bond for a similar default. It is an entire mistake to suppose that the second bond was a substitution for the first, in the sense that it operated a release of the sureties on the first bond from all liability. The act of March 24th, 1875 (15 Stat. 942,) expressly provides that the sureties upon the first bond "shall be released from responsibility for all acts or defaults of such officer which may be done or committed subsequent to the approval of such new bond. So that the act does not purport even to release the sureties from liabilities incurred prior to the giving of the new bonds to say nothing as to the question whether the legislature would have the power to release a party from the consequences of a breach of his contract after such breach had been committed.

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*If, therefore, Moses committed any breach of his official bond prior to the giving of the second bond, either by failure to deposit in bank moneys collected by him officially, or otherwise, such default would render the sureties on the first bond liable to judgment for the penalty which would stand as security for any damages which any party aggrieved might be able to establish by proper proceedings for that purpose. And if such default continued after the second bond was given, the sureties on that bond would also be liable, as we have held in the case of the State v. Moses, supra. Which set of sureties would be primarily liable, as between themselves, is not a question in this case, and need not, therefore, be considered here; but both sets of sureties may be liable to the plaintiff and to the aggrieved parties, provided defaults have occurred under both bonds and any damages have resulted therefrom.

We think, therefore, that the Circuit judge erred in instructing the jury that the verdict in favor of the plaintiff, in the action on the second bond, barred a recovery in this action, and that he also erred in refusing plaintiff's second, third and fourth requests to charge, as set out above; but we do not think there was any error in refusing the first request to charge, for it may be that though the funds were not found on deposit, yet they may have been paid out according to law, and therefore the simple failure to find them on deposit was not, of itself, sufficient to establish a breach of the bond. So much of the judge's charge as relates to the subject of damages, whether both sets of sureties may not be liable for the same damages, resulting from the several breaches of the conditions of the two bonds, is not now properly before us, inasmuch as the persons claiming such damages do not now appear to be before the court. The only question in the case, as at present presented is, whether there was a breach of the condition of the first bond before the second bond was given, and, if so, then the plaintiff is entitled to judgment for the penalty of the first bond, notwithstanding the fact that the plaintiff has already recovered judgment for the penalty of the second bond. When parties come in by proper proceedings to establish any damages alleged to have been sustained by reason of the breach of the condition of either or both

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of the *bonds, these questions will then properly arise and can then be determined.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

20 S. C. 471

In re COVIN'S ESTATE.

(November Term, 1883.)

[1. *Appeal and Error* ⇐1011.]

On appeal from the Probate Court, the Circuit judge, upon the testimony taken below and upon additional testimony taken by consent before the master, sustained one of the Probate judge's findings of fact and reversed another. On appeal to this court, these findings of the Circuit judge were approved.

[Ed. Note.—Cited in Sartor v. Beaty, 25 S. C. 303; In re Solomons' Estate, 74 S. C. 192, 54 S. E. 207; Jenkins v. Jenkins, 83 S. C. 544, 65 S. E. 736.

For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. ⇐1011.]

[2. *Wills* ⇐762.]

Testator devised his lands specifically but directed all of them to be valued and "each legatee to be equal." After making his will, testator caused twenty-four acres of the tract devised to his daughter, T., to be surveyed and laid out for her, and put her and her husband in possession, but executed no deed; and upon this land T. and her husband put improvements. *Held*, that in making the devisees equal, the increased value of these twenty-four acres by reason of the improvements, should not be estimated.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1971; Dec. Dig. ⇐762.]

[3. *Wills* ⇐759.]

Under proceedings had in the Court of Probate for a settlement of this estate, a note of one of the devisees, barred by the statute of limitations, could not be set off against his devise, but his interest in the personal estate should be retained to that extent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1962, 1965; Dec. Dig. ⇐759.]

[4. *Executors and Administrators* ⇐76.]

The Court of Probate, on petition of the executors, had jurisdiction of the settlement of this estate, it being a matter testamentary, and, as incident to such settlement, of the matters therein involved.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 336–338; Dec. Dig. ⇐76.]

Before Wallace, J., Abbeville, February, 1883.

This was a petition filed in the Probate Court on May 11th, 1881, by P. A. Covin and S. R. Morrah, qualified executors of Louis Covin, deceased, for final discharge and settlement. The will was dated November 3d, 1875, and testator died July 9th, 1880. S. R. Morrah died August 2d, 1882. The case is otherwise fully stated in the opinion of this court and the Circuit decree. The latter was as follows:

This case is an appeal from the decree of the Probate judge and was heard by me upon exceptions, as follows:

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*The executor appealed upon the ground that the Probate judge erred in deciding that Mrs. M. M. Tarrant, one of the legatees under the will of Louis Covin, deceased, should be allowed $1.50 per acre for improvements placed upon the land devised to her and her children in the will, she not being entitled to any deductions in regard to said improvements. The testimony shows that the testator sold to M. M. Tarrant, during his life-time, the improvements put upon the place by the said Tarrant, and it further appears that Mrs. Tarrant subsequently made improvements on the place, believing that the place belonged to her. This exception is overruled, and the decision of the Probate judge affirmed.

Mrs. M. E. Tarrant appeals from the said decree upon the grounds: 1. Because the Judge of Probate erred in not giving to a certain instrument of writing, executed by the testator, by which he gave to the said M. E. Tarrant twenty-four acres of land and the improvements thereon, the effect of a deed. The plat of said twenty-four acres, and the possession of the land having been delivered by the testator to the said M. E. Tarrant, this exception is overruled, and the decision of the court below affirmed.

2. Second exception. Because the Judge of Probate erred in not charging J. L. Covin with the amount of the purchase-money of the tract of land on which the said J. L. Covin now lives, he having executed his promissory note for $500, dated April 1st, 1873, for the same in favor of the testator, Louis Covin. It being in proof that J. L. Covin had not paid said note, and that it is still a subsisting demand against J. L. Covin, in favor of the estate of Louis Covin, Judge Cothran referred the following issues to a jury. Subsequently the parties agreed that the testimony should be taken by the master, and upon his report this exception came before me. The issues were: 1. Did J. L. Covin execute and deliver to Louis Covin a note for $500, dated April 1st, 1873? 2. Did the testator destroy the said note for the purpose of forgiving the debt? 3. Was said note assigned and transferred to a third party?

The testimony satisfies my mind that J. L. Covin did execute and deliver to Louis Covin, a promissory note for $500, dated

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*April 1st, 1883; that the said note has not been destroyed by testator with the intention of forgiving the debt, and that the said note has not been assigned and transferred.

This exception is sustained, and it is ordered and adjudged that J. L. Covin be held to account for the said note of $500, with interest from April 1st, 1873, from his share of the estate of the said Louis Covin, deceased. That the Probate judge take testimony, and allow such credits as appear to be due on this note. Further ordered, that the case be remitted to the Probate Court for such proceedings as are necessary to carry out this decree, and that the settlement of said estate be made in accordance therewith.

From this decree an appeal was taken by the executor, and by James L. Covin. The exceptions raise the precise points considered by this court.

Messrs. Noble & Noble, for executor, appellant.

Mr. W. A. Lee, for J. L. Covin, appellant, in whose behalf was also read argument of Mr. A. Burt, deceased.

Mr. L. W. Perrin, for Mrs. Tarrant, respondent.

March 4th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The petition below was filed in the Probate Court by the qualified executors of Louis Covin, deceased, for the settlement of his estate. The testator left a will in which he devised certain tracts of land to his wife and children, directing said lands to be valued, "each legatee to be equal." He then directed that the balance of his lands and other property be sold, and the proceeds be divided equally among his wife and children, appointing James L. Covin, P. A. Covin and S. R. Morrah, his executors, the two last of whom alone qualified.

Upon the hearing by the Probate Court, Mrs. Martha E. Tarrant, a daughter of the deceased, and to whom a tract of land had been devised as above, claimed that upon the equalization of the lands, she should not be charged with the improvements on

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*her tract, because, as to the house, her husband, M. M. Tarrant, had bought it from her father in his life-time, and that she herself had put the other improvements on the place, after she went into possession, which was also during the life of her father, he having placed her in possession before his death. The Probate judge upon testimony found, as a fact, that M. M. Tarrant had bought the house from the deceased at the price of $500, for which he gave his note, which note went into the possession of the executors and was sold by them as part of the testator's estate. He also found as matter of fact, that the additional improvements had been put on the place by Mrs. Tarrant after her possession, and he directed that Mrs. Tarrant should have credit in the appraisement for $1.50 per acre for these improvements, including the house, which reduced her land to $6.50 per acre.

J. L. Covin, one of the devisees, had been indebted to his father in the sum of $500, by note dated before April, 1873. This note was barred by the statute of limitations in the life-time of the father, and had been destroyed by him. The Probate judge held, that the testimony before him was not sufficient to charge the said J. L. Covin with this note in the settlement.

From this decree an appeal was taken to the Circuit Court, where the issues involved were heard by Judge Wallace, by agreement of parties, upon testimony taken and reported by the master, as well as that previously taken by the Probate judge, who, concurring with the Probate judge as to the matter of improvements claimed by Mrs. Tarrant, affirmed his rulings in that respect. He, however, differed in reference to the note of J. L. Covin, and finding, as matter of fact that this note had not been destroyed by the testator with the intent to forgive it, he decreed that Covin should account for it, ordering the case remanded to the Probate Court, to be carried out in accordance with his findings and rulings. The questions now before the court are the same as those raised below with the additional ground that the Probate Court had no jurisdiction over the question of the equalization of the lands, nor as to the accountability of J. L. Covin for his note of $500. The case as heard below involved questions of fact as well as of law, all of which are presented in this appeal. First, as matter of fact, had M. M.

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Tarrant pur*chased the house which was on the land devised to his wife, and did she erect the other improvements on the place, after she went into possession and during the life of the father? Secondly, was the Circuit judge correct in finding that the note of J. L. Covin had not been destroyed by the testator with the intention of forgiving it. As to these findings we do not see that manifest error which alone would warrant us in overruling them; we cannot say that there is an absence of all testimony or that the evident weight of it is adverse. We must, therefore, regard the facts as found by the judge, to be established, and must declare the law applicable to such facts.

In leaving directions in his will that the land devised should be valued so that each devisee should be made equal, did the testator intend that his daughter should account for the house, which before his death he had sold to her husband, or for the other improvements which she had put upon it, after he had had it surveyed for her and had himself placed her in possession? It is true that he had not executed a deed to her, and therefore the title was still in him, but it is in evidence that he directed a survey to be made, upon the plat of which was indorsed by the surveyor, "That by the request of Louis Covin, he had surveyed and laid out for Mrs. Tarrant the twenty-four acres" upon which the improvements were placed. This survey was dated March, 1878, some three years after the date of the will. Under this survey Mrs. Tarrant went into possession, and was in possession at the death of her father. She had every reason to believe that the land had been given to her by her father, and especially that the improvements which, in his presence and by his acquiescence, if not by posi-

tive permission, she was putting on the place, would redound to her benefit. We think there is enough in the case to bring her claim under the principle of equity which allowed improvements in the cases of Scaife v. Thomson, 15 S. C. 368; Williman v. Holmes, 4 Rich. Eq. 476, and Johnson v. Harrelson, 18 S. C. 604, or at least that the executors are estopped by the conduct of the testator. Big. Estop. 480; Bollmann v. Bollmann, 6 S. C. 46; Bull v. Rowe, 13 S. C. 370.

Next, the case of Wilson v. Kelley, 16 S.

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C. 216, seems con*clusive on the question of the note of J. L. Covin, so far as to exclude him from any participation in the residue of the estate, unless he accounts for his note, but he cannot thereby be debarred from getting the land devised to him. The will gives him title against everybody except creditors, and the note, even if it were not barred by the statute, could not be counter-claimed against the land. But his interest in the residue is in a different position. The will directs this residue to be sold, and the proceeds to be equally divided between the testator's wife and children. J. L. Covin's portion of these proceeds, after the sale, will be in the hands of the executors, his creditors, and they will have the right to apply it to the debt which he owes, which, although protected from suit by the statute, is yet not paid as found by the Circuit judge.

We do not see the force of the jurisdictional question raised. The matter of equalizing the lands devised is embraced in the will. The executors are before the Probate Court seeking a settlement and a discharge from their trust. The Probate Court has jurisdiction in matters testamentary. The settlement which is sought must be made in accordance with the provisions of the will. This is certainly testamentary. The executors cannot be discharged until they make a settlement such as the will demands. This involves the judgment of the Probate Court as to the terms of settlement, and the rights of the parties, subject to appeal, of course, to the Circuit Court.

This objection cannot avail, nor can the other, that the Probate Court has no jurisdiction of the note of J. L. Covin. The most of the positions taken by appellant's counsel on that subject are no doubt correct, to wit: That J. L. Covin is not liable to account to a legatee, nor to creditors of the estate, nor could the executors sue him in the Probate Court on his note. But neither of these principles are involved here. There is no attempt to enforce payment of his note by either legatee, creditor or the executors. The question on the contrary is, whether the executors shall be required to pay over to him certain interests which, under the will of his father, he seems to be entitled to. He is a devisee and legatee under this will and the estate cannot be settled without determining his

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interests, as well as that of all *the other parties, and in defining and adjudging his interests all the facts connected therewith must be considered. The executors are seeking no judgment on the note against him, but they are seeking a decree as to the conditions upon which they shall pay over to him such interest as he may have in their hands.

It is the judgment of this court that the judgment of the Circuit Court be modified in so far that the devise of the tract of land to J. L. Covin shall not be affected by his unpaid note to the estate. In all other respects it is affirmed. Let the case be remitted to the Probate Court to be carried out as herein announced.

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20 S. C. 477

HUFF v. WATKINS.

(November Term, 1883.)

[1. *Costs* ⇐215.]

The right to costs and the manner of adjusting them are matters not within the original jurisdiction of the Supreme Court, and cannot be here adjudged except on appeal from rulings in the court below upon those subjects.

[Ed. Note.—Cited in Burgess v. Crumpton, 93 S. C. 563, 77 S. E. 356.

For other cases, see Costs, Cent. Dig. § 797; Dec. Dig. ⇐215.]

[2. *Abatement and Revival* ⇐54.]

Where a plaintiff sued in form ex delicto, and the defendant died before judgment, the action cannot be revived against the personal representative of the deceased. Chaplin v. Barrett, 12 Rich. 284 [75 Am. Dec. 731], approved.

[Ed. Note.—Cited in Holladay v. Holladay, 24 S. C. 524; Reed v. Northeastern R. Co., 37 S. C. 51, 16 S. E. 289; Jenkins v. Bennett, 40 S. C. 397, 18 S. E. 929; Rabb v. Patterson, 42 S. C. 538, 20 S. E. 540, 46 Am. St. Rep. 743; Stuckey v. Atlantic Coast Line R. Co., 57 S. C. 398, 35 S. E. 550; Allen v. Petty, 58 S. C. 245, 36 S. E. 586; Elmore v. Elmore, 58 S. C. 292, 36 S. E. 656, 51 L. R. A. 261; Sims v. Davis, 70 S. C. 373, 49 S. E. 872.

For other cases, see Abatement and Revival, Cent. Dig. § 257; Dec. Dig. ⇐54.]

[3. *Master and Servant* ⇐340.]

Enticing away a servant in another's employment is actionable as a tort only, and cannot be treated as an implied contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1284; Dec. Dig. ⇐340.]

Before Hudson, J., Newberry, November, 1883.

This was an action by William T. Huff against William Watkins, commenced May 16th, 1879. The complaint alleges that, about January 1st, 1879, the plaintiff employed one Jordan Butler to serve him as an agricultural laborer for and during that year, and that he did so serve the plaintiff for about the period of two months, receiving advances in the meanwhile from the plaintiff; that about March 1st the said Jordan Butler, secretly and without cause, left the employ of the

said plaintiff and hired to the defendant; that the plaintiff at once gave notice, by public advertisement and to the defendant personally, that the services of Jordan Butler were due to the plaintiff for said year, and required the defendant to discharge him from his employ; that the defendant failed to dis-

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charge the said Jordan Butler, and still *continued to employ him, to the plaintiff's damage of $1,000, and demands judgment for $1,000 and the costs and disbursements of this action. Other matters are stated in the opinion.

[For subsequent opinion, see 25 S. C. 243.]

Messrs. Moorman & Simkins, for appellant, cited Code, § 142; 2 Add. Torts 538, note 1, 540, 558; Toll. Ex. 460–462; 1 Chit. Pl. 113, 153; Code, § 188; 2 Wait Pr. 356–365.

Messrs. Suber & Caldwell, contra, cited 3 Bouv. Inst. 173, §§ 2750–53; 12 Rich. 284; 37 N. J. 372; 58 N. Y. 282; 44 Am. Dec. 159; 1 Bay 58; 2 Beav. 159; 16 Rep. 575; 49 L. T. N. S. 5; Code, § 323.

March 8th, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action to recover damages for enticing a servant employed by the plaintiff to leave his employment. The case has been in this court twice before. See 15 S. C. 83 [40 Am. Rep. 680], and 18 Id. 510. At the last hearing here, the verdict for defendant was set aside and the case sent back for a new trial, but before it was heard on Circuit for the third time, the defendant died, (October, 1883,) leaving a will, of which James F. Watkins became the qualified executor. At the next term (November) of the court the plaintiff moved to substitute the executor as defendant, and to continue the action against him under section 142 of the code. The Circuit judge held, that the cause of action, being the wrongful act of defendant, in hiring and retaining in his employment a servant of the plaintiff, is not such as survives against the personal representative of the defendant, and refused the motion. He "ordered that the cause be stricken from the calendars of this court, each party paying his own costs in this court, and nothing herein shall, in any manner, prevent the clerk of this court from taxing the costs on the two judgments heretofore rendered in the Supreme Court, granting new trials to the plaintiff—the clerk in so doing to be governed by the rule of court and the law regulating costs on appeal to the Supreme Court."

From this order the plaintiff appeals to this court upon the ground that "the judge erred in refusing the plaintiff's motion

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*to continue the action against the executor of the defendant, and in granting the order abating the action." The parties, also by agreement, submitted for the judgment of the court thereon, the following questions of law: "1. Whether the plaintiff herein, having prevailed in his two appeals heretofore to the Supreme Court, and on each appeal obtained an order for a new trial, is entitled to costs against the estate of the defendant. 2. Whether, under rule 40 of the Circuit Court, the clerk of that court is now authorized to record the judgments of the Supreme Court herein, and enter abstracts thereof against the defendant, and thereunder to adjust the costs and disbursements in the Supreme Court—the defendant having died since the remittiturs were filed below. 3. And, if so, whether the clerk is authorized to do so before final judgment below, in case this court should reverse the order herein appealed from."

In reference to the questions of law submitted for the judgment of the court, it is only necessary to say that the matter of costs, either for services in this court or the Circuit Court, are not within our original jurisdiction. We have no right to adjudge anything upon the subject until it has been heard by the proper tribunal below and comes here on appeal, by way of correcting some alleged error of law. Any decision we might make could be nothing more than the opinion of three lawyers, and without the force of law.

As to what actions survive against the executor of one deceased, our law has not been changed by the late revision of the statutes. Section 2187 simply re-enacts the old statute of 4 Edward III., c. 7, as to the right of executors to bring actions against trespassers upon the property of their testators in certain cases; and section 123 of the code provides as follows: "If a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his executors or administrators," &c. So that the question is still left open, as to what actions survive against the representatives of one deceased.

Without going into the learning upon the subject, and citing the array of authorities,

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which are not always in accord, we do *not know that the rule is better stated anywhere than by Judge Munro in Chaplin v. Barrett, Adm'r, 12 Rich. 284 [75 Am. Dec. 731], where, citing from 1 Chit. Pl. 68, he says: "We have seen that the right of action for the breach of a contract, upon the death of either party, in general survives to or against the executor or administrator of each; but in the case of torts, where the action must be in form ex delicto for the recovery of damages, and the plea is not guilty, the rule at common law was otherwise, it being a maxim that actio personalis moritur cum persona, and we shall find that the statute 4 Edward III., c. 7, has altered this rule only

in its relations to personal property, and in favor of the personal representative; but if the action can be framed in form ex contractu, the rule does not apply."

Then the important inquiry is, whether this action was for a breach of contract or for a tort, where the action must be in form ex delicto. The old forms of the different actions have been abolished, and there is now only one general form, so that the mere form throws very little light upon the subject. But it is not the form of action but the substance which furnishes the test of survivorship. Although the forms of action have been changed, the causes of action remain the same as formerly, and we agree with the Circuit judge, that the cause of action here was not ex contractu, but for damages on account of an alleged wrongful act of the testator, Watkins, in his life-time, like the old action on the case.

But it is urged that the old rule of the common law, as announced above, was found to be harsh and unjust, and, as a consequence, it was gradually relaxed until the doctrine was finally established, "That in all cases where the deceased actually had the property of the other party, so as to derive a benefit therefrom, so that a promise to pay therefor could be presumed or implied, while an action for tort could not be maintained, yet the tort could be waived and assumpsit maintained for the value of the property." 2 Add. Torts 539 and note. Accepting this to be the rule, it might be enough to say that this action, now proposed to be revived against the executor of Watkins, was brought against the testator in his life-time, not assumpsit on any supposed promise, express

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or implied, but clearly ex delicto for a *wrong done. The action has already taken form, and we have no authority to change its whole nature in order to revive it against the executor. Upon the face of the record itself the cause of action arose ex delicto, and, as it seems to us, was buried with the offender.

But if we had the power to change the form, as was said by Judge O'Neall in Chalk v. McAlily, 10 Rich. 94, "We do not see how the defendant's injury could by any ingenuity be turned into a contract." Among the numerous cases upon the subject, we have not been able to find one that decides the identical point as to an action on the case for harboring a servant. But we think that case falls within the principle upon which some of them proceed. Thus it has been held, that case for diverting a watercourse to the injury of another, dies with the person. Holmes v. Moore, 5 Pick. 257. Also an action for mesne profits while the testator was wrongfully in possession. Harker v. Whitaker, 5 Watts 474, and authorities in note to 2 Add. Torts 541.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

20 S. C. 481

SULLIVAN v. ELLISON.

(November Term, 1883.)

[1. *Landlord and Tenant* ⟸254.]

A landlord's lien for rent is not defeated by his taking a writing under seal, whereby the tenant promises to pay the amount agreed upon "for the rent of the place."

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1037; Dec. Dig. ⟸254.]

[2. *Sheriffs and Constables* ⟸120.]

A landlord having given notice to a constable of his claim for the tenant's past-due rent of the current year, after the constable had levied executions upon the tenant's personal property, on the leased premises, and before removal, the landlord was entitled to judgment against the constable for the proceeds of the sale (they being less than the amount due for rent), the constable having sold the property and refused to pay such rent. Gen. Stat., § 1824.

[Ed. Note.—Cited in Ex parte Knobeloch, 26 S. C. 335, 2 S. E. 612.

For other cases, see Sheriffs and Constables, Cent. Dig. § 214; Dec. Dig. ⟸120.]

[3. *Justices of the Peace* ⟸38.]

This being "an action for damages for injury to rights pertaining to personal property," it was within the jurisdiction of a trial justice. Code, § 71, ¶ 2.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 126; Dec. Dig. ⟸38.]

[4. *Landlord and Tenant* ⟸265.]

[Cited in Miller v. White, 25 S. C. 238; Brewster v. McNab, 36 S. C. 278, 279, 15 S. E. 233; Parrott v. Malpass, 49 S. C. 6, 26 S. E. 884, to the point that a landlord's agricultural lien does not bar his right to distrain.]

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1062–1074; Dec. Dig. ⟸265.]

Before Witherspoon, J., Greenville, July, 1883.

The opinion fully states the case.

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*Messrs. Perry & Perry, for appellant.

Defendant is estopped from denying plaintiff's right to recover. 13 S. C. 370; 6 Wait Ac. & Def. 681, 685. Plaintiff's lien followed the proceeds of the property sold. 3 McCord 484. The case of Kennedy v. Reames, 15 S. C. 552, does not apply to a case like this, where there was a different lien, enforceable in a different way, viz., by distress. But, under section 1824 of the general statutes, defendant had no right to levy or sell without paying one year's rent. 3 McCord 38, 378; 12 Rich. 349; 1 Treadw. Con. R. 120.

Messrs. Wait & Westmoreland, contra.

The facts here do not constitute an estoppel. Big. Estop. 431, 437, 438; 17 S. C. 7. If defendant promised to pay plaintiff, such promise would be void because not in writing. Acceptance of a note for rent after the year was half gone, was a waiver of the statutory lien. In 18 S. C. 179, the contract for rent was verbal. But if not waived, the lien did not follow the proceeds of sale. 15

S. C. 552; 14 Id. 35; 1 Bailey 237. Defendant is sued in his official capacity, and there is no evidence of any violation of official duty. The proper remedy would have been a rule issued by the Circuit Court. This case does not come under any of the subdivisions of section 71 of the code, and therefore the trial justice was without jurisdiction.

March 8th, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. Irvine Davenport leased land from Hewlet Sullivan for the year 1882, for which he gave an obligation, of which the following is a copy:

"$80. On or by the 1st day of November next, I promise to pay H. Sullivan, or order, eighty dollars, the same being for the rent of the place I now live on; and I further promise and agree to take good care of the premises and houses, &c., and return the same to said Sullivan at the end of this year. This 21st August, 1882.

"Witness my hand and seal.

(Signed,) "Irvine Davenport. [L. S.]

"Test—Charles D. Smith."

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*Part of the rent was paid, leaving due $23. Some time in the fall of the year, Davenport, the tenant, absconded, and it seems that David Ellison, a constable, levied sundry executions in his hands upon the property left on the place, viz., corn, shucks, cotton-seed, bee-gums, farming tools, a cow, &c. After the levy, but before the property was removed from the place or sold, Hewlet Sullivan, the landlord—taking with him a trial justice, F. M. Davenport, Esq.—went on the place, as the trial justice states, "for the purpose of issuing an attachment or rent warrant, or something of the kind, to take charge of the property," in order to secure the balance on the obligation for rent. Sullivan sent for Ellison, and gave him notice of his claim for rent, and he replied, "That is all right; let it stand; and when the property is sold, your claim will be first paid, as it is for rent." Upon this assurance, Sullivan forebore to seize the property under any process.

Afterwards, the property was sold by the constable, but he refused to pay the balance of his rent to the plaintiff, who then brought this action against him before trial justice J. M. Cureton; and he gave judgment in favor of the plaintiff for $23. The defendant appealed to the Court of Common Pleas, and Judge Witherspoon reversed the judgment. From his judgment, the plaintiff appeals to this court, upon the following grounds: "1. Because the defendant, having induced the plaintiff to forbear enforcing his landlord's lien by the promises made to him, is estopped from denying his liability in this action. 2. Because the plaintiff had a lien upon the specified property levied upon by the defendant, which followed the proceeds of the sale of said property into the hands of the defendant, and made him liable in this action. 3. Because the defendant, as constable, had no right to take the corn by virtue of any execution, unless the party at whose suit said execution was sued out had paid to the plaintiff in this action the rent then due him as landlord, and was therefore liable to the plaintiff in this action."

It does not appear precisely when the levy was made, but as there was no allegation that the rent was not due, we suppose it was after November 1st, 1882. There is nothing in the objection that the plaintiff, Sullivan, is not entitled to the rights of a

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land*lord, for the reason that he had taken a sealed note for the rent. Rent is usually, as we think, secured by writing, and what is here called a sealed note, is substantially a lease of a certain tract of land, and at the same time securing the rent therefor. See Fife v. Irving, 1 Rich. 226; Fiske v. Judge & Dennis, 2 Speers 436 [42 Am. Dec. 382]; Bailey v. Wright, 3 McCord 484.

The plaintiff, as landlord, clearly had an agricultural lien on one-third of the crop made on the premises leased, (16 Stat. 411; Carter v. DuPre, 18 S. C. 182,) but such a lien can only be enforced according to the machinery provided by the statute itself, viz., through a warrant issued by a clerk of the court against the crop itself in specie, and not against the proceeds of the crop. Kennedy v. Reames, 15 S. C. 550. It appears that the plaintiff, misled by the assurances of the defendant that the rent claimed should be first paid, pretermitted his right to have the crop itself seized before it was sold; and it is now insisted that he cannot enforce that lien against the money, the proceeds of sale. This may be so, and in this, the defendant certainly misled the plaintiff to his injury. But from the view which the court takes, it will not be necessary to consider the question whether the constable is personally liable and estopped from making a defense. He is a mere stakeholder and possibly was required by the creditors, in whose behalf he levied the property, to make the defense for their benefit. If recovery is had, it must be paid out of the money officially in the hands of the constable, and, therefore, we will regard the defense as actually made by the judgment-creditors.

Assuming, then, that he was deceived into an inactivity which practically lost him the benefit of his agricultural lien, we think that the plaintiff, as landlord, had another right entirely distinct from his agricultural lien on a part of the crops made on the leased premises. A landlord had the right to distrain for rent in arrear under our law, as it existed down to 1868, when distress for non-payment of rent was abolished. 14 Stat.

106. In 1878 the law was restored as it formerly existed, with the single exception that no property could be taken except such as belonged to the tenant in his own right. 16

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Stat. 511; Mobley v. Dent, *10 S. C. 472. At any time after November 1st, the landlord had the right to distrain any property of the tenant on the place, whether it was, or was not, a part of the crop made there. But when he reached the premises he found that the property had been levied under executions in the hands of Ellison, the constable; it was then in custodia legis, and his duty was, not to proceed to seize the property, thereby creating a conflict of authority, but to give notice of his claim, which he did, under section 1824 of the general statutes, which provides as follows: "No goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements which are or shall be leased * * * shall be liable to be taken by virtue of any execution or any pretense whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking of such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent," &c.

The plaintiff having given notice of his claim for rent, the duty of Ellison, the constable, was, in accordance with his declarations and promises made before the property was sold, to retain out of the proceeds of sale so much as was necessary to pay to the plaintiff first the balance due him for rent of that year. Hamilton v. Reedy, 3 McCord 39. See the Matter of F. W. Connor, Landlord, 12 Rich. 350. The constable violated his duty, damaging the plaintiff to the extent of the balance of rent, $23, and Trial Justice Cureton was right in giving judgment against him for that amount.

It is insisted that the trial justice had no jurisdiction in the matter. It was "an action for damages for injury to rights pertaining to personal property." See Paragraph 2, Section 71 of the Code.

It is said the plaintiff should have applied to the Circuit Court for a rule on the respondent. Perhaps he might have done so, but he had no status in that court, and we

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do not see why he *could not sue the constable for an injury done him, as was done in the similar case of Margart v. Swift, 3 McCord 379.

The judgment of this court is that the judgment of the Circuit Court be set aside and that of the trial justice affirmed.

20 S. C. 486

GRIFFIN v. GRIFFIN.

(November Term, 1883.)

[1. *Insane Persons* ⟸92.]

Action by the committee of a lunatic to recover money of the lunatic erroneously paid to defendant by the county commissioners, is an action at law, and the Circuit judge committed no error in overruling a demurrer to the complaint, and in permitting plaintiff to amend by making the lunatic a party, giving defendant leave to answer thereto. And to such action, the county commissioners were not necessary parties.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 161, 162; Dec. Dig. ⟸92.]

[2. *Reference* ⟸100.]

The Circuit judge, while hearing a case on exceptions to the report of a referee, to whom it had been referred to hear and determine the issues and report to the court, called for the production of a paper which had not been put in evidence, and based his decree upon a fact therein stated. *Held*, that in this there was error. The case should have been decided upon the report and exceptions, or else recommitted for further testimony.

[Ed. Note.—Cited in Stark v. Hopson, 22 S. C. 46; Meetze v. Charlotte, C. & A. R. Co., 23 S. C. 16; Clayton v. Mitchell, 31 S. C. 203, 9 S. E. 814, 10 S. E. 390; Ex parte White, 38 S. C. 48, 16 S. E. 286; Armstrong v. Austin, 45 S. C. 82, 22 S. E. 763, 29 L. R. A. 772.

For other cases, see Reference, Cent. Dig. § 165; Dec. Dig. ⟸100.]

[3. *Reference* ⟸97, 100.]

The modes of trial provided for by the code and the changes under the revision of 1882, stated and considered.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 127, 128, 157–168; Dec. Dig. ⟸97, 100.]

[4. *Money Received* ⟸15.]

[Defendant instituted a proceeding in a probate court, in which he represented that G., a declared lunatic, had recovered her mind, and got possession of certain money of the lunatic from the hands of the county commissioners. Afterwards plaintiff was appointed G.'s committee, and brought an action as such committee for such money. *Held*, that the action was one at law, as for money had and received.]

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 44; Dec. Dig. ⟸15.]

[This case is also cited in Jefferies v. Allen, 34 S. C. 191, 13 S. E. 365, and distinguished therefrom.]

Before Hudson, J., and Pressley, J., Spartanburg, April, 1881, and March, 1882.

This was an action, which came up on appeal under the title of Elizabeth A. Griffin, by her committee, William L. Morgan, against John H. Griffin. The action was commenced September 8th, 1878. It was referred March 29th, 1879, to a referee to "take testimony and decide all the issues of law and fact arising herein, and that he do report the same to this court." The report of the referee, sustaining the demurrer, was overruled by Judge Hudson, who referred the cause back to the same referee "for trial

of issues of law and fact, with directions to report to this court his findings and conclusions." The second report of the referee was made on March 8th, 1882. In other particulars, the opinion states the case.

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*Messrs. Duncan, Cleveland & Sanders and J. S. R. Thomson, for appellant.

Messrs. Evins, Bomar & Simpson and Bobo & Carlisle, contra.

March 8th, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. Elizabeth A. Griffin, a declared lunatic, living with her nephew, John H. Griffin, had a small sum of money in the hands of the commissioners of the county of Spartanburg. The said John H. Griffin instituted some proceedings in the Probate Court, by which he, representing that his aunt had recovered her mind, got possession of the money as her agent and next friend. He afterwards made an application to be appointed her committee, alleging that she had relapsed, but the Judge of Probate, declining his application, appointed the plaintiff, W. L. Morgan, who commenced this action in his own name as committee against Griffin for the said fund. The case was referred to C. P. Wofford, Esq., "as special referee to take testimony and decide all the issues of law and fact, and report the same to the court."

The defendant demurred upon two grounds: first, that the county commissioners were necessary parties, and, second, that the complaint did not state facts sufficient to constitute a cause of action. The referee sustained the demurrer and gave judgment for the defendant, but, exceptions being taken. Judge Hudson reversed the judgment, and overruled the demurrer, but providing, "as the defendant may have expended justly a part of said fund in support of the lunatic, he must be allowed credit for all such expenditures, bona fide made, and to this end he is allowed to answer over," &c. He also gave the plaintiff leave to amend his complaint by joining the lunatic, Elizabeth A. Griffin, as party plaintiff with himself, and directed that after the pleadings were perfected, the cause should be remanded to the same referee "for the trial of issues of law and fact."

Accordingly, the case as amended went back to the referee under the aforesaid order of reference, who took all the testimony that was offered and reported that, as a matter of fact, he found "that the support furnished

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by the defendant exceeds in value *any sum with which he is chargeable, and, as matter of law, that the complaint should be dismissed with costs." Exceptions were filed, which came on to be heard by Judge Pressley, who reports as follows: "In the progress of the case, it transpired that defendant had been the actor in the Probate Court when the plaintiff was appointed committee of the lunatic, and I required production of defendant's petition, that I might see what statement he therein made concerning the estate of the lunatic. Defendant's counsel objected, because the same was not in evidence. I ruled, that a chancellor trying a case could, during the trial, call for and put in evidence any paper pertaining to the matter, and to this exception was taken. It appears, by such petition, that the defendant therein set forth the estate of the lunatic as amounting to $400. I regarded that as an express waiver of so much of his charges for maintenance as would reduce said estate below that amount, and gave judgment for that sum."

From this judgment, and that also of Judge Hudson, the defendant appeals to this court, and moves to reverse them upon the following alleged errors: I. In sustaining plaintiff's exceptions to the first report of the referee. II. In overruling first report of referee. III. In not allowing defendant to answer over fully when the demurrer was overruled. IV. In overruling the demurrer and giving judgment absolute against the defendant, and at the same time allowing plaintiff to amend his complaint. V. In not holding that the defendant in the second reference had the right to answer over fully. VI. In that, while the case was being heard on exceptions to the second report of the referee, his Honor, of his own motion, and against the objection of defendant, put in further evidence to sustain the claim of plaintiff. VII. In holding that the petition so put in evidence amounted to an express waiver of so much of plaintiff's (defendant's) charges for maintenance as would reduce said estate below that amount. VIII. In overruling the second report of the referee. IX. In giving judgment against the defendant for $400 and costs. X. In not dismissing the complaint. XI. In not giving credit to the defendant for

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the maintenance and support of the *said lunatic after the date of said petition, and of sums paid out for her benefit after said date," &c.

It seems to us that the action was at law as for money had and received—money in the hands of Griffin, which, ex equo et bono, belonged to the plaintiff. Buchanan v. Buchanan, 4 Strobh. 68. We have no doubt it was in this view that Judge Hudson gave permission to amend the complaint by making the lunatic, Elizabeth A. Griffin, a party plaintiff (see Cathcart v. Sugenheimer, 18 S. C. 128). The judge did not render judgment absolute against defendant, but gave him further time to answer the complaint in the amended form, and he was therefore in no way injured. Coleman v. Heller, 13 S. C. 491.

Nor do we think it was error to overrule the demurrer. That only decided that there was enough to sustain the action for money

received and due, the possession of which was obtained by the defendant expressly as the property of the plaintiff and for her use and benefit. We cannot see why it was necessary to make the county commissioners parties. It is true they once had control of the money, but they had paid it to defendant, in accordance with a judgment of the Court of Probate, obtained through the representation of the said defendant, and which, so far as they knew, was free from fraud and was legal and binding.

But the case must go back, and it would therefore be injudicious to consider the merits at this time. We think it was error in the Circuit judge, whilst hearing exceptions to the report of the referee, appointed to decide the issue, to call for the production of a paper which had not been in evidence before the referee, and to base upon it his judgment in the case. While, as a general rule, the sound theory of judicial action, based upon experience and reason, requires that the judge shall remain passive until moved in the right of those interested, we may say that we agree with the Circuit judge "that a chancellor trying a case may, during the trial, call for and put in evidence any paper pertaining to the matter." But it is not so certain that in the instance before us the chancellor was, in the full sense of the words, "trying a case" upon the proofs offered before him, but rather hearing exceptions to the decision of a referee already made. We do not think the cases are precisely the same.

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*The code contemplates and provides for three distinct modes of trial—by a jury, by the court and by referees. The case had been heard and decided by the referee, who had made his report; that report was being considered on exceptions, and it should have been heard upon the evidence alone which the parties offered before the referee; or, if that was considered perfunctory or imperfect, the case should have been recommitted to the referee with instructions to take further testimony, subject, of course, to rebuttal, cross-examination, exceptions, &c. Under the New York code, the decision of a referee to decide the issues was not subject to review at all by the Circuit Court who appointed him, but, subject to certain rights of appeal, stood as the judgment of the court. The provision was: "The report of a referee upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court." Wait Anno. Code, p. 487.

Our code was taken from that of New York, and contained the same declaration as to the force and effect of the decision of a referee to decide issues until the late revision (1882), when the aforesaid provision was omitted, and our code now simply declares, "that the decision of a referee or master may be excepted to and reviewed in like manner and with like effect in all respects as in cases of appeal under section 290. * * * Where the case shall have been decided upon the report of the referee and exceptions, the decision may be reviewed upon appeal to the Supreme Court." Code, § 294. We suppose that the effect of this alteration must be to change the character of a referee from being, as it were, an independent tribunal to that of an adjunct to the Court of Common Pleas, which appoints him and retains the right of receiving and reviewing his report before it can be considered a judgment, or, by appeal, reach the Supreme Court.

But, assuming that such must be the effect of the changes in the code, still, as it seems to us, a referee or master under the code (for its provisions are made to apply as well to masters in counties where they take the place of referees) must be something more than a commissioner in equity or master under the old practice in equity; and it is important to keep the different kinds of trial separate and distinct. In reference to the

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old *master in chancery, it was the practice to hear his report alone upon the evidence offered before him, and to recommit rather than produce confusion by supplementing further proof in open court. "At the hearing of a report the practice is, that the court hears no evidence but what was before the master and reported by him as evidence upon which his report is founded." Bank v. Rose, 1 Strobh. Eq. 257.

And such has certainly been the practice in regard to reports of referees under the code. It is said in the case of The State v. S. & U. Railroad Company, 8 S. C. 170: "We are obliged to accept the testimony as reported by the referees. Although some exceptions were taken to its omission of certain facts, averred to have been proved, and to error in the report of some of them, we have nothing before us by which it can be corrected. The proper course for the appellants was to have moved the Circuit Court to recommit the report on the exceptions thus taken, that they might have the opportunity of showing wherein they were prejudiced by its statement of the evidence. No such application was made, and we are not at liberty to go outside of the report." In the case before us the appellant had no complaint to make of the report, which was in his favor, and if the respondent wished the use of testimony not embraced in the report, it devolved upon him to make the motion to recommit.

The judgment of this court is that the judgment below be set aside, without prejudice, and the cause remanded to the Circuit for such orders as may be necessary to give effect to the conclusions herein announced.

20 S. C. 491

RHODES v. CASEY.

(November Term, 1883.)

[1. *Execution* ⊂⊃360; *Executors and Administrators* ⊂⊃508.]

A judgment recovered against an administrator on final settlement of the estate of his intestate, is a judgment against him individually, and upon such judgment, supplementary proceedings may be had.

[Ed. Note.—Cited in Verner v. Bookman, 53 S. C. 407, 31 S. E. 283, 60 Am. St. Rep. 870.

For other cases, see Execution, Cent. Dig. § 1093; Dec. Dig. ⊂⊃360; Executors and Administrators, Cent. Dig. § 2198; Dec. Dig. ⊂⊃508.]

[2. *Execution* ⊂⊃364.]

Where an administrator is charged, on final settlement, with a judgment recovered by him as administrator, such judgment becomes his own property, and may be reached by his creditors under supplementary proceedings.

[Ed. Note.—Cited in Abercrombie v. Abercrombie, 25 S. C. 51.

For other cases, see Execution, Cent. Dig. § 1101; Dec. Dig. ⊂⊃364.]

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[3. *Executors and Administrators* ⊂⊃314.]

*Where a judgment is rendered against an administrator, in favor of several distributees, two of whom institute supplementary proceedings against him, it would seem that the property thus reached should go to the moving creditors alone; but this is a matter of no interest to the debtor.

[Ed. Note.—Cited in Ryttenberg v. Keels, 39 S. C. 213, 17 S. E. 441.

For other cases, see Executors and Administrators, Cent. Dig. § 927; Dec. Dig. ⊂⊃314.]

Before Wallace, J., Spartanburg, July, 1882.

The opinion fully states the case.

Messrs. Bobo & Carlisle, for appellant.

Messrs. Evins, Bomar & Simpson, contra.

March 8th, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. These cases were heard together. They were proceedings supplementary to execution against one C. L. Casey. The cases were referred to J. K. Jennings, Esq., as special referee, before whom Casey was ordered to answer concerning his property. He did so answer, and the referee reported the following state of facts:

The said Casey was administrator de bonis non of the estate of one James Rhodes, deceased, and upon final settlement of the estate in the office of the Probate Court (1875), the Judge of Probate decreed against him certain sums, in favor of the distributees, as follows: To James Rhodes, $109.20; to William Rhodes, $109.20; to Nancy Rhodes, $109.20; to B. F. Rhodes, $164.02; to Montgomery Rhodes, $164.02; to Sarah Rhodes, $164.02; to Jane Casey and J. R. Casey, $111.91; to the estate of Nancy Casey, $141.12; and gave to said distributees, respectively, leave to issue execution for the same against the said administrator, C. L. Casey. In the settlement, the Judge of Probate charged the administrator with certain good debts due the intestate, and, to his relief, directed the distributees to take said debts in part payment of said judgments in their favor. Among these notes was one on A. C. Sherbert and James Nesbitt for $187.94. On August 3d, 1876, after the aforesaid settlement and judgments against Casey, the administrator, he recovered judgment upon the Nesbitt note against the executor, L. Twitty, for $192, besides interest and costs;

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and this is the judgment *which is the matter of contention. Casey, the administrator, is insolvent, and one of the sureties upon his administration bond (Tolleson) has been discharged in bankruptcy.

Under these circumstances, two of the distributees, in whose favor judgments were rendered in the Court of Probate, viz.: J. M. Rhodes and Sarah Rhodes, had their executions against him returned "unsatisfied," and commenced these supplementary proceedings to have the said judgment standing in Casey's favor against Twitty, executor, paid to them, in satisfaction pro tanto of their judgments against Casey. The referee reported in favor of the plaintiffs, that they are entitled to an order directing Twitty to pay to them the judgment in favor of Casey, their debtor. Upon exceptions, Judge Wallace sustained the report; and from his judgment Casey appeals to this court upon the following exceptions: Because it is most respectfully submitted the Circuit judge erred: 1. In not sustaining the exceptions of appellant to the report of the referee. 2. In passing a final order in the case, after it had been docketed for a hearing. 3. In ordering appellant to pay to respondents money which has never been in his hands, and which, if paid to appellant, would be held by him in a fiduciary capacity. 4. In ordering respondent (appellant) to pay money in his hands as administrator, which he has never refused to apply in due course of administration. 5. In granting the order herein under the facts and circumstances of the case. 6. In refusing to dismiss the proceedings.

If the judgments of plaintiffs had been rendered against Casey individually, and not as administrator, and his judgment against Twitty, executor, had also been recovered by him in his own name, and not as administrator, there could not possibly be the least doubt of the propriety of the order, under section 317 of the code, part of the chapter concerning "proceedings supplementary to the execution," which provides that "the judge may order any property of the judgment debtor, not exempt from execution, in the hands of either himself or of any other person, or due to the judgment debtor, to be

applied towards the satisfaction of the judgment," &c. But it is contended, in the first place, that the judgments of plaintiffs were not recovered against Casey individually, but as administrator of the estate of Rhodes,

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and, *therefore, their tenor should be payable de bonis testatoris, and not de bonis propriis. We think this is error. A judgment recovered against an administrator, on final settlement of the estate of his intestate, is a judgment against him individually. The words "as administrator" only indicate the matter out of which the judgment arose and are merely "descriptio personæ." Ford v. Administrators of Rouse, Rice 222; De La Howe v. Harper, 5 S. C. 470. In the case from Rice, Judge O'Neall, after referring to the different modes of establishing a devastavit, says: "The only other mode of reaching him (an administrator) personally, is by an account before the ordinary or in equity, preparatory to a suit on his bond."

It is also contended that the judgment against Twitty, executor, is due to Casey in his fiduciary character of administrator, and therefore does not come within the provision of the code above cited; that the judgment is not really "the property of Casey, the debtor," but of the estate of his intestate, Rhodes. This may be so in appearance, but it is not so in reality. As the note originally belonged to the estate, Casey sued and recovered upon it as administrator, but he was charged with it in the final settlement, and it became absolutely his own property, subject to a strong equity that it should be paid to the distributees of the estate, whose judgments, at least in part, were based upon it.

The matter of greatest difficulty in the case, is, to whom should the proceeds of the judgment be paid—to all the distributees on their shares pro rata, or only to the two who instituted the proceedings; and we suppose that must depend somewhat upon the manner in which the executions were issued. We are not informed whether they were issued separately, or following the decree, collectively in one process; but we incline to think that the judgments and executions may properly be regarded as separate, and the proceeds should go to those whose vigilance made the discovery and whose activity instituted the proceedings. At all events the appellant has no interest in that question.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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20 S. C. *495

*ACKER v. COUNTY OF ANDERSON.

(November Term, 1883.)

[1. *Bridges* ⇐41.]

A county is not responsible for injuries to a mule and buggy, caused by the mule taking fright at a placard placed on a public bridge without the knowledge of the county commissioners, and removed by them so soon as it was brought to their attention.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. § 87; Dec. Dig. ⇐41.]

[2. *Bridges* ⇐41.]

Doubted, whether the county could have been held liable, even if the commissioners had allowed the placard to be posted, as, under the statute, action is given against the county for injuries only "through a defect in the repair of a highway, causeway or bridge."

[Ed. Note.—Cited in Chick v. Newberry and Union Counties, 27 S. C. 425, 3 S. E. 787; Mason v. County of Spartanburg, 40 S. C. 393, 19 S. E. 15, 42 Am. St. Rep. 887; Dunn v. Town of Barnwell, 43 S. C. 402, 21 S. E. 315, 49 Am. St. Rep. 843; Bryant v. City Council of Orangeburg, 70 S. C. 143, 49 S. E. 229; Parish v. Town of Yorkville, 96 S. C. 26, 79 S. E. 635.

For other cases, see Bridges, Cent. Dig. §§ 54, 80, 81, 87; Dec. Dig. ⇐41.]

[3. *Trial* ⇐256.]

The judge having charged upon the question of contributory negligence, his failure to state the doctrine more fully than he did, cannot be considered as error, no request so to charge having been made and the omission not being brought at the time to the judge's attention.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628–641; Dec. Dig. ⇐256.]

[4. *Trial* ⇐194.]

In his charge to the jury, the trial judge said: "Would a prudent man have driven his mule across the bridge with two ladies in his buggy, with the sign staring him in the face? Would a man of ordinary prudence have driven, or led, as Mr. B. said he did?" *Held*, not a charge on the facts within the meaning of the constitutional inhibition. Article IV., § 26.

[Ed. Note.—Cited in State v. Norton, 28 S. C. 577, 6 S. E. 820; MaGill v. County of Lancaster, 39 S. C. 32, 17 S. E. 507; Norris v. Clinkscales, 47 S. C. 513, 25 S. E. 797.

For other cases, see Trial, Cent. Dig. § 466; Dec. Dig. ⇐194.]

[This case is also cited in Walker v. Chester County, 40 S. C. 344, 18 S. E. 936, as to application of the doctrine of contributory negligence, and in Brown v. Laurens County, 38 S. C. 283, 17 S. E. 21, as to facts, and in Blakely v. Laurens County, 55 S. C. 426, 33 S. E. 503, and distinguished therefrom.]

Before Aldrich, J., Anderson, February, 1882.

Action by Joshua Acker against the county of Anderson. The charge to the jury was as follows:

The legislation on which the plaintiff relies to support his action is good law. It makes the taxpayers mutual insurers for the protection of persons and property. This is right. If injury is done to the citizen by the carelessness, negligence or ignorance of its officers, whom the people have elected to perform the duties required by law, the whole body of the people who elected him should be held responsible for his acts.

The first question you will have to consider is, Was this sign or advertisement a public inconvenience, and did the county commissioners know not only of its existence

but of its tendency to frighten horses and mules passing on the bridge? Second. Did they have it removed as soon as it came to their knowledge? The commissioners are bound by law to keep the bridge in repair. Was it safe?

There is a feature in this case you are

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bound to consider before *you make the county liable: Did the plaintiff by his own negligence contribute to this accident? Would a prudent man have driven his mule across the bridge, with two ladies in his buggy, with the sign staring him in the face? If you conclude that this plaintiff contributed by his own negligence to the accident, he cannot recover. Would a man of ordinary prudence have driven, or led, across the bridge, as Mr. Brazeale said he did?

You will bear in mind that the commissioners cannot keep a guard at each bridge to prevent ingenious persons from painting their signs and placards on the bridges spanning the streams of the county. They are not insurers against accident. Their duty is to keep the highways and bridges in repair so as to facilitate travel and commerce. If the bridge was in good repair, and the placard not sufficient to frighten good work animals in harness, the county has done all it was required to do. Bridges are not to be constructed so as to make them safe against vicious, fractious and obstinate horses and mules, but to secure safe travel for well-broken animals. If you conclude this "force-pump" placard was a nuisance well calculated to scare horses; that it was not removed when the county commissioners had it brought to their notice, and that the plaintiff did not by his own negligence and imprudence contribute to the accident, then you will determine what damage he has sustained and render your verdict accordingly.

As to all other matters, the opinion fully states the case.

Mr. J. C. C. Featherston, for appellant.
Mr. B. F. Whitner, contra.

March 8th, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action against the county of Anderson for damages to the plaintiff, in attempting to cross a public bridge over Rocky river, in said county. It seems that, in October, 1881, the plaintiff, with his daughter and granddaughter, in a buggy, was crossing the bridge when the mule drawing the buggy shied at an advertisement of a "force-pump," in large black letters, posted on the bridge. The

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mule *backed the buggy towards the edge of the bridge and the plaintiff and his daughter managed to get out, but, striking the railing of the bridge, the railing gave away, and the mule and buggy, with the granddaughter, went over and fell eighteen or twenty feet. The buggy was broken to pieces, and the mule so crippled that he died in a day or two. The complaint charged that the injury was caused by the unlawful and negligent act of the officers of the county, in permitting the placard to be placed and to remain posted upon the bridge, and in negligently failing to repair the defects in the railing of the bridge—claiming damage to the extent of $300. The answer denied all the material allegations of the complaint.

The cause came on for trial, and under the charge of Judge Aldrich, the jury found a verdict for the defendant. The plaintiff appeals to this court upon the following exceptions: "1. Because it was error for his Honor to comment upon the facts by saying, 'Would a prudent man have driven his mule across the bridge with two ladies in his buggy, with the sign staring him in the face? If you conclude that the plaintiff contributed by his own negligence to the accident he cannot recover. Would a man of ordinary prudence have driven or led across the bridge, as Mr. Brazeale did?' 2. That it was error in his Honor to charge the proposition of contributory negligence when it was not charged in the answer, nor argued, and when under such general denial of negligence, evidence of contributory negligence was not admissible. 3. That if his Honor had the right to charge, he ought to have charged the whole of the doctrine and not a part thereof, and it was error to charge 'That if you think the plaintiff acted imprudently in driving his buggy across the bridge, instead of leading his mule, then the doctrine of contributory negligence will apply,' without charging further that the negligence on the part of the plaintiff to prevent a recovery must have been the immediate cooperative cause of the injury complained of. 4. That it was error on the part of his Honor to refuse the motion for a new trial when there was no evidence of contributory negligence, and, in fact, no evidence to support the verdict."

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*By the act of 1874, re-enacted in the general statutes as section 1087, it is provided that "Any person who shall receive bodily injury or damage in his person or property through a defect in the repair of a highway, causeway or bridge, may recover, in an action against the county, the amount of damages fixed by the finding of a jury," &c. This action was brought under this authority, and the only question was, whether the plaintiff's injury was received "through a defect in the repair" of Rocky river bridge. It appeared that the county commissioners had nothing to do with putting the placard on the bridge, which was placed there as a public place by some enterprising business man, intent on advertising the merits of the "force-pump," and that as soon as it was

brought to their attention they had it taken down. If, therefore, any responsibility as to consequences arose out of the placard being on the bridge, it would seem not to attach to the county.

Even if the commissioners had allowed it to be placed there, it is more than doubtful whether the county could have been made liable. The only matter for which the act gives an action against the county is "a defect in the repair of a highway, causeway or bridge." If there was no defect in this bridge, there was no right of action against the county, and whether there was such a defect was a question of fact, which was submitted to the jury, upon what we must assume to have been a fair charge, as no complaint is made here on that point. The jury had to decide that there was a defect in the bridge before the question of contributory negligence could arise. It may be that they came to their conclusion on the main point, as to the alleged defect in the bridge; and, if so, the secondary question of contributory negligence had nothing whatever to do with the case.

But, as the jury may possibly have reached the question of contributory negligence, we will consider it. All the exceptions relate to this subject. The second is abandoned. The third insists that the judge should have charged the whole doctrine, but he omitted to tell the jury that negligence on the part of the plaintiff, to be considered contributory, must be the immediate and co-operative cause of the injury complained of. We

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*do not see how the omission complained of could affect the case, but it is enough to say there was no request to charge, and, so far as we can discover from the "Case," the alleged omission was in no way brought to the attention of the judge at the trial. In such case a mere omission to charge cannot be considered error. Sullivan v. Jones, 14 S. C. 565; Hogg v. Pinckney, 16 S. C. 387.

The first exception complains that the judge not only charged upon the subject of contributory negligence, but commented on the evidence, and, in doing so, exceeded his constitutional powers in saying, "Would a prudent man have driven his mule across the bridge with two ladies in his buggy, with that sign staring him in the face? Would a man of ordinary prudence have driven or led, as Mr. Brazeale did?" In order to make his charge intelligible, it is necessary for a Circuit judge, in charging the jury, to make some reference to the facts of the case; but it is extremely difficult, if not impossible, to define with precision the extent to which he may go. We do not see that the interrogatories of the judge in this case were stronger than those put by the judge in Lynn v. Thomson, 17 S. C. 137, in reference to which the chief justice said: "It is difficult to lay down an inflexible rule, by the application of which it can be determined in any case whether section 26, article IV. of the constitution, has been violated. A clear violation is where the judge decides a question of fact about which there is dispute, and so instructs the jury; but where there is no dispute as to the immediate fact testified to, and the question is as to the effect of such fact, it being susceptible of one or more inferences, we do not see that it would be an invasion of the province of the jury for the judge to point out to them the different conclusions which may be drawn, and the circumstances which might incline them to believe the one or the other, reserving his own opinion. We do not know, nor can we say, that the presiding judge in this case intended to do more than this by the question which he propounded to the jury," &c.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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20 S. C. *500

*JOHNSON v. FRAZEE.

(November Term, 1883.)

[1. *Mechanics' Liens* ⇨265.]

In proceedings to enforce a mechanics' lien, the petition was filed in court and an order obtained requiring defendant to appear and answer, which, together with the petition, was served upon defendant. *Held*, that the proceeding was regulated by a special statute and not by the code, that therefore defendant was properly in court, a summons not being necessary. Gen. Stat., § 2363.

[Ed. Note.—Cited in Oliver v. Fowler, 22 S. C. 540; Tenney v. Anderson Water, Light & Power Co., 67 S. C. 16, 45 S. E. 111; Metz v. Critcher, 83 S. C. 399, 65 S. E. 394.

For other cases, see Mechanics' Liens, Cent. Dig. § 487; Dec. Dig. ⇨265.]

[2. *Mechanics' Liens* ⇨302.]

In such proceeding it was error to give a personal judgment against defendant for any deficiency that might remain after a sale of the property covered by the lien.

[Ed. Note.—Cited in Metz v. Critcher, 83 S. C. 401, 65 S. E. 394.

For other cases, see Mechanics' Liens, Cent. Dig. § 627; Dec. Dig. ⇨302.]

[3. *Appeal and Error* ⇨1022.]

Findings of fact by master, concurred in by the Circuit judge, approved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. ⇨1022.]

[4. *Appeal and Error* ⇨273.]

An exception to a Circuit decree alleging error "in overruling exceptions to master's report," alleges no specific error and cannot be considered.

[Ed. Note.—Cited in Levi v. Blackwell, 35 S. C. 514, 15 S. E. 243.

For other cases, see Appeal and Error, Cent. Dig. § 1620; Dec. Dig. ⇨273.]

Before Hudson, J., Richland, April, 1883.

This case came up on appeal upon the following exceptions to the Circuit decree:

1. "Because his Honor overruled the ex-

ceptions of P. F. Frazee, the respondent, to the master's report, and confirmed the said report.

2. "Because his Honor ruled, and erred in ruling, that this matter was a special proceeding, and not an action, and that no summons need be issued and served in said cause.

3. "Because his Honor erred in holding that the contract between Johnson and Frazee was complied with and fulfilled, when the preponderance of the testimony, in fact, all of it, except the plaintiff's, showed that the contract was not completed.

4. "Because his Honor held that this cause was a special proceeding, yet, in his judgment and decree, gives judgment against Phineas F. Frazee, the respondent, for any deficiency which may arise, with leave for execution to issue—this being the touchstone to ascertain and determine whether it be an action or special proceeding."

Other matters are stated in the opinion.

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*Mr. John Bauskett, for appellant.

Mr. John T. Sloan, Jr., contra.

March 10th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Two questions of law are presented in this appeal, to wit: 1st. Whether, in the enforcement of a mechanics' lien under the statute, the owner of the property may be brought into court by an order based upon the petition of the creditor, or is a summons necessary? 2d. Whether judgment may be given for the excess of the claim in the event that the property fails to pay the debt.

The sections of the statute applicable to this subject are found in general statutes, pages 669 and 670, sections 2356, 2359 and 2363. The first provides "that the lien may be enforced by petition to the Court of Common Pleas for the county where the building or structure is situated. The petition may be filed in term, or in the clerk's office in vacation, and the date of the filing shall be deemed the commencement of the suit." The second, that "the petition may be served with the summons or filed with the clerk, and shall be returned and entered as other civil actions." And the third, "that the court in which the petition is entered shall order notice to be given to the owner of the building or structure that he may appear and answer thereto at a certain day in the same term, or at the next term, by serving him with an attested copy of the petition, with the order of the court thereon, fourteen days, at least, before the time assigned for the hearing; and the court shall also order notice of the filing of the petition to be given to all creditors who have a lien of the same kind upon the same estate by serving them with a copy of the last-mentioned order in like manner."

The proceeding below was commenced by petition, upon the reading of which, and it appearing by the certificate of the clerk of the court for Richland county that said petition had been filed in his office, Judge Kershaw, in pursuance of the provisions of the last section of the act above, ordered that the appellant, Frazee, be served with a copy

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thereof, and also with a copy of *his order, and that he do appear and answer the same on November 14th, 1882, "provided the said court is in session, and, if not, then on the first day of the next term of the Court of Common Pleas to be holden for the county of Richland, on the Monday after the fourth Monday of March, 1883."

The defendant, Frazee, in obedience to this order, appeared and answered, submitting, with other defenses, that the action had been improperly brought, as no summons had been issued, and that the case should have been commenced by issuing a summons with the petition, and should have been returned and docketed by the clerk as any other civil case. The argument of the appellant is, that this proceeding is a civil action, and the mode of proceeding therein must be the same as in other civil actions under the code, except that the statement of the cause of action is presented by petition instead of by complaint. Whether the proceeding is to be styled a civil action or a special proceeding makes but little difference; whatever it may be, it is governed by the act which provides it, and not by the code. It is a statutory proceeding intended to enforce a specific statutory right, and it is apropriate only where that right is in question. Its character, nature and mode of procedure, therefore, depend upon the act which affords it. The sections of this act applicable to the question have been stated above.

No doubt, had section 2359 been followed, and, accordingly, had the petition been served with a summons instead of being filed in the clerk's office and an order of notice obtained, as was done in this case, the proceeding would have been valid and unobjectionable; but this mode is not imperative or exclusive; if so, section 2363 is a nullity. We can see no reason why section 2363 should apply only in cases where the proceeding is, in the first instance, against the contractor, and it becomes important to make the owner a party, as contended by appellant. There is certainly nothing in the language of the section which confines it to such cases, and there can be no reason peculiar to such a case why the owner should be brought in under a fourteen days' notice by order from the court then, and by a twenty days' summons in other cases when he is the only defendant. Section 2363 is explicit, that the

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court in which the petition is filed *should order notice to be given to the owner.

* * * This has been done in this case: the party has appeared and answered, and we see no legal necessity that a summons should have issued also.

We think there was error in so much of the judgment below as allowed the respondent to have execution for any deficiency that might exist after applying the proceeds of sale of the land. The extent of the remedy afforded by the act, is to enforce the lien upon the property covered. There is no provision for judgment for the excess, if any, to be rendered in the statutory proceeding provided. We do not feel authorized to disturb the findings of fact below. They are not without testimony. Exception one alleges no specific error, and is in conflict with rule V. of this court, and therefore cannot be considered.

It is the judgment of this court that the judgment below be modified so as to reverse so much thereof as allows execution to the appellant for any deficiency in his claim after the application of the proceeds of sale of the land. In all other respects the judgment below is affirmed.

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20 S. C. 503

BURCH v. BRANTLEY.

(November Term, 1883.)

[1. *Fraudulent Conveyances* ⟸264.]

In action by a purchaser at sheriff's sale to recover the land from the defendants, who are in possession under a prior deed from the judgment-debtor, alleged in the complaint to have been executed in fraud of creditors, it is not necessary that the complaint should allege a return of nulla bona on the execution.

[Ed. Note.—Cited in State v. Foot, 27 S. C. 345, 3 S. E. 546; Compton v. Patterson, 28 S. C. 154, 5 S. E. 470.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 768; Dec. Dig. ⟸264.]

[2. *Fraudulent Conveyances* ⟸286.]

The charge of fraud renders admissible all testimony necessary to sustain it.

[Ed. Note.—Cited in Roddey v. Erwin, 31 S. C. 47, 9 S. E. 729.

For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 822–825, 827–834, 863–866; Dec. Dig. ⟸286.]

[3. *Fraudulent Conveyances* ⟸223.]

A purchaser at sheriff's sale may sue for the recovery of the land purchased, assailing for fraud a prior conveyance by the judgment-debtor, and in the same action ask judgment that the prior deed be set aside.

[Ed. Note.—Cited in Miller v. Hughes, 33 S. C. 542, 12 S. E. 419; Bank of Charleston v. Dowling, 45 S. C. 683, 23 S. E. 982; Greig & Jones v. Rice, 66 S. C. 174, 181, 44 S. E. 729.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 651; Dec. Dig. ⟸223.]

Before Fraser, J., Chesterfield, May, 1883.

This was an action by Henrietta Burch against W. P. Brantley, Eliza J. Brantley, John H. Brantley and W. B. Hancock, commenced in May, 1881. Plaintiff claimed as

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a purchaser at *sheriff's sale on April 5th, 1880, under execution of Carhart & Bro. v. W. P. Brantley. Other matters are stated in the opinion.

The order overruling the demurrer was as follows:

The pleadings in this case having been read, the defendants interposed an oral demurrer, that the complaint does not state facts sufficient to constitute a cause of action. The fact of a deed for the land in dispute, made by W. P. Brantley to W. B. Hancock, while stated with an "if," is certainly assumed in the complaint, and relief is demanded based on that fact. That deed can be assailed by the creditor for fraud only after a return of nulla bona, which has not been alleged. The purchaser at sheriff's sale, under the judgment and execution, can be in no better position, if, indeed, such a purchaser takes anything at such a sale, when the legal title before judgment has passed out of the debtor.

It is therefore ordered, that the complaint be dismissed with costs, without prejudice to any future proceeding the plaintiff may be advised to take in this matter.

Plaintiff appealed and asked for a reversal of this order, upon the following grounds:

1. Because his Honor, the presiding judge, erred in dismissing the complaint.

2. Because his Honor, the presiding judge, erred in holding that the complaint did not state facts sufficient to constitute a cause of action.

3. Because his Honor erred in holding that the complaint was in the nature of a creditor's bill, when it was a complaint by one not a creditor of any of the defendants, to recover possession of real estate purchased at sheriff's sale.

4. Because plaintiff had no control of the execution under which she purchased the land at sheriff's sale, as creditor of the defendant Brantley, or otherwise, and could not proceed in that capacity, and his Honor should have so held.

5. His Honor erred in holding that the plaintiff should have alleged a nulla bona return on the execution under which the land was sold, when sheriff had sold the land

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under said execu*tion as the land of W. P. Brantley, and plaintiff only claims under said deed.

6. Because his Honor erred in holding that plaintiff admitted that the legal title to said land was in W. B. Hancock, trustee, when complaint alleges that plaintiff has legal title to said land, and that the deed which defendants say was made to W. B. Hancock, if ever made, was null and void.

7. Because his Honor erred in holding that a purchaser at sheriff's sale, in an action to recover the real estate so purchased, could

not attack a fraudulent deed made by judgment-debtor to third person, when said deed is set up in defendants' answer, without plaintiff alleges in the complaint that there has been a return of nulla bona upon the execution.

8. His Honor erred in holding that the plaintiff, a purchaser at sheriff's sale, could not, in the same complaint, ask for the possession of the land so purchased, and that a fraudulent deed from the judgment-debtor to a third person, in trust for the wife of said debtor, be declared void.

9. His Honor erred in holding that a purchaser at sheriff's sale, for valuable consideration, without notice, is in no better position to attack a fraudulent deed made by judgment-debtor than is the judgment-creditor.

Messrs. Caston & McIver and E. J. Kennedy, for appellant.

1. The paramount question in this case seems to be, Can the plaintiff, a purchaser at sheriff's sale, without notice, in an action to recover the land so purchased, ask that a conveyance made by the judgment-creditor, just before judgment obtained, be set aside and declared to be null and void under the Stat. 13 Eliz. (Gen. Stat. of 1872, 425)? Under the practice prior to the code there seems to be no doubt that this could be done. See 2 Bailey 324; 1 Hill 380; 9 Rich. 106; 14 Rich. 95. This is certainly the present practice as to personal property fraudulently disposed of. 17 S. C. 288, and cases there cited.

2. There seems to be no change made in the practice by the code. See 3 S. C. 577; 13 S. C. 379. The case of Verner v. Downs, 13 S. C. 449, is not in conflict with this posi-

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tion, for *that "action is in the nature of a creditor's bill," in which class of cases evidence of a nulla bona return must be had to entitle the plaintiff to demand the aid of a court of equity. This is not a creditor's bill, but an action by a purchaser at sheriff's sale to recover possession of land. So, also, is distinguished Ragsdale v. Holmes, 1 S. C. 91. This has not been changed by the decision in the case of Suber v. Chandler, 18 S. C. 526, which had reference only to the time from which the currency of the statute of limitations would begin.

3. The authorities first above cited, we conclude, sustain the proposition, that it is not necessary, in a case of this kind, to allege a nulla bona return. And we submit, that these cases are founded on sound reason. The sheriff could not make a return of nulla bona on the execution under which this land was sold, for the land was there, in the possession and use of the defendant Brantley, the sheriff had no notice of Hancock's claim, and nothing was in the way except a deed, of which neither sheriff, plaintiff nor execution-creditor had notice, and which the statute says is null and void, which means absolutely of no effect. Webs. Unab. Dict. Besides, the case of Suber v. Chandler, supra, certainly does not require nulla bona to be alleged; if anything, it only requires that it be shown.

4. Henrietta Burch, the plaintiff herein, being an innocent purchaser at sheriff's sale, without notice, is not affected by the equities existing between Carhart & Bro., the execution-creditors, and the defendant Brantley.

5. The plaintiff was certainly entitled to the interest of W. P. Brantley, and, even if there was a trust deed—if Brantley had reduced land to possession—he had a leviable interest in it. 11 S. C. 71.

Mr. C. P. Townsend, contra.

March 10th, 1874. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, appellant, brought the action below to recover a tract of land purchased at sheriff's sale, under execution against the defendant W. P. Brantley. The complaint alleged that defendants were in possession,

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as she was *informed and believed, under a deed from W. P. Brantley to W. Hancock, as trustee, for the use of Eliza Brantley, which deed she alleges was void, because made by the said W. P. Brantley for the purpose of defrauding his creditors, under the execution of one of whom she purchased, and she prayed that the land be surrendered, that the said deed to W. B. Hancock be declared null and void, and that she recover $1,000 damages for the detention. The answer of defendants admitted that they were in possession under the deed to Hancock, which they claimed to be a good and valid deed, of which plaintiff had notice when she purchased, and it denied the other allegations in the complaint.

Upon the call of the case for trial, the defendants interposed an oral demurrer: "That the complaint did not state facts sufficient to constitute a cause of action," which his Honor T. B. Fraser, presiding, sustained, on the ground that the deed to Hancock relied on by defendants, could not be assailed by a creditor for fraud until after a return of nulla bona, which was not alleged in the complaint, and that the purchaser at sheriff's sale, under judgment and execution, stood in no better position than the creditor.

The only legal question involved in the appeal is, whether the failure to allege a return of nulla bona in the complaint in this case, before the land in question was levied and sold, was fatal—leaving the facts insufficient to constitute a cause of action, and therefore obnoxious to the oral demurrer interposed. We know of no case in which it has been held that it is necessary

to allege in the complaint a return of nulla bona before a creditor can assail a conveyance of his debtor for fraud. True, to vacate such conveyance, fraud must be alleged and proved, but a return of nulla bona constitutes no part of the fraud. It is only evidence thereof, which, with other facts, may show the fraud. It is one of the probative facts by which the fraud may be developed, but it is no part of the essence of the fraud, and, consequently, not necessary to be alleged. The allegation that the deed was founded in fraud, opens the door to the introduction of all testimony within the possession of the assailing party bearing upon that question, and such testimony may be

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adduced without any specific allega*tion of such facts. The charge of fraud renders admissible all testimony necessary to sustain it.

There is nothing, either in Verner v. Downs, 13 S. C. 449, or Suber v. Chandler, 18 S. C. 526, in conflict with these views. In Verner v. Downs the court held, "that a judgment-creditor is not entitled to a decree adjudging a deed of conveyance, made by his debtor, to be fraudulent until there has been return of nulla bona to an execution issued upon the judgment," and there being no evidence in the case of such return, and the plaintiff not claiming that such evidence could be supplied, the complaint was dismissed. It does not appear that the allegation of a return of nulla bona was made in the complaint, nor was the complaint dismissed because of such omission; but, on the contrary, it was dismissed because there was no testimony to that fact at the trial; and, further, because there was no offer to supply the deficient testimony. The case evidently turned on deficiency of testimony at the trial, and not deficiency of allegations in the complaint.

Neither did the case of Suber v. Chandler, rule anything as to the necessity of alleging a return of nulla bona in the complaint. The court said in that case: "That if, at the time of the execution of the deed, a wrong was intended, the fraud is positive and active, and attaches to the act at that moment. If, however, no wrong was then intended, and the conveyance becomes injurious to creditors afterwards, because at some future time the grantor's property has failed to meet the just demands of his creditors, whose claims existed at the time of the deed, then a passive and legal fraud is developed, which, attaching to the deed, renders it void, not from the beginning, but at that moment. * * * Hence, it has been often held, that a creditor, before attempting to assail the conveyance of his debtor, must not simply be apparently unable to secure payment otherwise, but must absolutely fail to do so after exhausting all legal effort to that end, by judicially establishing his debt and having a return of nulla bona by the sheriff upon an execution issued thereon."

We think it was error to dismiss the complaint on the ground suggested. We do not understand that the Circuit judge held that a purchaser at sheriff's sale, in an action to recover the possession of a tract of land

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bought at such sale, could not assail *for fraud a conveyance of the judgment-debtor, executed before the sale by the debtor, and in the same proceeding ask judgment that said deed be set aside and vacated. The practice of contesting deeds of this character in this way is of old standing, and was frequently pursued under the former system. Lowry v. Pinson, 2 Bailey 324 [23 Am. Dec. 140]; Thomas & Ashby v. Jeter & Abney, 1 Hill 380; Smith v. Culbertson, 9 Rich. 106; Richardson v. Rhodus, 14 Rich. 95. And the door to such end has been opened still wider under the code.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

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20 S. C. 509

SULLIVAN & CO. v. SULLIVAN.

(November Term, 1883.)

[1. *Appeal and Error* ⇐757.]

This court cannot consider alleged errors in a charge where the brief does not furnish a copy of the charge or any part of it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. ⇐757.]

[2. *Appeal and Error* ⇐501.]

Errors of a charge alleged in grounds of appeal, but not excepted to as required by the statute and rules of court, are not properly before this court for consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2304, 2930; Dec. Dig. ⇐501.]

[3. *Action* ⇐16.]

The code of procedure has made no material changes in the primary rights of parties or in the causes of action, nor has it given any new redress for wrongs perpetrated; it has only changed the mode by which such redress is reached and applied.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 85–93, 262; Dec. Dig. ⇐16.]

[4. *Pledges* ⇐48.]

In action to recover notes of plaintiff deposited with defendant as collateral security for a debt, which was now paid, the Circuit judge properly refused to charge the jury that the plaintiff could recover nothing except the notes, or if they could not be delivered, their amount and interest—there being evidence that the notes had diminished in value while retained by the defendant.

[Ed. Note.—Cited in Tittle v. Kennedy, 71 S. C. 4, 50 S. E. 544.

For other cases, see Pledges, Cent. Dig. § 117; Dec. Dig. ⇐48.]

[5. *Payment* ⊂⊃63.]

Under a general allegation of payment, evidence may be offered to show an agreement that certain accounts should be received as payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 156; Dec. Dig. ⊂⊃63.]

Before Wallace, J., Greenville, April, 1883.

Action by J. H. Sullivan & Co. against Hewlet Sullivan, commenced December 18th, 1880. Within the required time after the adjournment of the court at which the cause was tried, the defendant served upon the presiding judge and the plaintiffs' attorneys, the following notice: "Please take

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notice that the *defendant in the above action appeals from the order of his Honor, the presiding judge, refusing the motion for a new trial herein, and will renew said motion in the Supreme Court, upon the same grounds moved in said Circuit Court, to wit:" [Here follow the grounds of appeal stated in the opinion.] All other matters necessary to a full understanding of the case, appear in the opinion of this court.

Messrs. Perry & Perry and J. H. Whitner, for appellant.

Messrs. Wells & Orr, contra.

March 10th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiffs, respondents, brought the action below to recover possession of certain notes which they had deposited with defendant, appellant, as collateral security, and also damages for their detention. The complaint alleged that the debt of respondents to appellant, to secure which these notes had been deposited, had been paid, and that a return of said notes, upon demand, had been refused.

On the question of the payment of respondents' debt to appellant, testimony was received (appellant excepting) that appellant had agreed to take in part payment of said indebtedness a store account which respondents held against appellant, which if credited thereon with the other credits would extinguish the same. The judge was requested by defendant's attorney to charge the jury, that the plaintiffs were not entitled to recover in this action anything but the notes claimed, or, if they cannot be delivered, then the amount of said notes and interest. This he declined.

The jury found for the plaintiffs the notes described in the pleadings and $150 damages. The admission of the alleged incompetent testimony above referred to, with several other grounds, constitute the basis of the appeal. These grounds are as follows: "First. Because his Honor erred in charging the jury that damages might be found for the plaintiffs for any inconvenience which they suffered by the detention of

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the *property (notes) by the defendant, the value of which was appreciable or could be estimated in money. Second. Because it appeared from the evidence of the plaintiffs that the notes sued for were as valuable as at the time of the alleged conversion, and would be returned if the verdict was for the plaintiffs, and, therefore, only nominal damages could be recovered. And, Third. Because the damages were excessive."

The charge of the judge is not set forth either in whole or in part in the brief, and the portion of it referred to in the grounds of appeal, and upon which the appellant bases the greater part of his argument, is not admitted by the respondents; on the contrary, the respondents' argument is addressed to the refusal to charge appellant's request above, which it sustains. Whatever may be the facts of the case, this court is confined to the record. Any other rule would lead to utmost confusion. It does not appear in the record that the judge charged as stated in the first ground of appeal, nor, if he thus charged, does it appear that any exception thereto was served as required by the rules of this court and the act of assembly on the subject of appeals. And, therefore, that ground in full is not fairly before us, except so far as it is involved in the request to charge.

This request denied the right of plaintiffs to recover in this action anything but the notes claimed, or if they could not be delivered, then the amount thereof and interest. The argument of appellant is founded upon section 298 of the code, which provides, "That when damages are recoverable, the plaintiff may recover, if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action," and he contends that before the adoption of the code and under the old forms of action in cases like this, when notes or bills formed the subject of the action, which were solvent and bearing interest, the recovery of the notes with the costs of the action was the extent of plaintiffs' right, except where fraud, malice or special aggravation rendered vindictive or punitive damages proper; that in the absence of such elements last suggested, the plaintiff was confined to the direct pecuniary loss sustained, which, in mere money demands, includes nothing more than the interest and costs, such being the case under the former

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*practice. It is now urged that section 298 of the code remands such cases to the former practice and limits the recovery of damages, as did the law before the new procedure. This position in the main is no doubt correct. The code has made no material changes in the primary rights of parties, or in the causes of actions, nor has it given any

new redress for wrongs perpetrated. It has only changed the mode by which such redress is reached and applied. The rights and remedies (using the term "remedy" in the sense of "redress") are still the same.

But is the other position of appellant correct, to wit: That under the former practice in cases like this, the plaintiff could recover nothing except the notes, or, if they could not be delivered, then their amount and interest; so much so, as to demand that the judge should have charged in this case that proposition as matter of law? The action below was an action for the recovery of personal property and damages for its detention. It was an action in the nature of the old action of trover. It will not be denied that in actions of that kind, under the former practice (as a general rule), damages for detention beyond the property itself could be and were uniformly recovered, such damages being measured by different rules, according to the character of the property and the circumstances of each case. See case of Murdock v. McDowell, 1 Nott & McCord 237 [9 Am. Dec. 684], where the court said: "It has lately been determined by this court in several cases, that a jury cannot give vindictive damages in an action of trover. The value of the property, with such damages as must necessarily be supposed to flow from the conversion, is the true measure. Such, for instance, as the work and labor of negroes; interest on the value of dead property." Buford v. Fannen, 1 Bay (2d edit.) 273 [1 Am. Dec. 615]; Harley v. Platts, 6 Rich. 318; Kid v. Mitchell, 1 Nott & McCord 338 [9 Am. Dec. 702].

It is said, however, that these cases involved property other than a money demand, property the possession and use of which was valuable to the defendant, and to that extent injurious to the plaintiff, and therefore it was proper to apply the value of such possession and use as the measure of damages for the detention, while in the case before the court the property being notes, of which no use could be made, the same measure

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could not be *applied; but, on the contrary, the same rule was the one required, to wit, a recovery of the notes, or their amount with interest. Admitting the principle as a general proposition, that in actions on money demands for the recovery of bills or notes, the evidence of money demands, the measure of damages for the detention in case the said notes cannot be delivered, is the interest, and that the verdict should be for the notes, or their amount and interest; yet this principle is not universal and inflexible: on the contrary, it is subject to that other general rule which is universal, and which applies to all cases sounding in damages, to wit, that the plaintiff is entitled to recover for his direct pecuniary loss flowing from the wrong which he has suffered at the hands of the defendant.

Here there was some evidence that the notes had been diminished in value while in the hands of defendant. Upon one, the Harrison note, the defendant had received $30, and another on the Sullivan Manufacturing Co. was said to be worthless, because not presented and proved before the assignee. Under these circumstances it would have been error for the judge to have charged in the form requested, as one of the alternatives suggested, to wit, the recovery of the notes, would not have been the full measure of plaintiffs' right. He was entitled certainly, in addition to the notes, to the amount collected by the defendant on the Harrison note, and also to damages to the extent of the impaired value, if any, of the Sullivan Manufacturing Co. note, which might have been denied him under the request to charge, if that request had been complied with. We do not know the basis of the verdict. It may be that they found from the evidence that the notes, one or more, had been impaired in value below their face, while in the hands of the defendant and by his negligence. This was a question of fact, with which we have nothing to do. The verdict, while giving to the plaintiff the notes described in the pleadings, may have intended, by the amount of damages given, to put said notes back to the value when the defendant received them. In that view the verdict would be at least substantial justice between the parties, and the judgment should not be therefore hastily disturbed.

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*As to the incompetent testimony on the allegation of payment, see Pom. Rem., § 701; Bank v. Sherman, 33 N. Y. 69. The other grounds involve questions of fact and need not be considered.

It is the judgment of this court that the judgment below be affirmed.

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20 S. C. 514

McCLENDON v. WELLS.

(November Term, 1883.)

[1. *Attachment* ⇐351.]

In an action ex contractu on an attachment bond, the Circuit judge erred in charging the jury that if defendant was actuated by malice in obtaining the attachment with a view to injuring this plaintiff, they could give punitive damages.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1295; Dec. Dig. ⇐351.]

[2. *Attachment* ⇐349.]

And he further erred in instructing the jury that the plaintiff could in such action recover damages for a trespass in seizing and selling the property under a chattel mortgage, which defendant had purchased and thereunder seized the property attached at the instant of the dis-

solution of the attachment—no such cause of action being stated in the complaint.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1259; Dec. Dig. ⟸349.]

[3. *Chattel Mortgages* ⟸296, 297, 300.]

Moreover, being mortgagee after condition broken, defendant committed no trespass in seizing the chattels, and the only remedy of the mortgagor was an action before sale to redeem, or after sale for accounting, and in either case the mortgagor would be required to pay the mortgage debt, and also all other indebtedness to the mortgagee. Reese v. Lyon, ante 17, approved.

[Ed. Note.—Cited in Williams v. Dobson, 26 S. C. 112, 1 S. E. 421; Ex parte Lorenz, 32 S. C. 368, 11 S. E. 206, 17 Am. St. Rep. 862; Jackson v. Merchants' Hotel Ass'n, 37 S. C. 568, 16 S. E. 713; Baum v. Trantham, 42 S. C. 110, 19 S. E. 973, 46 Am. St. Rep. 697; Martin v. Jenkins, 51 S. C. 43, 27 S. E. 947.

For other cases, see Chattel Mortgages, Cent. Dig. §§ 583, 584, 586; Dec. Dig. ⟸296, 297, 300.]

[4. *Chattel Mortgages* ⟸162, 239; *Tender* ⟸[illegible].]

Tender by the mortgagor after condition broken and seizure would not revest title in the mortgagor; besides, a tender of the debt, but not of interest and expenses, was insufficient.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 286, 502; Dec. Dig. ⟸162, 239; Tender, Cent. Dig. § 28; Dec. Dig. ⟸12.]

[5. *Chattel Mortgages* ⟸162.]

The mortgagee had the right, after condition broken, to take peaceable possession of the chattels, wherever found, or, having them then in his possession, to retain them.

[Ed. Note.—Cited in Powell v. Patrick, 64 S. C. 193, 41 S. E. 894.

For other cases, see Chattel Mortgages, Cent. Dig. §§ 286–293; Dec. Dig. ⟸162.]

[6. *Pleading* ⟸382.]

A general denial in a reply does not permit plaintiff to prove an affirmative defense to the counter-claim. The case being remanded, permission was given to plaintiff by this court to amend his reply.

[Ed. Note.—Cited in Nettles v. Marco, 33 S. C. 56, 11 S. E. 595.

For other cases, see Pleading, Cent. Dig. § 1282; Dec. Dig. ⟸382.]

[7. *Evidence* ⟸234.]

Admissions made by the mortgagees, of the amount due on the mortgage, prior to their assignment of it, are admissible in evidence against their assignee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 870; Dec. Dig. ⟸234.]

[8. *Chattel Mortgages* ⟸176.]

[After a rightful seizure of mortgaged chattels for breach of condition, the mortgagor's tender of the debt and costs will not entitle him to maintain an action for damages.]

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 330; Dec. Dig. ⟸176.]

Before Hudson, J., Laurens, September, 1883.

The exceptions and the opinion of this court constitute a full statement of the case. The former were as follows:

1. Because his Honor erred, it is respect-

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fully submitted, in *charging the jury that the defendant was bound to return the property taken under the attachment when said attachment was released, although the defendant, at the time of said release, was the owner of a chattel mortgage of said property with condition broken.

2. Because his Honor erred in charging the jury that the plaintiff could recover the value of the property taken under the attachment, when the property was not sold under the attachment but was sold by the defendant after the release of the attachment by virtue of a power vested before the said release, in him as assignee of a chattel mortgage with condition broken.

3. Because his Honor erred in charging the jury that the plaintiff could recover damages for the loss of the property resulting from a cause other than the attachment, when the allegations of the complaint did not extend to any source of injury outside of the attachment.

4. Because his Honor erred in charging the jury that the plaintiff could recover in this action the proceeds of the sale of the property sold by the defendant under a chattel mortgage with condition broken, on the ground that the plaintiff did not owe the full amount of the debt secured by said mortgage, when it appears that the plaintiff executed the said bond and mortgage to Moore, Quarles & Co., for a greater amount than was actually due for the purpose of defrauding his creditors.

5. Because his Honor erred in admitting as evidence a paper purporting to be a statement made by Moore, Quarles & Co. on the mortgage, when the statement did not refer to this particular mortgage, and when the defendant, the assignee, did not have the opportunity to cross-examine the maker of the statement, and when Quarles, one of the assignors of said bond and mortgage, was dead.

6. Because his Honor erred in charging the jury that the plaintiff could recover on the bond, when the execution and delivery of the bond upon which the action was brought was not proved by any evidence whatsoever.

7. Because his Honor erred in charging the jury that the amount due on the mortgage was already paid.

8. Because his Honor erred in charging the

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jury that the tak*ing and disposing of any property over the amount due on the mortgage, to wit, $85.65, was a trespass, and the defendant was liable in this action for said trespass, when the defendant was not sued as trustee for the surplus.

9. Because his Honor erred in charging the jury that the amount of $85.65 was a good tender when the bond was overdue and the property had been taken under a mortgage

to secure the same, when no cost nor interest was tendered.

10. Because his Honor erred in refusing to charge the jury as requested by defendant's counsel, that the plaintiff coming into a court of justice must show that his title to equity is unmixed with any gross misconduct or negligence of himself or his agents.

11. Because his Honor erred in charging the jury that they could give punitive damages if there was any malice on the part of the plaintiff in attachment.

12. Because his Honor erred in allowing the plaintiff to show partial want of consideration of the said bond and mortgage, when the reply sets up only a general denial.

Messrs. F. P. McGowan and W. H. Martin, for appellant.

Messrs. Ball & Watts, contra.

March 10th, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. On December 3d, 1881, Wells, defendant herein, commenced an action against McClendon, the plaintiff herein, to recover the sum of $205.06, the value of certain goods advanced by one Pope to McClendon, at the request and upon the credit of Wells. At the time of commencing said action, Wells sued out a warrant of attachment, under which the sheriff's deputy, on December 6th, 1881, seized certain chattels, as the property of McClendon, viz., one road wagon, one bay mare, one black mule and about 150 bushels of cotton-seed, which were duly appraised at the sum of $273. On December 12th, 1881, the attorneys of McClendon made a motion before the clerk to dissolve the attachment for irregularity, which motion was refused, and no appeal was taken therefrom.

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*On December 15th, 1881, Wells took an assignment, in writing, from Moore, Quarles & Co., of a note and mortgage given by McClendon to said Moore, Quarles & Co. on November 19th, 1881. The note was for the sum of $500, and was due on the day of its date, and the mortgage given to secure the payment of said note covered all the property seized under the attachment, except the cotton-seed, as well as other property of McClendon. On December 17th, 1881, Wells had the sheriff to release the attachment and paid the costs on the same, and on the same day Wells appointed, in writing, the same deputy who had levied the attachment, his agent, to take possession of the property embraced in the mortgage and dispose of the same according to law. On the same day the deputy delivered the cotton-seed, which, as has been mentioned, was not embraced in the mortgage to McClendon, but retained the other property seized under the attachment, by virtue of his authority as agent of Wells, the assignee of the original mortgagees, Moore, Quarles & Co., and after duly advertising sold the same at public auction for $231, cash. Out of this sum the deputy paid the expenses of keeping the stock and of the sale, and the balance, to wit, the sum of $200.75, was credited on the mortgage. On March 1st, 1882, the action which had been commenced by Wells against McClendon to recover the amount of the account for $205.06, was discontinued on the payment of costs.

The action herein was commenced on September 11th, 1882, and was brought upon the undertaking, which was in the sum of $250, executed by Wells when he sued out the warrant of attachment hereinabove mentioned. The complaint, after setting out the commencement of the original action, the issuing of the warrant of attachment and the execution of said undertaking, alleged: "That the said writ of attachment was illegally issued and obtained; that the suit instituted was never reduced to judgment, but abandoned; that under said writ of attachment property, consisting of mules, horses and wagons, was seized and illegally disposed of, of the value of $800; the condition of the said bond mentioned in paragraph two of this complaint, has been broken to the damage of this plaintiff $1,000." Then, after setting forth that a copy of said bond or under-

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taking was filed with the *complaint as a part thereof, demanded judgment for $1,000 damages and for costs. The answer, after denying all the allegations in the complaint as to the illegality of the attachment, and denying that any property was ever sold under the attachment, set up as a counter-claim the note and mortgage hereinbefore mentioned given by McClendon to Moore, Quarles & Co., and by them assigned to Wells, and claimed judgment for the balance due thereon. The reply of the plaintiff was a general denial of all the allegations of the answer in reference to the counter-claim.

Testimony was offered tending to show that though the note, secured by mortgage, of McClendon to Moore, Quarles & Co. was on its face for $500, yet the amount really due was only $85.65, and while it did not distinctly appear what was the object in giving the note for an amount so much larger than was really due, there were circumstances pointing to the conclusion that McClendon's purpose was to shield his property from his creditors, especially from Wells. It also appeared in evidence that Wells only paid Moore, Quarles & Co. $85.65 for the note when it was assigned to him, though it did not distinctly appear that Wells, when he bought the note, had notice that it was given for a much larger amount than was really due, but the reasonable inference would be, that he must have known it, or at least had very good reason to suspect that such was the fact. It also appeared in evidence that McClendon made a tender to Wells of $85.65, as the

amount due on the note secured by the mortgage, the date of which tender was fixed by one of the witnesses as January 1st, 1882, but a few days before the sale under the mortgage, and of course, therefore, after the breach of the condition of the mortgage.

The Circuit judge charged the jury that the action was on the attachment bond, and "if Wells was actuated by any malice in obtaining the attachment with a view to injuring McClendon, the jury could give punitive damages; but, if there was no malice, then they could give only the actual damages sustained, not exceeding the penalty of the bond. If Pope sold goods of the value of $205.06 to McClendon in the name of Wells, and solely on his credit, it was Wells' debt to Pope and

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McClendon's *debt to Wells, and Wells had a good cause of action. The affidavit upon which the attachment was issued was clearly insufficient, and the action having been discontinued, the attachment was illegal. When Wells released the attachment it was his duty to return the property. The defendant does not ask for the $205.06 he paid Pope for McClendon, but he sets up as a defense a bond and mortgage under which he sold the property. The bond and mortgage were transferred to Wells after due, and if only $85.65 were due to Moore, Quarles & Co., Wells can stand upon no better ground than Moore, Quarles & Co., and McClendon cannot suffer. The taking and selling of McClendon's property by Wells, under the mortgage, for more than he paid Moore, Quarles & Co. for the bond and mortgage, viz., $85.65, was a trespass, for which the defendant was liable in this action. If McClendon offered Wells $85.65, this was a good tender, but it does not do away with the debt. All that Wells was entitled to was $85.65, and this he has been paid out of the proceeds of the sale under the mortgage. That the jury could give the plaintiff the value of the property sold under the mortgage, less the $85.65 Wells paid for the mortgage, subject, however, to the limit of the attachment, which was $250."

In response to an inquiry from the jury, whether the defendant was liable for the $200.75 credited on the mortgage, the Circuit judge charged them, "that the defendant was so liable in this action, and they could give the full value of the property sold under the mortgage, less the $85.65, but not to exceed the penalty of the bond, and that this action terminated Wells' liability under the mortgage."

The defendant's request to charge raised an abstract question which we do not think applies to the case, under the view which we take of it, and therefore need not be specially considered. The defendant appeals on numerous grounds, which need not be set out here, as we do not propose to consider them seriatim, but simply to adjudge what we regard the material questions in the case.

It is conceded that the action in this case was based solely on the undertaking or bond executed by the defendant when he sued out the warrant of attachment. The condition

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of this bond, as *stated in the complaint, was "for the payment to the said W. T. McClendon of all damages, costs and charges which might accrue to the said W. T. McClendon by reason of the issuing and obtaining the writ of attachment aforesaid, and all damages consequent to him from any illegality in obtaining and suing out the same." It was, therefore, not an action of tort to recover damages for trespass, but it was an action ex contractu, based upon the obligation assumed by the defendant in the undertaking, to pay all such damages as the plaintiff might sustain by reason of any illegality in the attachment. The measure of the damages, therefore, which the plaintiff was entitled to recover, was the amount to which he had been injured by the illegal seizure of his property under the attachment. He was entitled to compensation for his losses—not to have the defendant punished for his illegal acts. We think, therefore, that the Circuit judge erred in saying to the jury, that if Wells was actuated by malice in obtaining the attachment with a view to injurying McClendon, they could give punitive damages.

So, too, we think it was error to instruct the jury that the plaintiff could, in this action, recover damages for any alleged trespass in seizing and selling the property under the mortgage. No such cause of action is stated in the complaint, and we are unable to see, under an action on the attachment bond, how the conduct of the defendant in enforcing his mortgage could have properly been considered. But, more than this, Wells having acquired the ownership of the mortgage, stands in the same position as the original mortgagees, and the condition of the mortgage having been broken, he had become the legal owner of the property mortgaged, and entitled to take possession of it wherever he could find it, or retain possession of it, for the purpose of enforcing his rights under the mortgage. Flenniken v. Scruggs, 15 S. C. 88; Reese v. Lyon, ante, p. 17, and the authorities there cited. In doing so, he would not become a trespasser, and liable to an action for damages as such, but the remedy of McClendon, if he felt himself aggrieved, would be to bring an action to redeem the mortgaged property before the sale took place, or after the sale to bring his action for an account of the proceeds of the sale of the mortgaged property, in either of

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*which actions McClendon would be required to pay, not only the amount secured by the mortgage, but also any other debt which might be due by him to Wells. Reese v. Lyon, supra.

The tender of the alleged amount due, even

if it had been of the full sum due, could not have the effect of revesting the title to the mortgaged property in the mortgagor, as it was made after condition broken. Reese v. Lyon, supra, and the authorities therein cited. But, besides this, the mortgage debt was an interest-bearing demand, and no interest was tendered, nor were the costs and expenses attending the seizure of the property tendered, which should have been done, as the alleged tender was made after such seizure and after expenses had been incurred in keeping the mortgaged animals.

Wells being, as we have seen, the legal owner of the mortgaged property, as soon as the condition of the mortgage was broken, was under no obligation to return such property when the attachment was released, for, as such owner, he had a right to take it into his possession wherever he could find it, provided he committed no violation of the criminal law in so doing, and, of course, he had the right to retain possession of it.

Next, as to the plaintiff's defense to the defendant's counterclaim. The rule is, that a general denial only puts in issue such facts as it is necessary for the plaintiff (or the defendant, when he puts in a counter-claim,) to prove in order to establish his cause of action; and if the defendant, or the plaintiff, as the case may be, desires to establish and rely upon any affirmative defense, he must plead such defense, and cannot, under a general denial, be permitted to go into evidence to establish such defense. In this case, all that the defendant was required to prove in order to establish his counter-claim, was the execution of the note and mortgage and the assignment by the original mortgagees to him; and the plaintiff by simply putting in a general denial was not at liberty to introduce evidence to establish the affirmative defense upon which he relied. The note being under seal, of itself imported a consideration, and if the plaintiff desired to show that by fraud, misrepresentation, or otherwise, he was induced to sign a note for a much larger amount than was really due, he should have

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specially pleaded such defense, so as to *advertise the defendant of the issue he would have to meet. Pom. Rem., § 660, p. 692; Lyles v. Bolles, 8 S. C. 258; Pender v. Lancaster, 14 S. C. 25 [37 Am. Rep. 720], MSS. Dec., No. 748, filed June 25th, 1879. But, as the case must go back for a new trial, we think it right, under the liberal provisions of the code, that the plaintiff should have an opportunity, if he so desires of amending his reply so as to set up any affirmative defense he may desire to the counter-claim.

We do not think that the fifth and sixth grounds of appeal can be sustained. The paper objected to was a written admission of the original mortgagees of the amount really due, bearing date prior to the transfer to the defendant, and was, therefore, clearly admissible; and the fact of the death of one of the mortgagees, even if it would have any effect, nowhere appears in the case and cannot be considered.

The sixth ground is based upon a misapprehension evidently. The defendant, by his pleading, admitted the execution of the attachment undertaking, inasmuch as it was alleged in the complaint and not denied in the answer, and, therefore, there was no necessity to introduce any evidence upon that point.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial, with leave to the plaintiff to amend his reply as herein indicated.

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20 S. C. 522

MYERS v. HAM.

(November Term, 1883.)

[1. *Marriage* ⇦16.]

Slaves married before emancipation according to the custom among plantation negroes, and living together as man and wife in 1865, were declared by the act of that year (13 Stat. 269) to be lawfully married; and their children are legitimate.

[Ed. Note.—Cited in Clement v. Riley, 33 S. C. 80, 11 S. E. 699.

For other cases, see Marriage, Cent. Dig. § 7; Dec. Dig. ⇦16.]

[2. *Homestead* ⇦17.]

Where a child of such parents lives with his father, the father is the head of a family within the meaning of the homestead laws.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 18; Dec. Dig. ⇦17.]

[3. *Homestead* ⇦205.]

A judgment debtor's land was sold by the sheriff, without objection or claim of homestead by the debtor, and was purchased by the judgment creditor. *Held*, that such debtor was not estopped from afterwards claiming a homestead in this land.

[Ed. Note.—Cited in Ketchin v. McCarley, 26 S. C. 13, 11 S. E. 1099, 4 Am. St. Rep. 674; Ross v. Bradford, 28 S. C. 72, 5 S. E. 84; Hall v. Woodward, 30 S. C. 575, 9 S. E. 684; Bradford v. Buchanan, 39 S. C. 244, 17 S. E. 501; Gray, Sullivan & Gray v. Putnam, 51 S. C. 101, 28 S. E. 149.

For other cases, see Homestead, Cent. Dig. § 339; Dec. Dig. ⇦205.]

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[4. *Homestead* ⇦29, 210.]

*A debtor cannot maintain an action in the Circuit Court to have a homestead assigned to him. He must follow the statutory proceedings, which are exclusive.

[Ed. Note.—Cited in Carolina Nat. Bank v. Senn, 25 S. C. 583; Bridgers v. Howell, 27 S. C. 431, 3 S. E. 790; Ex parte Brown, 37 S. C. 184, 15 S. E. 926; People's Bank v. Brice, 47 S. C. 137, 24 S. E. 1038; Ex parte Worley, 49 S. C. 57, 26 S. E. 949.

For other cases, see Homestead, Cent. Dig. §§ 37, 391; Dec. Dig. ⇦29, 210.]

Mr. Justice McGowan, concurred in the result.

Before Aldrich, J., Georgetown, March, 1883.

This was an action by Roanoke Myers against P. A. Ham, commenced January 20th, 1883. The case is fully stated in the Circuit decree, which was as follows:

The plaintiff Roanoke, claims that he is the head of a family and entitled to a homestead in a tract of land on Sampit, which was sold by the sheriff, at Georgetown, to satisfy an execution lodged in his office November 7th, 1881, on a judgment in favor of the defendant, Ham, who became the purchaser of the land now claimed as a homestead. The right of action, it is admitted, arose subsequent to the adoption of the constitution of 1868. He prays that the defendant be required to restore the land, to be set off as his homestead, that he pay damages, and that he be restrained from committing waste. The defendant admits that he was the purchaser, but denies that Roanoke was a married man and the head of a family; that the land was levied upon and advertised for sale, that he set up no claim for a homestead, and even if he had been a married man and the head of a family, that he is not now entitled to a homestead.

C. Wilson, J. Davis, S. Smith, and F. Vanderhorst, all negroes, testify that Roanoke and Delia lived together as husband and wife in one house, and were so regarded. Roanoke says he and Delia were man and wife; that they were married according to plantation law, that is, they went to their master, the Rev. Mr. Lance, for a house, and he would not let them have it unless as man and wife. That was the law of the plantation. That he took her for his wife and had four children by her. Cupid is the youngest. He has been living with him "ever since he was big enough to run arter me." He says he had Delia a year before freedom, and that she has not lived with him for ten years.

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*J. Z. McConnell, a white man, says he has known Roanoke twelve or fourteen years; that he was always regarded in the neighborhood as a single man. S. Knight, a mulatto, says Roanoke was regarded as a single man, unmarried; that he heard him tell Delia, in his yard, last February, "Delia, I never married you, and you ain't my wife." The defendant says Roanoke was regarded as a single man, and has lately married another woman. He says, after he bought at sheriff's sale, Roanoke was put out of possession by the trial justice; that he then became his tenant. His rent was the forage made. Defendant was working the trees for turpentine and wanted forage for his stock; Roanoke never said anything about a homestead at the sheriff's sale or since he bought the land. Sheriff Doar, and his deputy, Ward, say Roanoke has been here frequently, before and after the sale, and never said anything about a homestead.

Delia says: "My name is Delia Knight; I did not live with Roanoke as his wife—was never married to him;" that she lived with him two weeks before emancipation, when he threw her things out of the house; that after she went back to him, at the persuasion of her mother, and lived with him a week; then went to stay with him at "Harmony, and was back and forwards; staid with him in Georgetown, but he was not my husband, for I could not live with him; he beat me; then he lived with me in Georgetown three years; he beat me so I could not live with him; I paid the house-rent by washing; I had a child by Woodward, a white soldier; Cupid is the child of Roanoke."

This is, I think, a full statement of the facts. The first question is: Were Roanoke and Delia husband and wife? It is very evident they were not married according to the rites of the church. Were they husband and wife under the act of 1872 (Gen. Stat., § 2030)? In other words, did they, in the terms of the statute, occupy the relation of husband and wife, and were they cohabiting as such and recognizing that relation as still existing at the time of the passage of the act? Now this question is not to be determined by what the neighbors and community considered them; but did Roanoke and Delia undertake and agree to occupy the relation to each other of husband

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and *wife, and were they cohabiting as such? He says she did. She says she did not. I am disposed to think this is not the marriage contemplated by the act of 1872. Certainly Roanoke, by his own act, corroborates, his wife. He did not consider Delia his wife, for he not only said he never married her, but has actually married another woman by the rites of the church. I must, therefore, conclude that these persons are properly described in the words of the act as "persons who have agreed to live in concubinage after their emancipation."

But the learned and ingenious counsel, Mr. Dozier, does not claim that Roanoke is entitled to his homestead because he is the husband of Delia, but that being the father of Cupid, who lives with him, he is the head of a family. And this brings up the question: Can a man claim this beneficent provision of the constitution by virtue of the violation of the moral law and the proprieties of society? If Roanoke and Delia were not husband and wife, Cupid is a bastard—the son of no one. He cannot inherit Roanoke's estate, and it is hard to conceive, in a Christian country, that vice and immorality will be encouraged by a constitutional provision, that a debtor shall escape the payment of an honest debt by interposing his bastard son! It is true I was referred to a case from one of the Western States, where

a woman was awarded her homestead, she having a bastard child, and, therefore, the head of a family. I will not set the example of introducing such a school of morals in this old State of South Carolina. Men shall not be rewarded for violating social duty and decency by my consent.

The defense was forcibly and well argued by Mr. Sessions. The plaintiff set up no claim for homestead either before, at the time, or after the sale, until the filing of the complaint in January, 1883, the sale being made in July, 1882, under an execution lodged in November, 1881. He became the tenant of the defendant, and is now on the land as his tenant. He refers to Agnew v. Adams, Oliver v. White, by the present court, and Manning v. Dove, by the old court, 10 Rich. 395, to show that the plaintiff is estopped. From the views above expressed, it is not necessary to lengthen out this judgment. The complaint is dismissed with costs.

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*Plaintiff appealed upon the following grounds:

1. Because, it is submitted, his Honor misinterpreted the evidence, the clear weight of which showed that Roanoke and Delia were husband and wife, under the terms of the act of 1872.

2. Because, whether they were husband and wife or not, it is admitted that Cupid was their son, that he was recognized as such by Roanoke, and, in fact, has lived with and been supported by Roanoke since his early infancy, and this being the case, the plaintiff was, at the time of the levy and sale, the head of a family, and, therefore, entitled to a homestead under the constitution and laws of this State.

Mr. R. Dozier, for appellant.
Mr. Joseph Sessions, contra.

March 10th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The action below was an action on the equity side of the court, for the recovery and assignment of a homestead in certain lands located in Georgetown county. The lands in question formerly belonged to the appellant, but were sold in 1882 by the sheriff of Georgetown under an execution against the appellant in favor of respondent, who became the purchaser. No claim was made of the homestead at the sale. It is admitted, however, that the debt of appellant to the respondent under which the sale was made was contracted since the constitution of 1868. Since the sale appellant has been a tenant of respondent. The answer denied, first, that appellant was a married man, or the head of a family; and, second, the fact that appellant suffered the land to be sold to respondent without objection, or claim of homestead, was also interposed as a defense by way of estoppel. The circuit judge dismissed the complaint on these two grounds set out in the answer.

While we must affirm the judgment below, yet we do not concur on the grounds upon which it was based. We think that the act of 1865, 13 Stat. 269, as construed in Dav-

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enport v. *Caldwell, 10 S. C. 335, and State v. Whaley, Id. 500, is the act under which the facts here should have been considered, instead of the act of 1872, upon which it seems that the Circuit judge relied. It appears that the appellant and Delia were married before emancipation "according to plantation law." They went to their master and had a house assigned them, and they were thus living together as man and wife a short time as slaves, when the act of 1865 was passed. They had several children. True, they have been living apart for the last ten years, but their condition at the passage of the act of 1865, was as above described, which made their children legitimate, one of whom, the youngest, Cupid, is still living with the appellant, his father. This constitutes him the head of a family. Garaty & Armstrong v. Du Bose, 5 S. C. 499.

Nor do we think that the conduct of the appellant in not forbidding the sale by the sheriff estops him from still claiming his homestead, if he is otherwise entitled thereto. Section 1994, general statutes, while declaring that a homestead shall be exempt, further provides, that it shall be the duty of the sheriff before selling, to have it set off, and if the debtor neglects to nominate an appraiser, the sheriff shall appoint. And in section 1998 is found the following: "No waiver, however solemn, shall defeat the right." Here, the appellant was in possession when the land was sold, he was simply silent, and remained in possession until he was ejected by a trial justice. The purchaser was his creditor, and has not been injured. This is no place for the doctrine of estoppel. Bull v. Rowe, 13 S. C. 370; Douglass v. Craig, 13 S. C. 375.

The judgment, however, must be affirmed on a different ground from those above. The right of homestead is a statutory right, or rather a constitutional right, to be enforced by statutory proceedings. Under the statutes upon the subject of homestead, the Circuit Court is without original jurisdiction therein. Such jurisdiction has not been conferred upon this court either on its law or equity side. The act of force in reference to homesteads prescribes the mode of obtaining it in clear and distinct terms, and provides the necessary machinery to that end, suited to all cases where the right has attached,

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*whether it be in a debtor himself, with mesne or final process impending or otherwise, or whether it be in his widow and chil-

dren. Where a right is provided by statute, to be enforced in a prescribed mode, no other can be resorted to. The mode prescribed is exclusive. Ex parte Lewie, 17 S. C. 156; Howze v. Howze, 2 S. C. 229.

It is the judgment of this court that the judgment of the Circuit Court be affirmed without prejudice, however, to appellant, in any subsequent proceeding he may institute, if so advised, to obtain a homestead.

Mr. Justice McIVER concurred generally, but Mr. Justice McGOWAN only in the result.

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20 S. C. 528

JOHNSON v. DAWKINS.

(November Term, 1883.)

[1. *Executors and Administrators* ⇐537.]

Action upon an administration bond may be prosecuted in the name of the Probate judge, as successor of the ordinary to whom the bond was given. The decision in Kaminer v. Hope, 9 S. C. 253, stated.

[Ed. Note.—Cited in McCorkle v. Williams, 43 S. C. 69, 20 S. E. 744; Barnwell v. Marion, 54 S. C. 227, 32 S. E. 313.

For other cases, see Executors and Administrators, Cent. Dig. § 2536; Dec. Dig. ⇐537.]

[2. *Appeal and Error* ⇐1178.]

This court can only affirm, reverse or modify judgments of the courts below; therefore, in reversing a decree which sustained a demurrer to the complaint, it has no power to grant leave to defendant to answer over.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4617; Dec. Dig. ⇐1178.]

Before Kershaw, J., Union, June, 1883.

This was an action commenced in May, 1883, by David Johnson, Jr., as Judge of Probate for Union county, against Mary P. Dawkins, as executrix of Thomas N. Dawkins, deceased, who had signed as surety the administration bond of William J. Keenan, as administrator of Clinton Wilson, deceased, to recover the balance due upon the judgment rendered against Keenan in an accounting had in the Court of Equity. See Koon v. Munro, 18 S. C. 374. The defendant demurred to the complaint upon grounds which substantially raised the point that the plaintiff could not maintain the action.

The order of the Circuit judge, sustaining this demurrer, was as follows:

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*By the act of 1789, (5 Stat. 110, § 21,) administration bonds were to be made payable to the justices of the county court, or to the ordinary, and might have been sued by any person injured by the breach thereof. Afterwards they were directed to be made payable to the ordinary, and now are required to be drawn payable to the Probate judge, (Gen. Stat., § 1899,) and may be sued as prescribed in section 1885, to wit, "by any person injured by the breach of the condition." The practice formerly was to enter upon the record the names of the persons for whose benefit the suit was brought in the name of the ordinary (Ordinary v. Johnsey, 6 Rich. 355). Only the persons injured by the breach of the bond could recover money in the suit brought upon the bond.

The prayer of this complaint is that the plaintiff recover the money alleged to be due to the estate of the intestate. There is no law authorizing him to receive the money, and no one else appears in the record as a party to whom it could be paid. The plaintiff is not a trustee entitled to recover the money and to disburse it. His only duty in regard to the bond is to take care of and hold it as a record of his office for the benefit of the parties intended to be protected by it. There is no analogy with the former practice, whereby, when the bond was payable to a person having no interest, the obligee was held a trust for the benefit of the real party in interest, to the extent that suit might be brought in his name for the benefit of the real parties, for "it is no longer, consistently with the provisions of the code, possible for one person to sue to the use of another. The persons beneficially interested must themselves bring the action." Pom., § 138; Kaminer v. Hope, 9 S. C. 253.

If the condition of the bond had required the payment of the money demanded to the ordinary, for the benefit of the parties entitled thereto, the action would have been properly brought, for the plaintiff would, in that case, have been the trustee of an express trust, or a person in whose name a contract had been made for the benefit of another authorized by the code to sue. But, by the terms of the bond, the obligors are required to pay to the persons entitled by law, and there is no law entitling the ordinary, or the plaintiff as his successor in office, to re-

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ceive *the money claimed under the bond, and, as has been said, he is only a trustee to hold the bond, and not to recover or receive money under it. If the money should be paid to him, his sureties would not be liable for it (State v. White, 10 Rich. 442), and such payment would not protect the defendant from liability for the same to a party "injured by a breach of the bond." There is no one before the court in this case who could receive the money if its recovery should be adjudged. This is an anomaly, for, should a judgment be rendered against the defendant, who would be entitled to have execution for it?

It is adjudged that the demurrer be sustained and the complaint dismissed, with costs to the defendant.

From this judgment the plaintiff appealed upon the following grounds: "1. For that his Honor held that the Judge of Probate was not the proper person to bring this action. 2. For that his Honor sustained the defendant's demurrer herein. 3. For that his Honor dis-

missed the complaint herein without granting leave to the plaintiff to amend the same by substituting or adding the names of proper parties."

Messrs. Rion & McKissick, for appellant.
Messrs. Shand & Culp, contra.

March 10th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This appeal involves the question, whether an action on an administration bond given to the Probate judge, his successors, &c., can be brought in the name of the Probate judge in office at the time of the action, or should it be brought in the name of the parties entitled to the money? The Circuit judge held, that the parties interested should bring the action, and sustained a demurrer below on that ground, the action having been instituted in the name of the Probate judge.

In sections 132 and 134 of the code is found the law, under the reformed procedure as to parties plaintiff, and the question here presented must be decided by the requirements of these sections. Section 132 pro-

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vides, that every action must be *brought in the name of the real party in interest, except as otherwise provided in section 134. The exception in section 134 is, that executors or administrators, a trustee of an express trust or a person authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted, and it then declares that a trustee of an express trust, within the meaning of the section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another. Now it is apparent that the Probate judge is not the real party in interest in the bond sued on here. True, he is the official to whom the bond is made payable, and he is the legal custodian thereof, but the bond was not executed to secure any interest of his, nor is he entitled to receive any money that may be due thereon, as, by the terms of the bond itself, the funds intended to be secured are to be delivered to such persons respectively as might be entitled to the same by law. And it is equally apparent that the administrator de bonis non of the estate of Clinton Wilson is the real party in interest. Unless, therefore, the plaintiff falls within the exception of section 134, the demurrer was properly sustained.

But does not the plaintiff fall within the exception mentioned? Is he not a trustee of an express trust within the terms and meaning of said section? He is certainly, as successor, the party with whom the contract of defendant's testator was made. It is plain, too, as has been already said, that said contract was not made for his benefit, but was made for the benefit of another. These facts, which are obvious, clearly bring him within the language of the section, and expressly place him within the exception which permits the class mentioned to sue. This conclusion seems inevitable when these sections are construed in themselves, and when interpreted through their own terms.

Let us next examine the authorities and decided cases. We do not think that those cases decided in this State since the abolition of the old Court of Equity, in which it was held that the clerk of the court is the proper person to bring suit on bonds payable to the commissioner in equity, throw any light on the question. The bonds in these cases were money bonds payable to the commissioner, who was authorized and entitled

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to recover *the amounts due, and the right of the clerk to sue, turned upon the construction of the act of assembly, which, upon the destruction of the office of commissioner, transferred the books, records, &c., of said office to the several clerks of the Circuit Courts, and the question in these cases was, whether the act in question gave the clerks power to sue and collect these bonds. The case before us does not involve that question.

Nor is the former practice in suits on bonds given to the old ordinary of much assistance in reaching a correct conclusion. That practice, which was universal, recognized as the only correct mode of suing such bonds that the name of the ordinary should be used as plaintiff, though it was always well understood that the action was brought for the benefit of the persons interested in the estate, and not for the benefit of the ordinary. This practice, however, grew up when the code was unknown and when it was the law that the legal owner could alone sue or be heard. The code has since made a radical change on this subject, and we must look to it, and be governed by its provisions, if any, regardless of the former practice; therefore such practice is unimportant.

The case in our reports which comes nearest to the question, is the case of Kaminer v. Hope, 9 S. C. 253. But that case decides nothing more than that distributees, as the real parties in interest, could sue on such bonds. It did not decide that the Probate judge could not. This decision was in full accord with the provisions of the code, supra, for these provisions in no sense inhibit, either directly or indirectly, or by implication, distributees from bringing such actions. It declares that the real party must sue, except where the contract is made with one for the benefit of another, then the party with whom the contract is made may sue. In such last cases the term "must," as applied to the real party in interest, is expunged, and yet there is no imperative necessity for the Probate judge to sue. The action is not objectionable, however, because he does sue. For the effect of the two sections, when construed to-

gether, is to allow either the real party in interest or the Probate judge to sue. The term "must" being expunged, the substance of the two sections would be as follows: Either the real party in interest or the party

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*with whom a contract is made for another may institute an action on such contract. This is the doctrine, as we understand, which Mr. Pomeroy announces in his work on Remedies and Remedial Rights. And no writer has gone further than Mr. Pomeroy in pressing the code to its extreme limit. Such, too, is the doctrine in New York. People v. Norton, 9 N. Y. 176.

The fact that the Probate judge was not authorized to enforce the judgment is not sufficient argument against these positions. The practice which formerly prevailed in suits on the bond of the sheriff, of allowing a judgment for the penalty to be obtained for the security of all parties interested, and then by suggestion for each to have his particular demand assessed, is a safe and convenient practice on such bonds, much better than to require the real parties in interest to sue, who may be widely separated from each other, and many of them under disabilities of infancy or otherwise. State v. Moses, 18 S. C. 371. The argument of convenience is decidedly in favor of this practice.

The respondent asks in the event that the judgment below is overruled, that he may have leave to answer over. If it was within our power to grant such an order, we would have no hesitation in doing so, as it is manifest that the demurrer was interposed in good faith. But this court is confined to the review of the judgment below with power to affirm, modify or reverse. The court below has passed no judgment upon respondent's right to answer over, and, therefore, this question is not before us. When the case goes back, the respondent will have an opportunity to move for leave to answer, which will no doubt be granted him.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

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20 S. C. 533

WAGENER & CO. v. MARS.

(November Term, 1883.)

[*Payment* ⟸63.]

Under a plea of payment, defendant cannot avail himself of a counterclaim: as, e. g., where plaintiff received the proceeds of a draft, half of which belonged to defendant, but which was wholly applied to the individual indebtedness of the other owner of such draft, who indorsed it to plaintiff without instructions to apply any part of it to the defendant's debt.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 160; Dec. Dig. ⟸63.]

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*Before Cothran, J., Abbeville, September, 1882.

This was an action by F. W. Wagener & Co. against T. W. Mars, commenced September 28th, 1881. The opinion sufficiently states the case. The draft referred to was as follows:

No. 27,627. The National Bank of Columbus, Georgia, Oct. 5, 1880. Pay to the order of W. W. and T. W. Mars, Twenty-One Hundred and Eight 17–100 Dollars.

G. W. Dillinghan, Cashier.

$2,108.17. To John J. Cisco & Son, New York.

Indorsed: W. W. and T. W. Mars.

Mr. W. H. Parker, for appellants.

Mr. Ellis G. Graydon and W. C. Benet, contra, and on the same side argument of the late Mr. Armistead Burt was read.

March 11th, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. On February 9th, 1880, W. W. Mars and the defendant, T. W. Mars, executed their joint and several note, by which they promised to pay to the plaintiffs or bearer, $3,000 on or before December 1st, 1880, with interest from date; and on the same day T. W. Mars executed to the plaintiffs a mortgage on real estate to secure the payment of the said note. The action in this case was brought to foreclose said mortgage, and the defendant pleaded payment, first, by the proceeds of the sales of certain cotton shipped to plaintiffs, and, second, by the proceeds of a draft drawn by a bank in Georgia on John J. Cisco & Son, of New York, payable to the order of W. W. and T. W. Mars, for $2,108.17, to one-half of which it was claimed the defendant was entitled. The question as to the payment from the proceeds of the cotton has been finally disposed of in the court below, and the only question raised by the appeal is as to the payment claimed out of the proceeds of the Cisco draft.

The case was referred to the master, who found, as matter of fact, that the said draft was delivered to the plaintiffs by W. W. Mars, not as a payment on the account of W. W. Mars, but "for the purpose of allowing

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him to buy a bill of goods, and draw *drafts against it, the balance to go to the general account of W. W. Mars." The result, therefore, was that only such balance was applied to the general account of W. W. Mars which embraced the mortgage debt. To this report the defendant excepted, and the Circuit judge, without controverting the finding of fact by the master, held as follows: "As to the Cisco draft, it has been produced before me, and is made payable to W. W. Mars and T. W. Mars. The defendant did not indorse the draft. The plaintiffs therefore knew that defendant had a half interest in said draft. From that fact I hold that the plaintiffs are bound to apply one-half of the

said draft to some debt they then held against the defendant, that is, the mortgage debt—the only one in existence at the time the payment was made—no matter what directions Walter W. Mars may have given them." He therefore sustained the exception to the master's report relative to the Cisco draft, and recommitted the report of the master with instructions to credit the mortgage debt with one-half of the balance of the Cisco draft not already so applied. From this ruling the plaintiffs appeal, alleging error therein.

It will be observed that the only defense set up in the answer of defendant was payment, and that no counter-claim was pleaded. We do not suppose that it can, for a moment, be doubted that under a plea of payment a defendant cannot avail himself of any counter-claim. So that the real question in this case is, as it appears to us, whether, even granting that the defendant did not indorse the draft, either by himself or by any authorized agent, and that the plaintiffs knew that he was entitled to a half interest in the draft, these facts would sustain a plea of payment, or whether they would not rather establish a counter-claim. If the plaintiffs have wrongfully obtained possession of the defendant's money, that may constitute a good cause of action in his favor against them, which may be asserted either in a separate action or by counter-claim in this action if it had been so pleaded; but we are at a loss to conceive how such fact could constitute a payment. If the plaintiffs had been indebted to the defendant on any other account, or if they had in any way wrongfully acquired possession of any property of the defendant, surely it could not be said that such indebtedness, or

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the value of such *property, would constitute a payment on the debt, the collection of which the plaintiffs are seeking to enforce in this action.

Our province being simply to review the rulings of the Circuit Court, we have not deemed it necessary to consider the other questions so elaborately discussed by the counsel on both sides, because we are satisfied that, even assuming the facts to be as stated by the Circuit judge, his conclusion of law, under the state of the pleadings, was erroneous, and, on the contrary, under the findings of fact by the master, which are not controverted by the Circuit judge, and which can be sustained by the testimony, that the exceptions should have been overruled and the master's report confirmed. Of course, under this view of the case, the question as to the alleged errors of calculation cannot arise, and need not, therefore, be considered. We do not, however, desire to be understood as precluding the defendant from asserting in another action any claims which he may suppose he has against the plaintiffs.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for the purpose of carrying out the views herein announced.

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20 S. C. 536

STATE v. SATTERWHITE.

(November Term, 1883.)

[1. *Appeal and Error* ⟸911.]

Facts not stated in the brief cannot be assumed in order to show that a Circuit judge exceeded his jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3682–3688; Dec. Dig. ⟸911.]

[2. *Appeal and Error* ⟸911.]

The mere signing of an order for bail outside of his circuit, for a prisoner of his circuit, does not show that the judge heard the application beyond the limits of his own circuit. This case distinguished from Ex parte Parker, 6 S. C. 472.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3686; Dec. Dig. ⟸911.]

[3. *Bail* ⟸44.]

The Court of Sessions and the judges thereof have the power to admit persons to bail in all criminal cases, even after conviction, but it is a power to be exercised with due discretion, and, after conviction, with extreme caution.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 145; Dec. Dig. ⟸44.]

[4. *Bail* ⟸61; *Recognizances* ⟸2.]

A recognizance entered into and approved by the clerk of court, under the order of the judge, is in effect the taking of such recognizance by the judge himself, and is legal and binding.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 239; Dec. Dig. ⟸61; Recognizances, Cent. Dig. §§ 2, 16; Dec. Dig. ⟸2.]

[5. *Infants* ⟸46.]

An infant is not liable on a recognizance he signs as surety for another, unless he ratify and confirm it after attaining his majority, whether a recognizance be regarded as in the nature of a judgment or not.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 106; Dec. Dig. ⟸46.]

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*Before Kershaw, J., Newberry, July, 1883.

The opinion fully states the case.

Messrs. Goggans & Herbert, for appellant.

Mr. Solicitor Duncan, contra.

March 11th, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The facts out of which the points made by this appeal arise, are as follows: John P. Satterwhite was convicted at the February Term of the Court of Sessions for Newberry county (one of the counties embraced within the limits of the Seventh circuit), A. D. 1881, of the crime of maliciously burning a frame of timber prepared for building a house, and sentenced to imprisonment for five years in the State penitentiary. From this judgment he appealed, and, pending the appeal, he was carried before

the judge of the Seventh circuit under a writ of habeas corpus and admitted to bail. Under this order he entered into recognizance before the clerk of Sessions for Newberry county with the appellant, Kittie Satterwhite, and one J. F. Wheeler as his sureties.

His appeal having been dismissed, this proceeding was instituted to estreat his recognizance, and, upon hearing the return to the rule as to Kittie Satterwhite, Judge Kershaw held that no sufficient cause was shown, and ordered the recognizance estreated as to her. From this Kittie Satterwhite appeals, upon the following grounds: "1st. Because the recognizance sought to be estreated is illegal and contrary to public policy and void. 2d. Because the recognizance having been taken by, and acknowledged before the clerk of the court, instead of a judge or trial justice, as required by law, is void. 3d. Because his Honor erred in holding that Kittie Satterwhite was liable on the said recognizance, although she was under twenty-one years of age at the time of its execution."

As we gather from the argument of the counsel for appellant, two points are intended to be made by the first ground of appeal. 1st. That the judge of the Seventh circuit had no jurisdiction to hear an application

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for bail while in Columbia, outside the *limits of his own circuit, and therefore the recognizance taken under his order was illegal and void. Even granting the legal proposition upon which this point is based, (upon which, however, we do not now propose to express any opinion,) that the judge of the Seventh circuit had no authority to hear an application for bail in a case pending in his own circuit, while outside the limits of his circuit, we do not think that the "Case" furnishes the facts necessary to raise such a question, and we certainly cannot assume the existence of any fact necessary to show that a Circuit judge has exceeded his jurisdiction. On the contrary, we would assume, until the contrary is shown, the existence of the facts necessary to give him jurisdiction. The rule that applies in inferior courts, "that their proceedings must show upon their face that the subject-matter is within their jurisdiction," (Devall v. Taylor, Cheves 6,) does not apply to superior tribunals, for, as is said in that case, "the general rule, as stated by the court in Winford v. Powell, 2 Ld. Raym. 1310, in regard to inferior courts is, that nothing shall be intended to be within the jurisdiction that is not expressly averred so to be; though, in case of a superior jurisdiction, nothing shall be intended out of it."

Now, in this case, there is nothing whatever to show that the judge of the Seventh circuit was outside the limits of his circuit when he heard and granted the order for bail, except the single circumstance that the order is dated "Columbia, S. C., 5 May, 1881," and this is not inconsistent with the supposition that he may have heard and determined the application while in the Seventh circuit, and subsequently signed the order in Columbia. This case differs materially from the case of Ex parte Parker, 6 S. C. 472, for there it was conceded that the judge of the Sixth circuit went into the Fifth circuit for the purpose of issuing a writ of habeas corpus in a case pending in the Fifth circuit, and there heard the application and granted the order of discharge, while here the case was pending in the Seventh circuit, and there was no evidence as to where the writ of habeas corpus was issued, and only a single circumstance indicating that the order was signed beyond the limits of the Seventh circuit. We do not, therefore, think that sufficient appears in this case to warrant us in saying

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*that Judge Wallace exceeded his jurisdiction in granting the order under which the recognizance in question was taken.

The second point raised by the first ground of appeal is, that there is no authority for granting bail to a prisoner after conviction of an infamous offense, but, on the contrary, it is against public policy, and therefore the recognizance taken in this case was void. In the case of State v. Frink, 1 Bay 168, such an order was granted after a conviction for manslaughter. In the case of State v. Hill, 1 Tr. Con. Rep. 242, the question was whether bail could be granted after bill found by the grand jury, and the power was affirmed. In that case Judge Nott said: "I have no doubt but the judges of the court have the power and right to admit persons to bail after bill found in a capital case. Blackstone and Hawkins both say the judges of the King's Bench may admit to bail in all cases, and although it is not particularly said after bill found, yet, if this power extends to all cases, there are none to which it does not extend."

The reasoning and illustrations employed in this case will apply with equal force to the question of the power to admit to bail even after conviction; and, as Nott, J., says, if the power extends to all cases, then there are none to which it does not extend, and hence it may be exercised even after conviction. In State v. Potter, Dudley 300, Earle, J., said: "Independently, however, of the habeas corpus act, the Court of Sessions, by virtue of its general powers in criminal matters, may, in term time or at chambers, admit a prisoner to bail in all offenses and felonies whatever." The two cases last cited are recognized in State v. Holmes, 3 Strobh. 272. See also Hurd Hab. Corp. 444, 445, and authorities there cited.

It is true there is a case (State v. Connor, 2 Bay 34,) cited by the counsel for appellant which seems to sustain his position. But in that case the question was not properly before the court of last resort, though the judg-

es of that court did take occasion to say that they approved the course of the Circuit judge in refusing to admit the defendant to bail after conviction in a case so highly criminal, but at the same time recognized the power to grant bail even after conviction in cases for lower offenses. That was a case in which the defendant was convicted of forgery at

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*common law in altering the date of a receipt, and some stress seems to have been laid upon the fact that the offense belonged to the class of crimen falsi and called for infamous punishment. We do not think, therefore, that this case, which, so far as we have been able to discover, has not been followed in any subsequent case, based as it is upon a mere dictum and not upon a point presented for decision, is sufficient to supersede what we understand to be the rule to be deduced from the other cases cited above, to wit, that the Court of Sessions and the judges thereof, like the Court of King's Bench in England, have the power to admit persons to bail in all cases, even after conviction, but that it is a power, as is said in all of the cases, to be exercised with due discretion, and after conviction with extreme caution. The other case cited by appellant's counsel, Ex parte Ezell, 19 Am. Rep. 32, (40 Tex. 451), does not apply. In that case the only question was whether a statute prohibiting the granting of bail after conviction was in conflict with a clause in the constitution of Texas, providing that "all prisoners shall be bailable upon sufficient sureties." The very fact that it was found necessary to pass such a statute, would seem to imply that in that State a prisoner could, prior to the act, be bailed after conviction.

The second ground raises the question as to the power of the clerk to take the recognizance in question. The appellant contends that section 2659 of the general statutes of 1882, which is identical with section 7, chapter CXLII. general statutes of 1872, (the law which was in force at the time the recognizance in this case was taken,) expressly requires that every recognizance "for appearing as a party * * * at any court of criminal jurisdiction within the State," shall be "acknowledged in the presence of a judge or trial justice, who shall certify such acknowledgment, otherwise such recognizance shall be void," and, therefore, that a recognizance taken and acknowledged before the clerk has no legal or binding force. In this case the order for bail expressly required that the recognizance "be entered into and approved by the clerk of said court;" and this was in accordance with what we understand to have been the universal practice in this State. It was, in effect, the taking of

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the recognizance *by the judge himself, acting through the proper officer of his court, just as many other acts are done by the clerk, through the directions of the judge, as the acts of the court. We do not think, therefore, that the second ground of appeal can be sustained.

The third ground of appeal presents the question, whether the infancy of the appellant, at the time she signed the recognizance, is a good defense to the proceeding to estreat the recognizance. The Circuit judge found, as a matter of fact, that she was an infant under the age of twenty-one years at the time she signed the recognizance, but he found, as matter of law, that she could not, upon this ground, escape liability; "that a recognizance to appear is not simply a bond for the payment of money, and is not a simple contract, such as may be avoided on the usual grounds. It is of the nature of a judgment, and the signers acknowledge the existence of a subsisting obligation which is of record. Kittie Satterwhite can no more avoid this bond, and escape liability as surety, than she could avoid a judgment regularly obtained against her, according to law, d. .ng her infancy, and a part of the records of the court."

We think that the authorities cited by the appellant's counsel show that in this there was error. In State v. Morgan, 2 Bailey 601, it was held that a recognizance was not a judgment. In that case O'Neall, J., said: "A recognizance is defined to be an obligation of record which a man enters into before some court of record or magistrate duly authorized with condition to do some particular act. 2 Bl. Com. 34. The present application supposes it to be not only a record but also a judgment, creating a lien on the cognizor's land from its date. But this notion is, I think, erroneous. * * * Such a floating and unascertained liability as exists under a recognizance, is contrary to all my ideas of a judgment, which fixes both the liability of the defendant to pay and the amount which he is to pay." But, even could a recognizance be regarded as a judgment, or in the nature of a judgment, the plea of infancy might still be available. Haigler v. Way, 2 Rich. 324.

Whether an infant could bind himself by a recognizance to appear and answer to a criminal charge, is a question which does

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*not arise in this case, and has not, therefore, been considered. The question here is, whether an infant can be made liable on a recognizance which she has signed as surety for another; and all that we decide is, that she cannot in such a case unless it were shown, as it has not been in this case, that after she became of age she in some way ratified or confirmed the obligation entered into by her during infancy. On this ground, therefore, the judgment below must be reversed.

The judgment of this court is that the judgment of the Circuit Court be reversed.

20 S. C. 542

THATCHER & CO. v. MASSEY.

(November Term, 1883.)

[1. *Appeal and Error* ⇐272.]
Exceptions to an intermediate decree should be taken at the time; still, if not taken until final decree rendered, they will be considered.

[Ed. Note.—Cited in McCrady v. Jones, 36 S. C. 176, 15 S. E. 430.

For other cases, see Appeal and Error, Cent. Dig. § 1612; Dec. Dig. ⇐272.]

[2. *Bills and Notes* ⇐125.]
A note for advances payable at a future day, secured by an agricultural lien, which provides for interest on the advances at the rate of two and one-half per cent. a month from the date of each, after maturity draws legal interest only.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 281; Dec. Dig. ⇐125.]

[3. *Payment* ⇐39.]
A mortgage of land and agricultural lien were taken to secure advances to the extent of $2,000, but advances thereunder were made to a larger amount, and the cotton crop covered by this agricultural lien was shipped to the creditor without direction as to its application. *Held*, that the proceeds of the cotton was applicable to the $2,000 indebtedness, and the creditor could not apply it to the unsecured excess.

[Ed. Note.—Cited in Ellis v. Mason, 32 S. C. 280, 10 S. E. 1069; Summer v. Kelly, 38 S. C. 511, 17 S. E. 364; Hopper v. Hopper, 61 S. C. 137, 39 S. E. 366; Barfield v. Coker & Co., 73 S. C. 190, 53 S. E. 170.

For other cases, see Payment, Cent. Dig. §§ 104–114; Dec. Dig. ⇐39.]

[4. *Payment* ⇐39.]
But other payments made by the debtor without directions, the creditor could apply to any demands he then held against the debtor, and this right the creditor could exercise at any time before verdict or judgment.

[Ed. Note.—Cited in Hopper v. Hopper, 61 S. C. 137, 39 S. E. 366.

For other cases, see Payment, Cent. Dig. § 111; Dec. Dig. ⇐39.]

[5. *Appeal and Error* ⇐1022.]
Concurrent finding of fact by referee and Circuit judge, approved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⇐1022.]

[This case is also cited in Montague v. Stelts, 37 S. C. 213, 15 S. E. 968, 34 Am. St. Rep. 736, and distinguished therefrom.]

Before Pressley, J., and Hudson, J., Lancaster, October, 1881, and June, 1883.

This case is fully stated in the opinion.

[For subsequent opinion, see 26 S. C. 155, 1 S. E. 465.]

Messrs. R. E. & R. B. Allison, for appellants.

Mr. Ernest Moore, contra.

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*March 11th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. J. Y. Bryce & Co. agreed to advance to the defendant, Massey (respondent), for the year 1870, to the extent of $2,000, and on the second day of May of that year a very considerable portion of this amount having been advanced, to wit, $1,455.40, Massey executed and delivered to the said Bryce & Co. an instrument under seal, in which he promised to pay them or order, on or before November 1st, next, the said sum; and on the same day he executed a mortgage of certain real estate situate in Lancaster county, and also an agricultural lien on the crops of that year, to secure the payment of the said sum of $2,000, agreed to be advanced, in which was included the $1,455.40, already advanced as stated above. It was stipulated in this agricultural lien, that Massey should pay two and one-half per cent. per month on the advances from the date of each. Shortly after the execution of the above-mentioned note for $1,455.40 and the mortgage and agricultural lien, Bryce & Co. assigned and transferred the same to the plaintiffs, Thatcher & Co., but of this transfer the respondent, Massey, had no knowledge until this suit was brought in November, 1873.

During the year 1870, Bryce & Co. advanced to Massey, in money and supplies, including the $1,455.40, to the amount of $2,532.68, besides the interest thereon, which was in excess of the $2,000 agreed to be advanced, by the sum of $532.68. Bryce & Co. continued to advance in the year 1871, and also to a small amount in 1873, and they had also advanced in 1869, at the end of which year Massey had to his credit the sum of $37.92. The cotton crop of 1870, amounting to thirty-four bales, was received by Bryce & Co., to wit, three bales in December, 1870, and thirty-one bales in the Spring of 1871, at different times from January to May, the net proceeds amounting to some $2,005.91; and in 1872 Massey delivered four bales of the crop of 1871, the net proceeds of which amounted to $357.47. In the spring of 1871, Bryce & Co. received from Massey four mules, alleged by Massey as a sale to Bryce & Co. at $200 each. One of these mules was afterwards returned to Massey, leaving the other three in the hands of Bryce & Co. at

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*$600. There were other credits claimed by Massey, but it is unnecessary to notice them here under these circumstances.

The plaintiffs, Thatcher & Co., to whom, as stated above, the $1,455.40 note with the mortgage and agricultural lien had been assigned, brought this action on said note and for foreclosure of the mortgage. The defendant answered, pleading payment of all advances secured by said mortgage and agricultural lien, by credits of his cotton crop of 1870, by the balance to his credit at the end of the year 1869, to wit, $37.90, and by $600, the price of three mules sold to Bryce & Co., and he denied that a valid assignment had been made to the plaintiffs of the note and mortgage, &c. In 1875 the case was re-

ferred to a referee, whose report was heard by Judge Pressley in 1881, upon exceptions from both sides. In this report the referee took into the account the entire transactions between J. Y. Bryce & Co. and the defendant, Massey, from 1869 to 1873, and after crediting upon the indebtedness of Massey the proceeds of the cotton received by J. Y. Bryce & Co. during that time, the mules at $600, the balance due Massey from the transaction of 1869, $37.90, overcharge on bacon, damaged bacon, and amount paid by B. R. Smith & Co., $207.25, &c., found as matter of fact that the sum of $561.35 was due by the said Massey on September 16th, 1881, which, by virtue of the assignment to the plaintiffs of the note and mortgage, belonged to the plaintiffs.

To this report the plaintiffs excepted, alleging error: First. Because the referee had charged two and one-half per cent. per month interest on the cash advances only, whereas the terms of the agricultural lien stipulated for that per cent. upon all advances, whether of cash or supplies. Second. Because the referee gave Massey credit for $600, the price of the mules, when said mules were only placed in the hands of Bryce & Co. for sale, who sold them for $390 only. Third. Because the referee charged interest on the $1,455.40 at two and one-half per cent. per month only to January 1st, 1871, when this per cent. should have been charged until the note was paid, and also, the same error as to the items of advance, other than the note—with some other exceptions not material. The defendant also excepted upon various grounds, not necessary to be mention-

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ed *now, and gave notice that he would move the court for a recommittal of the report.

On hearing the report and exceptions, Judge Pressley adjudged that the interest on the sealed note should be computed after maturity at seven per cent. per annum; that the interest on all the other advances made under the lien should be computed from the date of each at two and one-half per cent. a month up to January 1st, 1871; that the proceeds of the crop of 1870 should be applied first to the indebtedness of Massey for advances made by Bryce & Co. to him in that year, represented by the note and account which was secured by the mortgage, and that the same should be applied as of the date or dates when said cotton was sold. That all other payments should be applied in accordance with the directions of the defendant, Massey, at the time the same were made, and that if no direction was given the same should be applied to any indebtedness then due, if so directed or done by J. Y. Bryce & Co. before suit brought, and that in the absence of any such application by either party, the same should be applied to any indebtedness then due not secured by mortgage. And after overruling all other exceptions not embraced in this ruling, he ordered the report to be recommitted to the master to state the accounts on the indebtedness of the year 1870 by note and account, according to the principles stated, and that either party have leave to introduce further evidence as to the particular matters above mentioned.

Under this order the referee made a second report, estimating the entire advances of the year 1870, as follows, to wit: Total advances outside of the note, with interest at two and one-half per cent. per month to January 1st, 1871, $1,538.78; amount of advances included in the note, interest at seven per cent. to January 1st, 1871, $1,472.36; total amount of advances to January 1st, 1871, $3,011.14. This amount he credited with the balance due from the transactions of 1869, $37.92, with damaged bacon, overcharge on bacon, the cotton crop of 1870, and $600 for the three mules, making the aggregate $2,649.21, which being deducted left a balance on the entire advances of 1870, of $361.93, to which interest being added, he

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found due *on June 12th, 1882, the sum of $651.87 to the plaintiffs, Thatcher & Co., assignees of Bryce & Co. On this reference, testimony was offered by the plaintiffs as to the mules, but this was ruled out, the referee holding that the decree of Judge Pressley had concluded that question, and that under said decree he had no other alternative but to credit the mules on the advances of 1870, and at the price of $600.

To this report both plaintiffs and defendant again excepted. The plaintiffs, because the referee excluded the testimony offered by them as to the value of the mules, on the ground that Judge Pressley had adjudged this matter, fixing the amount to be credited at $600. 2. Because there was no testimony that the value of these mules should be credited on the accounts of 1870, or that their value was $600. And, 3. Because the cotton crop should not have been credited at date of January 1st, 1871, as much of it was received after that date. The defendant, because, first, that the referee did not apply the proceeds of the cotton of 1870, and also all the other credits allowed by him, to the note and account secured by mortgage and agricultural lien, instead of the whole advance of that year; and, second, that he charged interest on the items of the account, outside of the note and account secured by lien and mortgage.

Upon the hearing of this report and exceptions Judge Hudson dismissed the complaint with costs, holding that the value of the mules was properly fixed at $600, and that this sum, with the cotton crop, should be applied to the advances of $2,000, under the agreement, secured by mortgage and agri-

cultural lien, which being done would extinguish the mortgage, leaving the plaintiffs without cause of action.

From this decree the plaintiffs have appealed, and now seek a review not only of this decree, but of the decree of Judge Pressley also, having excepted to both within ten days after the final decree of Judge Hudson. The exceptions to decree of Judge Pressley assign error: first, in that he restricted the referee to the indebtedness of Massey for the year 1870, represented by note and account, aggregating $2,000; second, in that he directed the proceeds of the cotton crop and other payments by Massey to be credited

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on this sum, when Massey was indebted *to Bryce & Co. upon other large amounts growing out of the transactions of 1870, 1871, 1872 and 1873, besides other large claims; and, third, because interest on the note of $1,455 should have been allowed at thirty per cent. per annum.

The decree of Judge Hudson is objected to on the grounds: first, because the estimate of Massey's indebtedness was restricted to the $2,000, advanced in 1870 and secured by mortgage and lien, when during that year Bryce & Co. advanced some $606.77 over and above the $2,000, besides other advances in 1871 and 1872, which should have been embraced, and upon which the price of the mules and other payments should have been applied, there being no evidence to show that the mules were received in part payment of the advances of 1870, or that Massey so directed such application, and further, that the mules were not worth more than $300; and, second, because the decree of Judge Hudson does not conform to the principles laid down by Judge Pressley.

The respondent denies the right of appellant to have the decree of Judge Pressley reviewed as an intermediate decree, no notice of appeal or exceptions having been filed or given thereto until after the final decree of Judge Hudson. While it would be better practice, for obvious reasons, that exceptions should be filed to the intermediate decree, in view of a possible appeal from the final decree, when, in such event, it would be proper to have the intermediate decree reviewed; yet under the cases of Hyatt v. McBurney, 17 S. C. 143, and Lee v. Fowler, 19 S. C. 607, the omission to file such exceptions is not legal error. The objection, therefore, of respondent cannot avail. Both decrees are before us, and must be considered.

We see no error in the decree of Judge Pressley as to the following matters excepted to. His ruling that the note should be computed at seven per cent. interest after maturity is sustained by Sharpe v. Lee, 14 S. C. 341, and there is no exception as to interest on the accounts. There can be no question as to the correctness of his direction, that the proceeds of the cotton crop of 1870 should be applied to the note and account secured by the mortgage and agricultural lien, in exclusion of all other indebtedness. This debt of $2,000, by express contract between the

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parties, had a *positive lien on this cotton, as evidenced by the agricultural lien agreement, which could have been enforced by warrant from the clerk, if any effort had been made of a different application. But the rules laid down by him, by which to determine the application of the other payments—to wit: That they should be credited as directed by the debtor, if any; if not, then at the discretion of the creditor before suit brought; if not, then to such of the debts as were not secured by mortgage—are not in accordance with Heilbron v. Bissell, Bailey Eq. 430, and Brice v. Hamilton, 12 S. C. 32. These cases decide that the creditor has until verdict or judgment to apply the payments, instead of before "suit brought" as stated by the Circuit judge. The case of Jones v. Kilgore, 2 Rich. Eq. 64, is not in conflict with Heilbron v. Bissell, and Brice v. Hamilton, as that case does not determine when the creditor shall make the application. Nor is there any case which confines it to "suit brought." Judge Pressley, as we understand his decree, did not undertake to decide what application should be made of any of the payments, except the proceeds of the cotton crop. These he did adjudge should be applied to the $2,000 secured by mortgage and agricultural lien, and in this we concur. As to the other payments, he determined the principle, but, as we think, incorrectly, by which they should be applied, recommitting the report to be reformed in accordance therewith, directing the referee to confine his investigations as to Massey's indebtedness for the year 1870. The fact that he confined the referee to a computation of Massey's indebtedness for the year 1870 did not determine that all the payments, including the cotton crop, should be applied to that indebtedness alone; on the contrary, the application of the payments other than the cotton crop was to be governed by the rules which he laid down.

This brings us to the decree of Judge Hudson. There is no error in this decree so far as the credits other than the value of the mules are concerned. There can be no doubt that the proceeds of the cotton should be credited on the note and account secured by the mortgage and agricultural lien, for the reason already given, and we concur with Judge Hudson, that the value of the mules was properly fixed at $600. Judge Pressley

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left *the application of this sum open, to be determined by the rules which he laid down. But the referee, supposing that he was concluded by the decree of Judge Pressley, declined to hear testimony on the subject, and applied his credits to the entire advances of 1870. Judge Hudson does not appear to

have made any ruling on the question whether the referee should have allowed further testimony as to the value of the mules and the application thereof, but he overruled the referee's application, and directed it to the note and account secured by mortgage, to wit, the $2,000 portion of the advances of 1870. There is no exception to this decree in that it made no ruling as to the power of the referee on the second reference on the question of the value of the mules and the application thereof; but the exception as to this point is, that Judge Hudson erred in directing the application to the $2,000 debt alone, to the exclusion of the excess of the advances for the year 1870, and other indebtedness of Massey.

Inasmuch as according to the cases cited supra, Bryce & Co., the creditors, had until judgment to make the application, in the absence of an application by Massey, the debtor, at the time of payment, and as the decree of Judge Pressley limited this privilege as to the creditor to "suit brought," which Judge Hudson sustained, under this ruling Bryce & Co. have been deprived of the opportunity of directing such application, which is their right; under these circumstances it was error to apply the value of the mules as directed in the decree. In our opinion, the payments, other than the value of the mules, should first be applied to the $2,000 debt—the proceeds of the cotton at the date of the sales. This will leave a small balance due on this debt, and whether any portion of the value of the mules shall be made to this balance, or whether the whole of that credit shall go to excess of the advances of 1870, over the secured $2,000 debt, or to other indebtedness due at the time the mules were received, must be left to the discretion of Bryce & Co. to exercise before judgment, in the absence of any application by Massey at the time he sold said mules, which facts can only be determined perhaps by another reference.

It is the judgment of this court that the

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judgment of the Cir*cuit Court be modified so as to leave the question as to the application of the value of the mules open, to be determined according to the principles hereinabove, and that in all other respects it be affirmed. Let the case be remanded to the Circuit Court.

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20 S. C. 550

BOWMAN v. BAILEY.

(November Term, 1883.)

[*Dower* ⊂⊃44.]

Real estate was purchased by A. and B., partners in a mercantile business, for partnership purposes; A. sold his interest to B., but made no deed, and subsequently they both signed a deed conveying the land to a stranger. Afterwards B. died. *Held*, that his widow was entitled to dower in the one-half interest held by B. under the deed to A. and B., but not in the other half, to which B. never had a legal title.

[Ed. Note.—Cited in Morgan v. Smith, 25 S. C. 339; Wagner v. Sanders, 49 S. C. 197, 27 S. E. 68; Ex parte Steen, 59 S. C. 223, 37 S. E. 829.

For other cases, see Dower, Cent. Dig. § 136; Dec. Dig. ⊂⊃44.]

Before Aldrich, J., Greenville, April, 1882.

The case is thus stated in the decree of Mr. Douthit, Probate judge, filed January 21st, 1881:

This is a case in which the petitioner claims dower as the widow of William Bowman, deceased, in lands which were conveyed to Simeon Hughes and William Bowman, and which were purchased by them for the purpose of erecting a storehouse to carry on the mercantile business, and was paid for out of the partnership funds. They did erect a building thereon for said purpose, and it was used by them for the purpose of carrying on said business for several months. Hughes then sold his half interest in said property to Bowman with the understanding between them that Bowman was to sell it to Wm. C. Bailey, the defendant herein. Bowman settled with Hughes for his interest in said property, but he did not take a deed for the same, but he and Hughes, as the firm of Hughes & Bowman, conveyed said property to the said Bailey. This was done a few days before they made their final settlement with each other, at which time the said firm was insolvent.

These being the facts, the court is of opinion and so decides:

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*I. That as the property was paid for, held and used by the said Hughes and Bowman as partners in trade, that it was partnership property.

II. That though said Hughes did sell his interest in the same to Bowman, and was paid for the same by him, that this could not affect Bailey, as there is no evidence going to show that he (Bailey) had any knowledge of such sale.

III. That the petitioner is not entitled to dower in the whole of said property, as her husband, the said Bowman, was never seized of one-half the same, but simply had an equitable title thereto, of which the defendant herein had no knowledge.

IV. That the petitioner is entitled to dower in one-half of said property, as it passed out of the partnership to a stranger, who was not privy to the trust, but holds the property discharged thereof.

It is therefore ordered, adjudged and decreed, that a writ for the admeasurement of dower do issue from this court, &c.

This decree was confirmed by the Circuit Court, and both parties appealed.

Mr. L. K. Clyde, for demandant.

The deed to Hughes & Bowman made no reference to a partnership, but was to them as joint tenants—dower then attached, and no act or declaration of the husband could defeat it. 11 Rich. 423; 6 Ibid. 269; 12 S. C. 465. Evidence that it was partnership property was therefore improperly received. 1 Bay 451. The widow then unquestionably had dower in half the land. 2 Strobh. 70. She is also entitled to dower in the whole land. His equitable title to the half purchased from Hughes became merged in the legal title he already held. Ibid. See, too, 2 Bl. Com. 131; 2 Story Eq. Jur., § 1212; 1 Wms. Ex. 581. Bailey's ignorance is no defense. 5 S. C. 275; 17 Id. 563. If partnership property, it ceased to be so when Hughes sold to Bowman. Before that, creditors of the firm might have subjected it as personalty to the payment of their claims, but not afterwards. The widow therefore is dowable of this land. Pars. Partn. 386.

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*Mr. George Westmoreland, for defendant.

The evidence said to be incompetent was received without objection, but it was competent. Pars. Partn. 364; 2 Kent Com. 39; Lind. Part. 193. As to Hughes' half, Bowman had neither title nor possession, and in that half there could be no dower even if they were joint tenants. Washb. Real Prop. 216. But she is not entitled to dower even in one-half. This was partnership property. Pars. Partn. 364; 3 Kent Com. 39; Story Part. 135; Washb. Real Prop. 200; Harp. Eq. 25. A widow has no dower in partnership property; 2 Desaus. 472. There is a vast difference between a partnership and a joint tenancy. Story Part., § 90; Lind. Part. 207; Pars. Partn. 2; Freem. Co-ten. & P., § 111; 3 Kent 37. Hence act of 1853, 5 Stat. 113, and Reed v. Kennedy, 2 Strobh. 67, do not apply here. See further on nature of partnership property, Pars. Partn. 383, 385; 20 Beav. 442; 15 Gratt. 11; 54 Ill. 281; 44 Miss. 406; 12 N. J. Eq. 31; 21 Pa. St. 257; 71 Id. 488; 3 Kent 39. If firm is insolvent the dower is gone. 1 Ohio 244; 20 Mo. 174. Here the firm was insolvent, and the land sold probably to pay debts. 63 Ill. 540; 86 Id. 286; 20 N. J. Eq. 288; 30 Id. 415; 2 Rich. 541; Harp. Eq. 25. See particularly 65 Mo. 138. The citation from Pars. Partn. 386, is not from the text, but from a note, citing 7 How. (Miss.) 437, which was a case of tenancy in common.

March 13th, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. In this case, the petitioner, by proceedings originally instituted in the Court of Probate, and carried thence, by appeal, to the Court of Common Pleas, demanded dower in a certain tract of land of which, as she alleged, her husband had been seized during coverture, and had in his life-time conveyed to the defendant. It seems that the land in question was conveyed by one Shumate to Simeon Hughes and William Bowman (the husband of petitioner); that Hughes and Bowman were partners in a mercantile business; that the land was bought as a site for a store which was erected thereon, and was paid for with part-

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nership money. *Some time afterwards Bowman bought out Hughes' interest in the land and settled with him for it, but took no deed, with the understanding that Bowman was to sell the property to the defendant, Bailey. Something was said by Hughes to Bowman about making him a deed for his interest, but Bowman said it was not necessary as they could unite in the deed to Bailey, which was done.

The Probate Judge held that the petitioner was entitled to dower in one-half, but not in the other half of the land, and from his decree both parties appealed to the Circuit Court, which affirmed the decree of the Court of Probate. This appeal now comes up from the Circuit Court, in which both parties allege error; the petitioner, because she was not allowed dower in the whole of the land; and the defendant, because there was no right of dower in any portion of the land.

The conclusion reached by the Circuit judge is so fully sustained by the case of Reed v. Kennedy, 2 Strobh. 67, which is so much like this case as to be almost identical with it, that it is scarcely necessary for us to do more than refer to that case. In that case, as in this, the land was conveyed to two persons who were copartners in a mercantile business, and paid for with the partnership funds. After the dissolution of the partnership the husband of demandant conveyed his interest to his copartner, under whom the defendant claimed, and it was held that the widow was entitled to dower in the one-half of which her deceased husband had been seized. As is said in 1 Washb. Real Prop., Book I., Chap. VII., § 2, ¶ 12: "Whether the widow of a deceased partner shall be entitled to dower in lands purchased and held by the partners, has been frequently discussed, and it is not easy to reconcile all the cases, especially the early ones, with the law as now understood, nor will it be attempted here. Though it may sometimes depend upon the character which the parties intended to give to lands held by them for their joint and mutual benefit, yet it may be laid down as a general proposition, that, if real estate is purchased by two or more parties, and paid for out of partnership funds, and held for partnership purposes, it will be regarded in law as held by the several partners as tenants in common,

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yet, in equity, it *is so far regarded in the light of personalty as to be subject, under

an implied trust, to be sold and applied, if necessary, for the payment of the partnership debts. Nor can the widow of one of such partners claim dower out of any part of such estate, except such as may not be required for the payment of the partnership debts. Of that she may claim her dower both at law and in equity." In this case the partnership creditors are not before the court making any claim, and, therefore, it is not necessary to consider or determine the question whether partnership creditors may not, in equity, subject real estate bought with the partnership funds to the payment of their debts, in derogation of the widow's right of dower. Here the controversy is between the widow and a purchaser from her deceased husband, and we think that she is entitled to dower in one-half, the interest of her deceased husband, in the land in question.

The remaining inquiry is, whether the fact that the husband had bought and paid for the interest of the other joint owner, but had taken no deed therefor, entitles her to claim dower in the other half also. We do not think so. Seizin of the husband during coverture is essential, and here the husband was never seized. He at most only had a right, in equity, to compel a conveyance from his joint owner for his interest, and this he never did, and never even took any steps towards doing. On the contrary, he declined to take a conveyance when offered, for the reason, doubtless, that he was about to sell to defendant, and it would be more convenient and less expensive to make one, rather than two deeds. Under these circumstances, we do not see that the husband ever had any such seizin, even in equity, as would entitle his widow to claim dower in the half which was never conveyed to him, but which, at his instance, was conveyed directly to the defendant. See the cases cited in 1 Washb. Real Prop., Book I., Chap. VII., § 3, ¶ 13 and 14.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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20 S. C. *555

*DEVEREUX v. TAFT.

(November Term, 1883.)

[1. *Mortgages* ⇐295.]

A mechanics' lien was entered against property upon which rested the lien of an older mortgage. Subsequently the mortgage was assigned to a stranger, who thereafter became the purchaser of the property at a tax sale and took tax titles. *Held*, that the purchase at a tax sale by the assignee of the mortgage extinguished the mortgage debt, and the mechanics' lien remained as the only lien upon this property in the hands of its purchaser.

[Ed. Note.—Cited in Agnew v. Charlotte, C. & A. R. Co., 24 S. C. 22, 58 Am. Rep. 237; Bleckeley v. Branyan, 26 S. C. 428, 2 S. E. 319; Brown v. Bank of Sumter, 55 S. C. 73, 32 S. E. 816; Powell v. Patrick, 64 S. C. 192, 41 S. E. 894; Ex parte Powell, 68 S. C. 325, 47 S. E. 440.

For other cases, see Mortgages, Cent. Dig. § 823; Dec. Dig. ⇐295.]

[2. *Mortgages* ⇐151.]

Amounts paid by the mortgagee for taxes and insurance on the property have not a priority over the mechanics' lien; for, even if the mortgage debt had not been extinguished by the purchase, there was no provision in the mortgage securing such payments by its lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 368; Mortgages, Dec. Dig. ⇐151.]

[3. *Interest* ⇐18.]

Accounts secured by mechanics' lien are like other open accounts, unliquidated, and do not bear interest.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 33; Dec. Dig. ⇐18.]

Before Wallace, J., Charleston, June, 1883.

This was an action by John H. Devereux against C. C. Bowen, executor of Susan P. Bowen, to enforce a mechanics' lien. After the death of C. C. Bowen it was revived and continued against W. N. Taft, in his own right and as administrator with the will annexed of Susan P. Bowen, G. W. Dingle, administrator of C. C. Bowen, and Mrs. Mary Taft. The case was referred to the master, W. D. Clancy, Esq., to inquire and report upon the issues of law and fact involved, with leave to report any special matter. He made reports, as stated in the opinion of this court, in April and June, 1883, to which, inter alia, the following exceptions were taken by the plaintiff:

3. Because the master erred, in that he should have found that W. N. Taft, the assignee of the said mortgage, having purchased the mortgaged premises at a tax sale, thereby merged the mortgage in the fee and extinguished the lien thereof.

6. Because the master erred in recommending that the said W. N. Taft be refunded all amounts expended by him for taxes and insurance on the premises before the debt he reports due to J. H. Devereux be paid.

7. Because the master erred in ruling that

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the plaintiff was *not entitled to recover interest on the balance due him, the subject of mechanics' lien.

The master's report was confirmed by the Circuit judge, and from his decree plaintiff appealed to this court "upon the exceptions heretofore filed to the report of Master Clancy." Other matters are stated in the opinion.

Mr. L. DeB. McCrady, for appellant.

By his purchase at tax sale, Taft has extinguished his lien. 1 Jones Mort., §§ 680, 711, 715; Tax Act of 1874, § 9; 1 McCord 400; Bailey Eq. 338; 6 Rich. Eq. 343; 9 Id. 53; 6 S. C. 316. Passages may be cited from Jones on Mortgages to show that there is no merger in such a case, but the author-

ities upon which he bases his text are from States which adhere to the old common law mortgage. See 1 Jones Mort., § 873. In this State a mortgage is a lien and not an estate. His purchase, however, did not discharge the mechanics' lien. Tax Act of 1874, § 99. Taft cannot be re-imbursed for taxes and insurance; the mortgage did not provide for such payments, and he paid either as volunteer or owner. Plaintiff having been kept out of money, for which he holds a lien, he is entitled to interest. 2 Spears 536.

Mr. E. McCrady, Jr., same side.

Mr. B. J. Whaley, contra.

There can be no merger when there is an intervening lien or estate which would be paid to the detriment of him whose rights are merged. 16 S. C. 330; 1 Jones Mort., §§ 848, 857, 870–873. The taxes and insurance were necessary to save the security. There can be no interest on plaintiff's demand. It is not an account stated; it has always been disputed, and the amount in doubt. The lien, having been filed after Mrs. Susan Bowen's death, conferred no specific lien. Chic. L. N., June 30th, 1883. The mechanics' lien was waived as to this mortgage, for the mortgage was given to secure money advanced to pay plaintiff. Crooks v. Finney, S. C. Ohio, 1883.

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*March 13th, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. Between September 4th, 1873, and December 11th, 1875, the plaintiff entered into a verbal contract with C. C. Bowen (now deceased), as the agent of his wife, Susan P. Bowen (now also deceased), to furnish the materials and erect a dwelling-house for her on a lot situate on Sullivan's Island. On December 11th, 1875, Susan P. Bowen died testate and C. C. Bowen duly qualified as executor of her will. On February 21st, 1876, the plaintiff, within ninety days after the completion of the work contracted to be done, filed in the clerk's office of the Court of Common Pleas for Charleston county a statement of the balance claimed to be due, with a notice of claim of lien on said building, under the provisions of the statute in such case made and provided.

On June 20th, 1874, Susan P. Bowen executed her promissory note to the plaintiff, payable six months after date, for the sum of $3,000, and to secure the payment thereof executed to the plaintiff, on the same day, a mortgage on the premises upon which the mechanics' lien was claimed. On the same day the plaintiff duly indorsed said note and had the same discounted by one Andrew Simonds, and at the same time assigned the mortgage to said Simonds. At the maturity of this note, to wit, on December 23d, 1874, it was retired by the execution of a renewal of the same, for the same amount, no payments having at that time been made. On June 3d, 1881, Simonds, for valuable consideration, sold the note to the defendant, W. N. Taft, and duly assigned to him the said mortgage; W. N. Taft became the purchaser at tax sale of the premises in question, and holds two tax titles therefor, one dated November 9th, 1881, and the other October 20th, 1882.

In the meantime, C. C. Bowen died intestate, to wit, on June 23d, 1880, leaving as his heirs-at-law, his widow, Mary Bowen, and one child, who has subsequently died; and letters of administration upon his estate have been duly granted to the defendant, G. W. Dingle. Subsequently, the widow of C. C. Bowen intermarried with the defendant, W. N. Taft, and on the ——— day of ———, 1882, letters of administration de

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bonis non with the will *annexed upon the estate of Susan P. Bowen, were duly granted to said Taft.

The main question presented by this appeal is, Which is entitled to the prior lien upon the premises in question, the mortgage now held by the defendant, Taft, as assignee, or the mechanics' lien in favor of the plaintiff? The Circuit judge held that the mortgage was entitled to priority, and ordered the premises sold and the proceeds applied, first, to the payment of the costs of this suit and the sale, next to the mortgage debt held by Taft, and to certain amounts paid by him for taxes and insurance on the property, and then to the debt of the plaintiff secured by the mechanics' lien; and if any balance should remain, that it be paid to the administrator of Susan P. Bowen, to be administered according to law. From this judgment the plaintiff appeals, upon several grounds set out in the "Case," but, from the view which we take, it will only be necessary to consider the third, sixth, and what may be called the seventh ground, though it is not so numbered, for, under our view, the other questions will not arise.

The point made by the third ground is, that the purchase of the mortgaged premises at a tax sale, by W. N. Taft, who was at that time the assignee and holder of the mortgage, and therefore, in reality, the mortgagee, extinguished the mortgage debt. The position is, we think, fully sustained by the authorities in this State. Schnell v. Schroder, Bailey Eq. 334; McLure, Brawley & Co. v. Wheeler, 6 Rich. Eq. 343; Allen v. Richardson, 9 Rich. Eq. 53. In Schnell v. Schroder, Bailey Eq., Boyer held a bond of Schroder, secured by a mortgage on a lot of land, which was sold under a judgment junior to the mortgage and bought by Boyer. *Held*, that his mortgage debt was thereby extinguished. Johnson, J., in delivering the opinion of the court, said: "Boyer had, unquestionably, the right to buy and Schroder to sell and release his equity of redemption; and whether he sells, or it is sold under

legal authority, the legal consequences are precisely the same."

In McLure, Brawley & Co. v. Wheeler, the mortgagee purchased the mortgaged property under a judgment recovered on one of the notes which his mortgage was given to se-

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cure, and it *was held that the mortgage debt was thereby extinguished, and that he was liable to account for certain notes placed in his hands as collateral security for the mortgage debt. In Allen v. Richardson, the same doctrine was applied in the case of one who held a statutory lien under proceedings for partition. Wardlaw, Ch., in that case said: "I conclude that a statutory mortgagee who buys the estate under mortgage, not under process of foreclosure of his lien, extinguishes the debt or claim, with lien on the land." The authority of these cases is recognized in Edwards v. Sanders, 6 S. C. 334, and again in Trimmier v. Vise, 17 S. C. 503 [43 Am. Rep. 624].

The reason upon which this doctrine is founded, applies with equal force to a purchase at a tax sale, as well as to a purchase directly from the mortgagor, or under an execution. In fact, to use the language of Wardlaw, Ch., supra, a mortgagee who purchases the mortgaged property at any sale, "not under process of foreclosure of his lien," extinguishes his debt and, of course, the lien of his mortgage also. Applying this doctrine to the case in hand, it seems to us that when Taft, the mortgagee, purchased the mortgaged property at the tax sale, as it is admitted that he did do, he thereby extinguished not only the lien of his mortgage, but also the debt which it was given to secure, and that the only remaining lien on the premises was the mechanics' lien in favor of the plaintiff; and that his purchase at the tax sale was subject to such lien. Act of March 19th, 1874, § 99, 15 Stat. 767.

The sixth ground alleges error on the part of the Circuit judge, in ordering the payment of the taxes and insurance paid by Taft in preference to the debt of the plaintiff secured by the mechanics' lien. This point, we think, is well taken; for even if the mortgage debt had not been extinguished by the purchase at the tax sale, we do not see upon what ground these payments could be given a priority over the mechanics' lien. There was no provision in the mortgage providing for the payment of taxes and insurance, and extending the lien of the mortgage over such payments, as is often the case in mortgages; and, therefore, we do not see how they could acquire any lien in the absence of such provision.

The last ground complains of error in not allowing the plaintiff interest on the balance due on his account. We do not see how this account stands upon any better or

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higher ground, so far *as the interest is concerned, than any other open account. It was an unliquidated demand, and, therefore, not an interest-bearing demand.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

20 S. C. 560

SHELTON v. SHELTON.

(November Term, 1883.)

[1. *Dower* ⇐40.]

The acceptance by a wife of property conveyed to her present use, under articles of separation in the life-time of the husband, cannot be considered as a jointure operating by force of law as a substitute for, and in satisfaction of, her dower, under section 1800 of the general statutes.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 111; Dec. Dig. ⇐40.]

[2. *Dower* ⇐42.]

While property may be given by a husband to his wife in lieu of dower, thus compelling an election by her, no such intention is indicated by a gift made by the husband to his wife during his life-time for her support while living apart from him, as to lands not embraced in the gift.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 125; Dec. Dig. ⇐42.]

[3. *Dower* ⇐49.]

It may be that since the constitution of 1868, and the laws passed thereunder, a married woman may, by covenant, bind herself not to claim dower out of her husband's lands; but to have such effect, the covenant must be entirely free from doubt—clear, positive and express in its terms.

[Ed. Note.—Cited in Smith v. Oglesby, 33 S. C. 198, 11 S. E. 687; Moon v. Bruce, 63 S. C. 128, 40 S. E. 1030; Gainey v. Anderson, 87 S. C. 52, 54, 55, 68 S. E. 888, 31 L. R. A. (N. S.) 323.

For other cases, see Dower, Cent. Dig. § 158; Dec. Dig. ⇐49.]

[4. *Dower* ⇐42.]

No such clear intent appears from the use by a married woman, in articles of separation, of the words "in lieu and in consideration of all claims and demands upon the said M. S. [the husband], or his estate, and I hereby relinquish all further claims upon him for support or otherwise."

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 127; Dec. Dig. ⇐42.]

[5. *Dower* ⇐76.]

When a tract of land is subdivided by a will, and devised separately by metes and bounds to three devisees, the widow of testator may demand her dower in one of these subdivided tracts, from the devisee of that tract, without making the other devisees parties.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 272; Dec. Dig. ⇐76.]

[6. *Dower* ⇐76.]

[Cited in Bostick v. Barnes, 59 S. C. 28, 37 S. E. 24; Kirby v. Kelly, 90 S. C. 383, 73 S. E. 780, as implying that a widow may bring

action for dower jointly against all persons in possession of any of the lands.]

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 267–276; Dec. Dig. ⊂⊃76.]

Before Wallace, J., Greenville, April, 1883.

The opinion fully states the case. The Circuit decree (omitting its statement of facts, which is repeated in the opinion,) was as follows:

Isabella Shelton now files her complaint in the Probate Court, demanding dower in the lands of which her husband had died seized, and had devised by his last will. Her claim

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is resisted *by Dyer Shelton, administrator with the will annexed of Marshall Shelton, and by Sacharissa Shelton (Griffith), to whom the lands in which dower is claimed, were devised by metes and bounds. They resist the demand upon the grounds: first, that the agreement and deed of 1874 was a provision for the demandant in the nature of a jointure, and that she is, by that, barred; second, that if the agreement and deed were not in the nature of a jointure, it was an agreement to relinquish her right of dower, and she is barred by it.

Under the statute found in section 1800 of the general statutes, "every married woman having a jointure, shall not claim, or have title to have any dower," &c. Sir Edward Coke defines jointure to be "a competent livelihood of freehold, for the wife, of lands and tenements to take effect in profit or possession presently after the death of the husband for the life of the wife at least." Such a jointure will bar the right of dower, if four requisites are observed in its creation: first, the jointure must take effect immediately on the death of the husband; second, it must be for her life at least, and not per autre vie, or for any term of years or other smaller estate; third, it must be made to herself and no other in trust for her; fourth, it must be made, and so in the deed particularly expressed, to be in satisfaction of her whole dower, and not of any particular part of it. 4 Bl. Com. *138. It is obvious that the writing in this case does not meet these requirements, and the widow is not barred at law.

It is argued, however, that it is not necessary in equity that the provision for the wife should be stated in express words to be in lieu of dower, if it can be clearly collected from the contents of the instrument that such was the intention, and that in such case the provision would be sustained as an equitable jointure, and held sufficient to bar her dower. It is further insisted that if the papers in this case do not make out a case of equitable jointure, that they make out an agreement upon sufficient consideration upon the part of the wife to relinquish dower.

Both of these latter grounds involve and

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depend upon the *intention of the parties. If it can be clearly collected from the instrument of writing that it was the intention of parties that dower should be barred or relinquished, and the wife was competent to contract, then she could not recover in this action. The alleged agreement having been made after marriage, would not, before the constitution of 1868, have bound the wife, and she would have had the right, after the death of her husband, to have renounced the provision, and demanded dower as she might elect, but by the constitution of 1868, having been made competent to contract as if she were sole, her post-nuptial contract in relation to dower would bind her as effectually as if made before marriage. Was it the intention of the parties then, to this deed and agreement, that the wife should be barred of or relinquish her dower? For if that was the contract, she is bound by it according to its terms, and cannot now renounce it.

It must be borne in mind that the agreement was made with reference to separation between the parties, and was to, and did, take effect immediately. Marshall Shelton, in his part of the agreement, declares the object and purpose of the gift from him to his wife to be "for her support and use." These words certainly do not signify or indicate a purpose on his part to bar her dower, but to provide for her separate maintenance during her life. Isabella Shelton, in her part of the agreement, binds herself to receive the property to be conveyed "in lieu and in consideration of all claims or demands upon the said Marshall Shelton, or his estate, and hereby relinquish all further claims upon him for support or otherwise." Now, if she had meant to relinquish her right of dower, would she not have said so when she distinctly "relinquished all claims upon him for support or otherwise?" She, as his wife, could claim the comforts of his society and his protection, as well as her rights to be supported. These she renounces as against him, but not one word of that implies a renunciation of her inchoate right of dower. If Marshall Shelton had meant to bar her dower why didn't he say so when he describes in the agreement the objects of the gift. Therefore, I conclude that it cannot be clearly collected from the agreement and deed that it was the intention of the parties to bar or relinquish the right of dower, and unless that intention is

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distinctly *manifested, the provisions cannot be held to operate as a bar to dower. Vizard v. Longdale, 3 Atk. 8; Walker v. Walker, 1 Ves. Sr. 55; Lord Dorchester v. Effingham, Taml. 279. Neither can the demandant be estopped by the agreement; for it does not

appear that she ever agreed to relinquish dower.

As the demandant does not claim out of the lands in which she has a life-estate, but only out of such as have been specifically devised by metes and bounds to the defendant herein, other heirs of Marshall Shelton are not necessary parties, as they have no interest in the action.

It is therefore ordered and adjudged, that exceptions of demandant to the decree of the Probate Court be sustained, and that the case be remanded for such further steps as may be necessary.

Mr. J. T. Nix, for appellant.
Messrs. Perry & Perry, contra.

March 18th, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. On June 26th, 1874, Marshall Shelton and his wife, with a view to living separate and apart, entered into an agreement under seal, as follows: "I, Marshall Shelton, of the first part, hereby covenant and agree to give and convey to the said Isabella Shelton for her support and use, the following described property, being her equitable portion of my estate, to wit: One parcel of land, about seventy acres, described in deed of conveyance of this date, for her sole use and benefit during her natural life, with the dwelling thereon. Also, I further agree to give her one cow and calf, one shoat, one bed and bedding, one ewe and lamb, one chest, one spinning-wheel, and whatever of household articles are her individual property. Also the growing crop upon the land conveyed to her by deed and this agreement. I, Isabella Shelton, of the second part, hereby agree and bind myself to receive the above-mentioned property in lieu and in consideration of all claims and demands upon the said Marshall Shelton, or

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his estate, and hereby relin*quish all further claims upon him for support or otherwise," &c. The deed referred to was executed the same day, giving the said Isabella a life-estate in the said parcel of land with limitation over to their three youngest daughters, Mary Elizabeth, Mahala, and Emily Maria. The said Isabella, leaving her husband, took possession of the property.

In May, 1882, the husband, Marshall, died leaving a will, by which he divided the lands of which he died seized, into three parcels, one of which he gave to his daughter Sacharissa Griffith, one to his daughter Frances Hawkins, and the other he directed to be sold for the payment of debts, &c. Isabella, now a widow, and still retaining possession of the property conveyed to her by the articles of separation and the deed made in conformity thereto (being in amount about one-third of the property of her husband), instituted these proceedings in the Probate Court against Sacharissa Griffith for dower in the lands given to her by her father's will, but she brought no action against the other devisees. Dyer Shelton, administrator with the will annexed of Marshall Shelton, and the said Sacharissa resisted the claim. The Probate judge held that the demandant, Isabella, had not received technical "jointure," so as to be barred of her right of dower, which she had never formally relinquished; but that her covenant in the articles of separation "was intended to relinquish and bar her right of dower," and that, having accepted the property given to her by the articles of separation, she could not retain that, and at the same time make a claim for dower in the remainder of her husband's land given to others, and dismissed the petition.

The demandant, Isabella, appealed to the Circuit Court, and Judge Wallace, sustaining the exceptions, reversed the decree of the Probate judge, and remanded the case for further proceedings in the Probate Court in setting off dower to the demandant. From this judgment the defendants appeal to this court upon the following grounds: "1. Because it is respectfully submitted, that his Honor erred in holding that the petitioner was not barred or estopped from claiming dower in the lands of which her husband died seized, by the deed of separation executed by her and her husband and the provisions therein contained. 2. Because his Honor, at least, erred in not holding that the

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said *deed of separation and the said provisions taken in connection with the husband's will, created a case for election between her claim and dower and the life-estate in the lands conveyed to her. 3. Because his Honor, having held that the petitioner was entitled to dower in the lands of which her husband died seized, and the lands at his death being one tract only, erred in holding that the petitioner could maintain her separate action against the respective devisees, notwithstanding the fact that none of them had gone into possession of their portions, but the entire tract was in the possession and under the control of the administrator with will annexed," &c.

In this case the Circuit decree is so full and clear that very little need be added. The widow's right of dower is one generally regarded by the courts with favor. Chancellor David Johnson, in Gordon v. Stevens, 2 Hill Eq. 47 [27 Am. Dec. 445], said: "It is one over which the husband has no control. He can neither dispose of it by contract in his life-time, nor direct the disposition of it after his death by will or otherwise. She can only dispose of it by her own act or voluntary contract." We agree with both the Probate and the Circuit judge, that the acceptance of the property conveyed to the wife, Isabella, under the articles of separation, in the life-time of the husband, can-

not be considered as "jointure," operating by force of law as a substitute for and in satisfaction of her dower, under section 1800 of general statutes. See the case of Gelzer v. Gelzer, Bailey Eq. 388 [23 Am. Dec. 180].

While the husband has no right to control the dower of his wife, he has the right to annex to the disposition of his property any conditions he may think proper, which are not illegal. He may, therefore, make a gift to his wife, with the express declaration that it is in lieu and bar of dower in his estate. This raises a case of election. The wife may decline the gift and insist on dower; but if she accepts it, she takes it with the condition of renouncing dower, and it must necessarily so operate. So far as we are informed, there is nothing in the will of the testator which can, as to the widow, raise a case of election. No gift is made to her in the will, with or without conditions. It does not appear that her name is mentioned in it.

It is, however, insisted that the previous

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conveyance to the *wife was necessarily in lieu and bar of dower, and raised a case of election. The articles of separation do not state that Marshall Shelton made the conveyance in lieu and bar of dower, but "for her support and use." Suppose that the identical words of the covenant of separation had been a part of Shelton's will, even in that case they would not have excluded dower, for the rule is "that the intent to exclude the right to dower by a voluntary gift must be demonstrated by express words, or by clear and manifest implication, and this implication must arise from some provision in the will, inconsistent with the operation of the claim." Gordon v. Stevens, supra. In the case supposed it would be inconsistent for Mrs. Shelton to make the claim as to the land given her for life, but not as to the other lands of the testator. Cuningham v. Shannon, 4 Rich. Eq. 135; Wilson v. Hayne, Chev. Eq. 40; Shaffer v. Shaffer, 16 S. C. 625.

But it is further said that, in the articles of separation, the demandant voluntarily covenanted that she would not assert her right of dower to any portion of her husband's estate outside of that conveyed to her. The law has prescribed a particular form by which a married woman must relinquish her right of dower. See Townsend v. Brown, 16 S. C. 92. But since the constitution of 1868, and the laws passed thereunder, giving a married woman the right to contract as if she were a feme sole, we suppose that a married woman may so covenant not to claim dower, as to make it binding upon her by way of estoppel. But we would say that the covenant of a married woman, to have that effect in relation to an inchoate right of dower, future and contingent in character, should be entirely free from doubt, clear, positive and express in its terms. The words of Mrs. Shelton's covenant are "in lieu and in consideration of all claims and demands upon the said Marshall Shelton, or his estate, and hereby relinquish all further claims upon him for support or otherwise." It is true these are broad and sweeping terms, but the very peculiar right of dower in the future was not expressly mentioned, and in giving construction to the obligation, it should not be overlooked that the parties were making provision for the wife about to separate from her husband, and the subject naturally

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uppermost *in their minds was the responsibility of the husband during his life to furnish suitable support and maintenance for his wife.

We do not see why the demandant may not maintain a separate action against one of the devisees without making the others parties. As we understand it, the testator himself made the division of the lands in his will, and gave a particular parcel described by metes and bounds to each one. The will is the title whether the party is in actual possession or not. The demandant has the right not to enforce part of her claim, if she chooses to do so. She may not intend to claim dower in the other parcels. We suppose, however, that she is not asking the dower of the whole lands out of one particular subdivision, but only the dower in that particular parcel belonging to the defendant in the proceeding.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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20 S. C. 567

ROBINSON v. ROBINSON.

(November Term, 1883.)

[1. *Appeal and Error* ⇐336.]

A motion made in this court by one of the appellants to have her name stricken from the record as an appellant, refused, the preponderance of the testimony being that she had authorized the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1872; Dec. Dig. ⇐336.]

[2. *Signatures* ⇐5.]

A note signed with a mark may be proved by one who witnessed it, whether named as a subscribing witness or not.

[Ed. Note.—For other cases, see Signatures, Cent. Dig. § 7; Dec. Dig. ⇐5.]

[3. *Witnesses* ⇐171.]

In action by the holder of a note against the administrator of the deceased principal debtor, the sureties to the note are competent witnesses to prove its execution by the principal.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 707; Dec. Dig. ⇐171.]

[4. *Witnesses* ⇐159.]

Doubted, whether the signing of a note by a principal debtor and her two sureties, who also signed in her presence, was a transaction be-

tween the principal and her sureties, within the meaning of section 400 of the code of procedure.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 629, 664, 666–669, 671–682; Dec. Dig. ⟸159.]

[5. *Witnesses* ⟸171.]

The interest affected which disqualifies witnesses as to transactions with persons deceased, (Code, § 400,) means the interest promoted; parties are not disqualified from giving testimony against their interest. Therefore, in action by the administrator for settlement of an ancestor's estate, two of the distributees, parties to the action, may prove the execution by their ancestor, as principal debtor of a note which they signed as sureties.

[Ed. Note.—Cited in Moffatt v. Hardin, 22 S. C. 25; Kennemore v. Kennemore, 26 S. C. 255, 1 S. E. 881; Shell v. Boyd, 32 S. C. 362, 11 S. E. 205; Griffin v. Earle, 34 S. C. 252, 13 S. E. 473; Westbury v. Simmons, 57 S. C. 470, 35 S. E. 764.

For other cases, see Witnesses, Cent. Dig. § 707; Dec. Dig. ⟸171.]

[6. *Bills and Notes* ⟸56.]

In action brought after the repeal of the stamp act, a note previously executed without stamps, but with no intention of evading the law, cannot be held void.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 215; Dec. Dig. ⟸56.]

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[7. *Executors and Administrators* ⟸88.]

*A note held by the administrator of an estate, payable to himself, is not paid by reason of his charging himself with the amount in a settlement of the estate, no payments having been made to him by any of the makers.

[Ed. Note.—Cited in Abercrombie v. Abercrombie, 25 S. C. 51; Pinson v. Puckett, 35 S. C. 185, 14 S. E. 393.

For other cases, see Executors and Administrators, Cent. Dig. § 393; Dec. Dig. ⟸88.]

[8. *Payment* ⟸66.]

A sealed note, payable in 1869, cannot be presumed to have been paid where action thereon was brought before 1883.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 176–188; Dec. Dig. ⟸66.]

Before Wallace, J., Anderson, March, 1883.

The opinion states the case.

Mr. J. C. C. Featherston, for appellants.

Mr. J. L. Tribble, contra.

March 18th, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action by Jesse Robinson, as administrator of his mother, Sarah Robinson, to sell the real estate of intestate in aid of personal property to pay debts and for partition. The heirs were all parties, viz.: Richard Robinson, James Robinson, Anna Robinson, Mary McDonald, Elizabeth Hinton, Isaac Robinson, Sallie H. Rickets, Nancy M. Smith and R. A. J. Robinson. The administrator, Jesse Robinson, was also one of the heirs, but his interest in the lands of the intestate had been levied on and sold under execution and purchased by J. C. C. Featherston, and, in respect of his interest, he also became a party.

Under a call for the creditors of the intestate, Sarah, to present and prove their demands, Richard Robinson, one of the heirs, presented a note, of which the following is a copy:

"On or before the 25th day of December, 1869, we, or either of us, promise to pay Richard Robinson, Adm., of the estate of John Robinson, deceased, or bearer, the sum of one hundred and sixty dollars, for value received. Nov. 28th, 1868. Witness my hand and seal.

Signed, "Sarah her X mark Robinson, [L. S.]
"James Robinson, [L. S.]
"Jesse Robinson. [L. S.]

"To be stamped when had."

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*Mr. Featherston, representing one of the distributees (Jesse), objected that the note was not proved, because it did not have a revenue stamp upon it, and that it had been paid; or, if not, that it was barred by the statute of limitations. Jesse and James Robinson proved (subject to objection) that the note was given for rent of land; that they knew their mother rented lands in 1868 from Richard, as administrator of John Robinson, for $160; that they saw her sign the note for that amount; that at the same time they signed as her sureties, and that they never paid the note. Richard Robinson testified (subject to objection) that the note is his own property and nothing was ever paid on it; that he was administrator of his father, John; that in 1868 he rented the lands of the estate to Sarah Robinson, and for the same she gave him her note for $160; that in the settlement of the personal estate of his intestate, John, in 1870, he accounted for the note and continued to hold it as a debt against his mother. Jesse, the administrator of Sarah, also testified that the note had been regularly presented to him, as administrator, and he believed it was still due and unpaid.

The master, W. W. Humphreys, Esq., reported that the note was not proved; that the witnesses offered to prove its execution, viz., Jesse and James Robinson were not competent under section 400 of the code; and further, that in a suit against one on a joint obligation, a co-obligor, not sued, is not a competent witness for the plaintiff to prove the execution of the instrument. Richard Robinson, the creditor, excepted to the report, and Judge Wallace reversed it, holding that the note was proved and should be paid. All the parties acquiesced in this order except J. C. C. Featherston, Mrs. Hinton and Mrs. McDonald, who appeal to this court on the following exceptions:

1. "Because the presiding judge erred in

sustaining the exceptions of Richard Robinson, in so far as holding that Jesse Robinson and James Robinson were competent witnesses under the code to prove the execution of the note alleged to have been made by Sarah Robinson.

2. "Because he erred in holding that the note in question was admissible in evidence, when he should have held that the same was invalid and of no effect for want of a revenue stamp.

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*3. "Because his Honor erred in overruling the exceptions of J. C. C. Featherston, when he should have sustained the same, and held that Richard Robinson was estopped by his return in the estate of John Robinson from setting up said note.

4. "Because his Honor erred in not holding that if the execution of the note was proved, the same having been accounted for in the estate of John Robinson, Richard Robinson could not recover upon the said note, but his remedy was assumpsit for so much money paid to the use of Sarah Robinson, and such claim was barred by the statute of limitations."

Before the appeal was heard in this court, a preliminary motion was made to strike the name of Mary McDonald from the record as an appellant. In support of the motion, she offered an affidavit that she never authorized the appeal; but Mr. Featherston, the attorney, swears that after the trial below she instructed him "to fight it to the last," and, in confirmation of this, the master, Mr. Humphreys, certifies that when he paid Mrs. McDonald money going to her from the estate of Sarah Robinson in his hands, there was reserved for the purpose of appeal in this case to the Supreme Court the sum of $14.53—her share of the necessary expenses of the appeal. The preponderance of the testimony is that Mrs. McDonald did authorize the appeal, and the motion is refused.

In reference to the note presented by Richard Robinson, the allegation is made that it was not proved; that the alleged signature of the intestate, Mrs. Robinson, by a mark, could not be proved except by an eyewitness, and that Jesse and James, her sons, the only persons who were present, were incompetent witnesses: first, because they were sureties on the note; and, second, because she being dead, and they interested as her heirs and parties to the proceeding, were excluded from proving that they saw her sign it, under section 400 of the code. The first objection cannot be sustained. A note executed by a mark may be proved by one who witnessed it whether he was named as a subscribing witness or not. Gervais v. Baird, 2 Brev. 37; Lyons v. Holmes, 11 S. C. 429 [32 Am. Rep. 483]. The fact that Jesse and James were sureties on the note, did not exclude them from proving that they saw their mother sign it. Leech v. Kennedy, 3

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Strobh. *488; Strickland v. Stevens, 12 Rich. 78. In the case of Leech v. Kennedy, Judge Richardson said: "Such cases expound the legal maxim, nemo in sua lite testificare potest, in its proper sense, reason and object, and make the witness offered competent or incompetent, according to his interest or indifference in the question to be solved by his evidence, and holds it immaterial whether he was a party to the original obligation or not."

Jesse and James Robinson were competent witnesses unless excluded by the code. The section (400) invoked, has certainly given rise to much difference of opinion. Its object is plain, to limit the general rule admitting all persons as witnesses, in regard to transactions and communications between a witness and a person dead or insane; but there is sometimes difficulty in applying it. The provision attempts to express so much and to provide for so many cases, in such short compass, that the intention is not always obvious or free from obscurity. The excluding proviso embraces three classes of persons: 1. Parties. 2. Those having an interest to be affected by the event of the action. And, 3. Assignors. Of course the testimony must relate to a transaction or communication between the witness and the deceased. Then they must be offered as witnesses against the party prosecuting or defending as administrator, &c., of such deceased person. And then only where such examination or judgment "can in any manner affect the interest of such witness." "But where such administrator, &c., shall be examined on his own behalf in regard to such transaction or communication, &c., then all other persons, not otherwise rendered incompetent, shall be made competent in relation to such transaction or communication."

Now apply these provisions to this case. In the first place, we have very grave doubt whether the act applies at all; whether the signing of the note by Mrs. Robinson to the creditor, Richard, in the presence of her sons, Jesse and James, who signed as sureties, was a transaction between Jesse and James and their mother in the sense contemplated by the provision. As a transaction, it was entirely with Richard. There was no transaction between Mrs. Robinson and Jesse and James, who signed themselves and were

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mere spectators of her act in *signing. Lobdell v. Lodbell, 33 How. Pr. 347; Wait Anno. Code 746 and note. But as some of the cases go very far as to what is a transaction with the deceased, we make no ruling on the point.

If this were a simple action at law by the creditor, Richard, against Jesse, as the representative of the estate, there would be no difficulty; for in that state of the pleadings, the administrator, as the representative of

the estate, would have had the right to testify as to the execution of the note, and his examination would have opened the door for all others. Brice v. Hamilton, 12 S. C. 36. But the matter is somewhat complicated by the fact that the proceeding is in equity concerning the lands of the estate, as to which the administrator does not represent the estate, and all the distributees who are the legal owners are parties. But without regard to the nature of the action, parties can only be excluded from testifying "where such examination or any judgment in the action can, in any manner, affect the interest of such witness." What is the proper construction of this declaration? Does it mean any interest, whether for himself or against himself; that a witness is excluded from giving testimony, which testimony is directly against his interest? The words "in any manner affect his interest" are very broad, but it seems to us that such was not the intention, but, on the contrary, that the word "interest" indicates nothing more than the mere liability to loss or gain indifferently, and involves the idea of personal advantage, and thus understood the word "affect" is used in the sense of "promote." As it was expressed by Chief Justice Moses, in Boykin v. Watts, 6 S. C. 82: "The obvious purpose and intent of the proviso is to exclude the evidence by a party interested in the event of the suit, of any transaction or communication with a deceased, by which such event may be determined in favor of such witness."

Even by the rule of the common law an adverse interest in the event of the suit would not exclude the witness, or rather in such case it would be considered that he had no disqualifying interest. "A bankrupt is not competent, in an action by his assignees, to prove any fact tending to increase the fund, although both he and his creditors may

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be witnesses to dimin*ish it. The same is true of a legatee, without a release, and also of an heir or distributee, in any action affecting the estate." 1 Greenl. Evid., § 392; Slead v. Brannon, Rice 298. It was not the intention of this provision of the code to exclude those as witnesses who were competent before. "Where the statute is a mere proviso or saving clause in the act abolishing the common law disqualification of interest, it does not make incompetent such testimony as would be competent at common law." Abb. Tr. Ev. 61. One claiming to be a creditor of Sarah Robinson, deceased, called James Robinson, an heir of the estate, as a witness to prove that the intestate, Sarah, in her life-time, had executed the note. This evidence tended to establish the note, and thereby to diminish the estate, and of course was against the interest of the witness. We think that, although a party to the proceeding, he was not incompetent, under the code, to give such testimony.

We do not think the note was void for want of a revenue stamp. There is no evidence that, by omitting to put a stamp upon the note, the parties intended to evade the law requiring a stamp. The memorandum on the note itself shows that they had no stamp, and when procured one was to be attached. But the law of the United States which required it is now repealed. See Pugh v. McCormick, 14 Wall. 374 [20 L. Ed. 789]; United States v. Buzzo, 18 Wall. 128 [21 L. Ed. 812]; Chit. Cont. 604 and note.

The exception that the note presented by Richard Robinson was paid, for the reason that his return as administrator of John Robinson shows that he had charged himself with the rent, $160, for which the note was given, cannot be sustained. We can see no reason why an administrator may not account for the estate in his hands, advance the shares found due to the distributees and retain the notes given to him as his own property. The authorities cited by the appellant (Cunningham v. Smith, Harp. Eq. 90, and Ex parte Ware, 5 Rich. Eq. 474,) were both cases in which the surety had paid the debt, and the question was, whether he could be subrogated to the rights of the creditor, as to the character of the instrument securing the debt. Such cases have no analogy to this, where neither the principal nor sureties paid the debt, but the money was

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advanced and the note pur*chased. It was not the duty of the payee, Richard, but of the obligors, to pay the note, which, according to the testimony, they have never done.

There is no presumption of payment, for the time is not sufficient to presume payment of a note under seal, and the proof is positive that it has never been paid.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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20 S. C. 574

BARKLEY v. TARRANT.

CROOK v. TARRANT.

WADDELL v. TARRANT.

(November Term, 1883.)

[*Bills and Notes* ⇐504.]

In action on a sealed note, signed by three makers in the following words: "One day after date we, or either of us, promise to pay six hundred ninety-eight dollars and eighty-nine cents, with interest annually, for value received of him, as witness we set our hands seals, September 7, 1864," parol testimony may be introduced to show who was the payee.

[Ed. Note.—Cited in Rapley v. Klugh, 40 S. C. 145, 18 S. E. 680; Bickley v. Commercial Bank, 43 S. C. 535, 21 S. E. 886; Redfearn v. Craig, 57 S. C. 545, 35 S. E. 1024.

For other cases, see Bills and Notes, Cent. Dig. § 1722; Dec. Dig. ⇐504.]

Before Wallace, J., Greenville, March, 1883.

The opinion states the cases.

Mr. L. K. Clyde, for appellants.

Written instruments must be perfect and complete when delivered. A sealed note must be in writing. Bouv. Dict. 186; Story Prom. N., § 9. There must be an obligor and an obligee. Id. A note must have a maker and a payee. Dan. Neg. Inst. 87, 89, 111, 116, 128; Story Prom. N. 40, 42; Byles Bills 63, 147; 4 McCord 239. To arrive at intention, construction is admissible, but that intention must appear upon the face of the instrument itself. Pars., Cont. 550; 1 McCord 41; Rob. Fr. 9; 1 Johns. Ch. 425. There is no ma-

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terial difference of principle *in rules of construction between wills and contracts. 1 Greenl. Evid., § 287. Patent ambiguities in a will cannot be explained by parol; the name of a legatee or devisee, left blank by testator, cannot be supplied by parol. 2 Hill Ch. 15; 3 Bro. Ch. C. 311; 4 Desaus. 225; 8 Bing. 244; 5 Rich. Eq. 85.

Mr. John R. Bellinger and Stokes & Irvine, same side.

Messrs. Wait & Westmoreland, contra.

The instrument here sued on is not a promissory note, but a single bill. In a sense, all written instruments are simply evidence of contracts. This paper shows that the obligors were indebted to somebody for money received from him, and that this "him" was the person to whom it was delivered. Add. Cont., § 230. The omission of the payee's name was clearly a casus omissus, and who the original payee was may be proved by parol. 1 Greenl. Evid., §§ 275, 277; Spenc. Eq. Jur. 553–557; 1 Sm. Lead. Cas. (H. & W.) 410. Proving the payee's name does not alter or vary a word. 1 Greenl. Evid., § 282; 3 Man. & G. 452; 5 Fost. 128; 2 R. I. 319; 5 Hurlst. & N. 117. Parol evidence is admissible to show a consideration different from that stated. 5 Rich. 305. It may surely then be shown to whom the consideration is to go. It may be otherwise as to negotiable instruments, but see 3 McCord 482. There was clearly a payee in this case, only his name was not expressed. 3 Rich. 133.

March 18th, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. The two cases stated first in the title were proceedings in equity, and heard together on Circuit. In them an order was made calling in the creditors of B. F. Tarrant, deceased; and under this order Rhoda H. Waddell, claiming to be a creditor of the estate, presented for proof an instrument of which the following is a copy.

"$698.89. One day after date we, or either of us, promise to pay six hundred ninety-eight dollars and eighty-nine cents,

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with *interest annually, for value received of him, as witness we set our hands seals, Sept. 7, 1864.

"B. F. Tarrant, [L. S.]
"L. P. Tarrant, [L. S.]
"P. H. Tarrant. [L. S.]"

This paper was accompanied by an affidavit of Rhoda H. Waddell, that "she is the owner and holder of the note, and that no part thereof has been paid, and that said note was given in renewal of an old note prior to 1861." The master reported the note as a valid claim against the estate, and the administrator, C. B. Tarrant, excepted to the report on the ground, principally, that "said instrument is fatally defective as a sealed note, single bill or bond, in that it is payable to no one, and is a nullity." Judge Wallace, in recommitting the report as to other claims, also recommitted it as to this claim, holding, however, that the omission of the name of the payee might be supplied by parol evidence. From this order C. B. Tarrant, the administrator of B. F. Tarrant, appeals to this court.

The case stated third in the title, R. H. Waddell v. P. H. Tarrant, was an action at law by Mrs. Waddell against P. H. Tarrant, one of the sureties on the sealed note copied above. The complaint stated substantially the same matter as was contained in her affidavit made before the master in the other case, viz.: That she is the owner and holder of the note; that it was given in renewal of an old one, and is still due and unpaid. The defendant demurred that the plaintiff had not capacity to sue, and that the complaint did not state facts sufficient to constitute a cause of action. Judge Wallace sustained the demurrer, but gave the plaintiff leave to amend her complaint. The defendant appealed to this court upon grounds substantially the same as those in the case first stated. They are set out in full in the brief and need not be restated here.

These cases, arising out of the same instrument and involving substantially the same question, were argued together, and we will consider them in the same manner. The exceptions in various forms state the objection to the orders below; but they may be condensed into the single proposition,

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"that said instrument is *fatally defective as a sealed note, single bill or bond, in that it is made payable to no one; and parol evidence is not admissible to supply the name of the payee."

The paper in contention here is certainly neither a bill nor promissory note, negotiable by delivery, as to which class of instruments it seems to be necessary that the parties

shall appear and be disclosed by the bare inspection of the paper. 1 Dan. Neg. Inst. 111. But it is an instrument under seal promising to pay, but not to order or bearer. Still, if there never was a payee, and the paper expressed the whole truth of the transaction, we suppose that there could be no recovery, for the simple reason that it takes two to make a binding contract, and in that case there would be no contract or person to receive the money. But, as a matter of fact, can there be a doubt that there was a payee? All the circumstances and the paper itself prove it. Three persons signed an obligation in all other respects perfect, promising circumstantially to pay so much money "one day after date, with interest payable annually, for value received of him." And this obligation must have been delivered to some one, as it is now presented and payment demanded. All this is utterly inconsistent with the idea that there was no other party but the obligors, and points unmistakably to an obligee from whom the value was "received," and to whom the promise to pay was made. We are not allowed fairly to conjecture that the parties were dealing with no one, but were consciously making false statements, and performing a solemn mockery in doing an act utterly nugatory.

Assuming then, as beyond all doubt, that the parties dealt with a payee in the flesh, it appears that by some oversight or accident the name of that payee was omitted in the obligation executed, and the question is whether parol proof is admissible to show who was the person that advanced his money, and to whom the promise was made. In dealing with the contract of parties it is, of course, desirable so to interpret and enforce them as to carry out the intention of the parties, if that can be done without doing violence to some settled principle or rule of law. But there are rules of evidence so important that they must be adhered to, even at the sacrifice of the intention in particu-

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lar *cases. Is there any rule which absolutely requires us to close our ears to parol evidence tending to show who the payee was in this transaction? There is no doubt of the general rule that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written agreement."

This is a most salutary rule, necessary to prevent frauds and perjuries, and to protect the real intention of parties; but, if applied without discrimination, it may be found to promote the very things it was intended to prevent. The rule has special reference to the words used in the instrument, and the intention of the parties; as, for example, in the familiar case of a latent ambiguity. Mr. Greenleaf says: "It is thus apparent that the rule excludes only parol evidence of the language of the parties contradicting, varying or adding to that which is contained in the written instrument: and this because they have themselves committed to writing all which they deemed necessary to give full expression to their meaning, and because of the mischiefs which would result if verbal testimony were in such cases received. But where the agreement in writing is expressed in short and incomplete terms, parol evidence is admissible to explain that which is per se unintelligible, such explanation not being inconsistent with the written terms." 1 Greenl. Evid., § 282.

In the case before us the instrument is manifestly imperfect, in omitting the name of the payee, and the evidence offered is not inconsistent with the written terms; but, on the contrary, is in direct accord with these terms. It does not vary or contradict a single line or word of them, but accepting the whole instrument as it stands, simply applies it to the right person, according to the contract and intention of the parties. It was properly admitted in the argument, that if a blank space had been left in the note for the name of the payee that would have shown the intention of the parties, and thereby made the parol testimony competent. We have no doubt whatever of the intention, and that being assumed, a blank for the name, larger or smaller, can make no difference.

It seems to us that the very terms of the note itself make a case, authorizing the intro-

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duction of parol testimony. The *unknown person, to whom the promise was made, was the same from whom the consideration came, "for value received of him." The reference here is manifestly to the payee, and suppose the promise had been in terms directly to "him," without inserting any name, could there be any doubt of the right to explain by parol testimony what was the meaning of the parties in making the word "him." The word "him" is a pronoun used for a noun before stated, indicating a person. If the note, instead of using the word "him," had used its equivalent, "the said Waddell," the matter would not have needed explanation.

In Bradley v. The W. A. & G. Steam Packet Company, 13 Pet. 99 [10 L. Ed. 72]; Mr. Justice Barbour summarizes the rule as follows: "Sometimes it has been applied to deeds, sometimes to wills and sometimes to mercantile and other contracts. In some cases it has been resorted to in order to ascertain which of several persons was intended; in others, which of several estates. In some to ascertain the identity of the subject; in others, its extent. In some to ascertain the meaning of a term, where it had acquired by use a particular meaning; in others, to ascertain in what sense it was used, where it admitted of several meanings. But in all the

purpose was the same—to ascertain by this medium of proof the intention of the parties, where, without the aid of such evidence, that could not be done, so as to give a just interpretation to the contract," &c.

In the United States v. Hardyman, 13 Pet. 178 [10 L. Ed. 113], it was held, that these words in a note "with interest at the rate of one M. per centum" could be explained by parol testimony, showing that the letter "M." meant "mill."

In Baldwin v. Bank of Newbury, 1 Wall. 234 [17 L. Ed. 524], a note was made payable to O. C. Cole, "cashier," without indicating the bank of which he was "cashier," held that parol testimony was allowable to show that he was "cashier" of plaintiffs' bank, and that in taking the paper he was acting as "cashier" and agent of that corporation.

In Kinney v. Flynn, 2 R. I. 319, there was an acknowledgment of indebtedness in these letters and words, "I. O. U. the sum of $160, which I shall pay on demand to you." It was held that parol evidence was admissi-

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ble to show the person to *whom it was addressed. In our case of Davega v. Moore, 3 McCord 482, the instrument was a promissory note payable "to order" without mentioning the name of any payee, and it was held that, like a note payable to a fictitious person, it might be recovered by any bona fide bearer thereof.

Leave was given in both cases to offer other evidence, and the defendants, respectively, may, if so advised, make the questions of presumed payment from lapse of time and as to the note being a confederate transaction, without prejudice.

The judgment of this court is that the judgment of the Circuit Court, in each of the cases stated in the title, be affirmed.

NOTES OF CAUSES

Decided during the period comprised in this Volume, and not reported in full

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*No. 1493. STATE v. ANDERSON. November Term, 1883. The defendant was indicted for murder and convicted. The "agreed statement," as presented to this court, gave a very brief and insufficient history of the case, no exceptions were taken, and no arguments here submitted; but, as it involved an issue of the gravest character, the court looked into the brief for errors and supposed objections. The case seemed to be one of circumstantial evidence. *Held*—

[1. *Criminal Law* ⊂⊃829.]

That there was no error on the part of the Circuit judge (Wallace) in failing to charge "that the testimony must not only show the guilt of the prisoner, but must not be capable of explanation by any other reasonable hypothesis," especially when no request so to charge was presented, and this proposition was made in argument by defendant's counsel, and conceded by the State's attorney, and when the judge did explain "to the jury the difference between circumstantial and positive evidence, and fully instructed them that the prisoner's guilt must be demonstrated to them, beyond a reasonable doubt, before they could convict on either kind of testimony."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⊂⊃829.]

[2. *Criminal Law* ⊂⊃419, 420.]

That statements made by the deceased as to quarrels, &c., with another person, were hearsay evidence, and, therefore, properly excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973–983; Dec. Dig. ⊂⊃419, 420.]

Opinion by Mr. Justice McIVER, January 15th, 1884.

Nos. 1494, 1495, 1496. Ex parte EDWARD F. STOKES. November Term, 1883. Petition for rehearing in three cases in which the appeals had been dismissed under rule XI. of this court. Motions refused per curiam, January 16th, 1884.

No. 1497. RENNEKER v. WARREN. November Term, 1883.

[*Appeal and Error* ⊂⊃807.]

This was an application to re-instate on

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the docket an appeal *which had been dismissed by this court. But as no notice of intention to appeal had been given to respondent or his attorney, within ten days after the rising of the court, as imperatively required by statute, (Code, §§ 348, 349,) the court has no power to remedy this omission.

[Ed. Note.—Cited in Saverance v. Lockhart, 66 S. C. 541, 45 S. E. 83.

For other cases, see Appeal and Error, Cent. Dig. §§ 3177–3188; Dec. Dig. ⊂⊃807.]

Motion refused per curiam, January 16th, 1884.

No. 1499. WARDLAW v. ERSKINE. November Term, 1883.

[*Appeal and Error* ⊂⊃807.]

This was a motion to re-instate on the docket an appeal which had been dismissed by the clerk under rules I. and II. Notice of intention to appeal having been duly given, the court held that they had the power to relieve the appellants from the consequences of other omissions in the perfecting of their appeal. Code, § 349. And being satisfied that there had been no culpable negligence or intent to delay on the part of the appellants, and, especially, as no delay would be caused by granting the relief asked, the court granted the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3177–3188; Dec. Dig. ⊂⊃807.]

Opinion per curiam, January 31st, 1884.

No. 1503. PRATT v. McGHEE. November Term, 1883.

[*Appeal and Error* ⊂⊃1097.]

This case brought up the question, whether this court, at a former hearing (Pratt v. McGhee, 17 S. C. 428), decided the rights of the parties in regard to the personalty. Judge Witherspoon held that it did, and, on appeal, his decree was affirmed, this court holding that their former judgment not only decided that the devise lapsed, but considered and determined the question of the lapse of the personal bequest to John Robert Ellis adversely to his children; that the question so determined was properly before the court, and the defendants are concluded by that decision. Warren v. Raymond, 17 S. C. 189.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358–4368, 4427; Dec. Dig. ⊂⊃1097.]

Opinion by Mr. Justice KERSHAW, (sitting in the stead of McGOWAN, A. J.,) February, 19th, 1884. Noble & Noble, for appellants. W. H. Parker, contra.

No. 1518. CURETON v. STOKES. November Term, 1883.

[*Appeal and Error* ⊂⊃248.]

P. D. Cureton brought this action against E. F. Stokes, on two sealed notes, one promissory note, and for money paid by plaintiff as surety for defendant on a note to one Sullivan, the four causes of action being separately stated in the complaint. The summons was issued in November, 1882, and was

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for relief. *Defendant demurred: 1. That several causes of action were improperly united. 2. That there was a defect of parties plaintiff. 3 That plaintiff had not legal capacity to sue. 4. That the court had no jurisdiction—the summons being for relief and the complaint for a money demand. 5. That complaint does not correspond with summons. 6. That complaint is not verified. 7. That the court has no jurisdiction of the subject of the action or of the person of defendant. On March 31st, 1883, Judge Wallace overruled the demurrer and ordered defendant to answer by April 3d next, and that the cause be transferred to calendar No. 1, for trial at the present term. "Defendant excepted to the order, in every particular, and submits that the demurrer should have been sustained, the summons and complaint dismissed, and in no event should an answer have been required to be served within the time limited." *Held*, that the appeal might be dismissed for the want of proper exceptions; however, considering the questions involved, it is obvious that the grounds specified in the demurrer are patently untenable, and have no foundation whatever; and the order of the judge was not beyond the power conferred upon him by section 193 of the code.

[Ed. Note.—Cited in Lowry v. Jackson, 27 S. C. 324, 3 S. E. 473; Weatherly v. Covington, 51 S. C. 56, 28 S. E. 1.

For other cases, see Appeal and Error, Cent. Dig. §§ 1432, 1435–1439, 1443, 1447–1452, 1454–1459, 1462, 1464–1468; Dec. Dig. ⊂⊃248.]

Opinion by Mr. Chief Justice SIMPSON, March 4th, 1884. E. F. Stokes, for appellant. No argument contra.

[For subsequent opinion, see 22 S. C. 583.]

No. 1530. SCARBOROUGH v. SPENCER. November Term, 1883.

[*Trusts* ⊂⊃191.]

This was a controversy submitted without action, raising the question whether defendant was bound to perform his written agreement with plaintiff, as trustee, to purchase a certain tract of land. The land had been conveyed to the plaintiff and his heirs in trust to pay from the rents, &c., a debt to J. and certain mortgages, and then from the income, &c., to pay for the support and maintenance of the family of C. S. and the education of his children—"it being understood that, with the consent of the said C. S., in writing, the said trustee shall have power to sell all or any portion of those several premises to carry out the trusts above created; and, also, that the said trustee shall have the authority to sell any portion of said lands, to change the investment, or reinvest the proceeds of sale in other property, and to do any act in regard to the said property now conveyed, with the consent of the said C. S., that the said C. S., could do were

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the fee-*simple vested in him; and further in trust, after the death of the said C. S., all legal incumbrances on said lands being first satisfied, to divide said lands, or the proceeds of the sale of said lands, among the wife and children of the said C. S., or among the children in case the said C. S. should leave no wife, according to the statute of distributions of the State of South Carolina."

The trustee paid the debts, and, by written consent of C. S., contracted in writing to sell the land to defendant. In the written consent of C. S., given to the trustee to make the sale, the proceeds were ordered to be applied to certain debts and liabilities contracted by the said C. S., or for the support and maintenance of his family, and of expenses of management of the trust property, the balance to be divided between his wife and children. Defendant refused to comply, alleging that the purpose of the sale was to work a revocation of the trust deed, which the trustee could not do. The Circuit judge (Cothran) decreed specific performance of the contract, and on appeal this decree was affirmed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 243; Dec. Dig. ⊂⊃191.]

Opinion by Mr. Chief Justice SIMPSON, March 10th, 1884. C. E. Spencer, for appellant. Haynsworth & Cooper, contra.

No. 1531. TOMPKINS v. TOMPKINS. November Term, 1883.

[*Mortgages* ⊂⊃479.]

Plaintiff brought action for foreclosure of mortgage, making a junior judgment creditor a party defendant. This defendant answered, admitting the mortgage, but alleging that certain rents received from the mortgaged property, and from a policy of fire insurance, should be credited on the mortgage. On this defendant's motion, Judge Hudson referred the cause to a master to "take testimony and state the amounts due upon the mortgage debt and upon the judgment, and report the same to this court, all equities reserved." Plaintiff appealed from this order, upon the ground that the issues of law

should have been decided by the court before a reference was ordered, and that it was error to refer the cause to a master to decide issues of law and fact. *Held*, that the order authorized a report on the facts of the case, including the facts connected with the alleged credits but not a decision of the legal questions involved, and that the order of reference was proper.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1395–1398; Dec. Dig. ⇐479.]

Opinion by Mr. Chief Justice SIMPSON, March 10th, 1884. Ernest Gary, for appellant. B. W. Bettis, contra.

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*No. 1537. McFADDEN v. TANT. November Term, 1883.

[*Justices of the Peace* ⇐171.]

This was an action for claim and delivery of a horse, judgment being rendered for defendant by the trial justice, on January 9th, 1882. Plaintiff appealed to the Court of Common Pleas, where it was heard in November, 1882, plaintiff claiming a trial de novo. The presiding judge (Aldrich) ruled that, under the provisions of section 358 of the code of procedure, which went into effect on May 1st, 1882, the appeal must be heard on the original papers sent up by the trial justice, without a jury, and without the examination of witnesses. To this ruling plaintiff excepted, and his appeal being dismissed, he further appealed to this court, upon the ground, inter alia, that "his Honor erred in ruling that an appeal taken from a trial justice's court prior to May 1st, 1882, must be tried on the papers sent up from the inferior court." Upon this ground the judgment of the Circuit Court was reversed, this court holding that the change in the law of appeals from trial justices' courts, as enacted in section 358 of the code, did not apply to trials had before a trial justice prior to May 1st, 1882. Citing Lynch's Code, § 369; Ex parte Graham, 13 Rich. 283; Nichols v. Briggs, 18 S. C. 481, and that plaintiff was entitled to a trial de novo in the Circuit Court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 655–657; Dec. Dig. ⇐171.]

Opinion by Mr. Justice McIVER, March 13th, 1884. L. T. Izlar, for appellant. No counsel contra.

No. 1538. DONALDSON v. WARD. November Term, 1883. This was an action to recover the amount of an account for rice sold by plaintiff to defendant. A counterclaim was pleaded. Judgment was for defendant (Kershaw, J.), and a motion on a "case containing exceptions" was heard at the next term by Fraser, J., and refused. Plaintiff appealed upon the following grounds, only the first two of which were pressed in argument:

"1. Because the verdict rendered in said cause is against both the law and the weight of evidence. 2. That the damages given by the jury in said cause are excessive, unreasonable and unjust. 3. That the verdict rendered by the jury is illogical. 4. That the defendant, while said trial was in progress, talked to one or more of the jurors, while the said trial was pending before said jury. 5. That one or more of the jurors who sat upon the jury had, before the trial, formed

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and expressed decided opinions *adverse to the interest of the plaintiff; this was unknown to plaintiff until after the trial. 6. That his Honor erred in charging the jury, 'That if they believed that the plaintiff had failed to perform her part of the contract in every particular, then the defendant was entitled to recover damages.' 7. Because his Honor should have granted the motion of plaintiff to strike out the first and second paragraphs of defendant's answer."

The judgment below was affirmed by this court, the exceptions being severally ruled upon as follows:

[1 and 2. *Appeal and Error* ⇐999.]

It is settled law that these matters are exclusively within the cognizance of the Circuit Court, and this court has no jurisdiction to hear or determine such questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912–3921, 3923, 3924, 3896–3899; Dec. Dig. ⇐999.]

[3. *Appeal and Error* ⇐731.]

No question of law is here presented, and therefore it need not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3017–3021; Dec. Dig. ⇐731.]

[4 and 5. *Appeal and Error* ⇐688.]

There is nothing stated in the "Case," by affidavit or otherwise, to establish the facts upon which these grounds are based.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2894–2896; Dec. Dig. ⇐688.]

[6. *Appeal and Error* ⇐699.]

The charge as set out in the "Case" contains no such proposition, and therefore this ground needs no further notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2928–2930; Dec. Dig. ⇐699.]

[7. *Appeal and Error* ⇐682.]

It does not appear that any such motion was made, or, if made, upon what grounds based. The answer is not given, and, therefore, it is not known what were the first and second paragraphs. It is stated that defendant pleaded a general denial and a

counter-claim, and no reason can be conceived why either of these defenses should have been stricken out.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2885, 2886; Dec. Dig. ⊂⊃ 682.]

Opinion by Mr. Justice McIVER, March 13th, 1884. C. R. Anderson, for appellant. No counsel contra.

No. 1543. OTIS v. BROWN. November Term, 1883. This was an action by the executrixes of James Welsman, deceased, who died in 1870, for a construction of the will of their testator. This will gave to his daughters, Harriet and Emma, each one-fifth part of the residuum for life, with remainder "to such children as she should leave surviving her;" and if "she should die leaving no child or children surviving her, the said one-fifth part or share shall return to my estate, and be divided among the surviving devisees under my will, to be held by them, respectively, in the same manner as the shares devised to them are held." One-fifth was to be divided into two parts, one part

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whereof was to go to *his granddaughter, Amelia C. Brown, for life, with remainder, &c., in precisely the same words as were employed in the gifts to Harriet and Emma; and the other part to his grandsons, R. E. Brown and J. W. Brown, to be divided equally between them, share and share alike, absolutely. One-fifth part to his daughter Maria for life, with remainder to all her children, surviving, if she married again; and, if not, then at Maria's death, one-half to his granddaughter, Amelia Otis, for life, with remainder, &c., in precisely the same words as were employed in the gifts to Harriet and Emma, and the other half to his grandson, Arthur, absolutely. The remaining one-fifth the testator gave, absolutely, to his son James T. By a codicil testator revoked the bequest to James T., "and in lieu and instead thereof" gave, devised and bequeathed the said one-fifth to his executors in trust to invest, and the income thereof to pay over to said James T., for and during the term of his natural life, and after his death to hold the same in trust for the use, &c., of his daughter Caroline for life, with remainder, &c., in precisely the same words as were employed in the gifts to Harriet and Emma.

Testator died in 1870, Harriet in 1872, unmarried; Amelia Otis in 1873, childless; James T. in 1877, who left his daughter Caroline surviving, who afterwards died, leaving her surviving, her husband, Dr. Jenkins, and two infant children—E. E. and A. N. Jenkins—one of whom, E. E., has since died, his father and brother being his heirs-at-law. *Held*—

[1. *Wills* ⊂⊃476.]

That the will and codicil were parts of the same thing—the last will and testament—and must be construed together; therefore, that James T. is one of the "surviving devisees under the will."

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 997; Dec. Dig. ⊂⊃476.]

[2. *Wills* ⊂⊃529.]

That on the death of Harriet, without children, her share was divisible as follows: One-fourth to the trustees of James T., under the terms and limitations of the codicil; one-fourth to Emma and Maria, each, and one-eighth to Amelia C. Brown, all subject to the precise conditions attached to the original shares given them under the will; and one-eighth to be divided equally between J. W. Brown and R. E. Brown, and to be theirs absolutely.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1142; Dec. Dig. § 529.]

[3. *Wills* ⊂⊃634.]

That Amelia Otis having died before Ma-

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ria, the contingent *remainder to said Amelia never vested, and there was, therefore, no reverter of such interest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. ⊂⊃634.]

[4. *Wills* ⊂⊃547.]

That the share of James T. passed, at his death, to Caroline, and then, at her death, to her two children, E. E. and A. N., and upon the death, afterwards, of said E. E., this share became distributable between Dr. Jenkins, his father, and his brother, A. N.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1179–1181, 1185; Dec. Dig. ⊂⊃547.]

[5. *Appeal and Error* ⊂⊃226.]

That the right of an allowance of counsel fees not having been presented to the court below, nor there determined, the question is not properly before this court. Circuit decree of Cothran, J., in its results, affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1324; Dec. Dig. ⊂⊃226.]

Opinion by Mr. Chief Justice SIMPSON, March 18th, 1884. A. G. Magrath, A. G. Magrath, Jr., B. J. Whaley, for appellants. Hayne & Ficken, contra.

No. 1548. MILLER v. SCHMIDT. November Term, 1883. This was an action in a trial justice's court for the recovery of the balance due on a note. Defendant appeared by her husband and agent, who made no objection to the trial proceeding. Judgment was given for plaintiff, and defendant appealed. On the call of the case in the Circuit Court, defendant, without previous notice, presented a petition for a new trial, upon the fact, stated in her own affidavit, that she was too sick to attend the trial below; that

she could have proved payment, and that manifest injustice had been done her. The Circuit judge (Fraser) refused the petition (1) because he had no right to grant it; (2) that it came too late and did not make out a proper case. After argument on the merits, judgment was rendered that the appeal be dismissed and the judgment below affirmed. On appeal to this court, *held*—

[1. *Appeal and Error* ⇐987.]

That this court was confined to a consideration of alleged errors of law only.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893–3896; Dec. Dig. ⇐987.]

[2. *Justices of the Peace* ⇐116.]

That defendant's petition was manifestly under section 368 of the code, which applies only to cases of default, and this was not a case of default. The Circuit judge had no right to grant the petition.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 369–371; Dec. Dig. ⇐116.]

[3. *Justices of the Peace* ⇐116.]

It is immaterial what other reasons were assigned for refusing the petition, but defendant was too late, it having been made at the trial without notice.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 369–371; Dec. Dig. ⇐116.]

[4. *Appeal and Error* ⇐242.]

Statements made by counsel for respondent

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in his argu*ment before the Circuit Court, called for no ruling, and none was made. It therefore furnishes no ground for an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417–1425; Dec. Dig. ⇐242.]

[5. *Appeal and Error* ⇐991.]

With a question of fact, this court has nothing to do. What evidence is entitled to more weight, especially where it is conflicting, presents no question of law. Judgment affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3896–3899, 3912, 3913; Dec. Dig. ⇐991.]

[This case is also cited in Wideman v. Patton, 64 S. C. 408, 411, 42 S. E. 190, and distinguished therefrom.]

Opinion by Mr. Justice McIVER, March 24th, 1884. R. A. Lynch, for appellant. Mark Reynolds, contra.

No. 1562. DUMAS v. ABLES. November Term, 1883. This was an action by plaintiff to have a parol agreement by defendant Ables, to execute a mortgage, set up as an equitable mortgage and superior to the lien of a judgment subsequently obtained by defendant Nevill against his co-defendant. In behalf of defendant Nevill, the Circuit judge (Wallace) dismissed the complaint. On appeal to this court, *held*—

[1. *Appeal and Error* ⇐171.]

That plaintiff, not having made the point on Circuit that the allegations of his complaint were admitted by the answers, but, having introduced evidence to sustain such allegations, he cannot raise the point in this court. It is an issue of law not passed upon by the Circuit Court nor even presented to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1063, 1066, 1067, 1161–1165; Dec. Dig. ⇐171.]

[2. *Appeal and Error* ⇐1008.]

Findings of fact by the Circuit judge, from evidence taken before him in open court, sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3960, 3962–3969; Dec. Dig. ⇐1008.]

[3. *Liens* ⇐22.]

If a secret lien can be established by parol testimony, it must be done without delay, and by evidence that is clear and indisputable, which can scarcely be affirmed of evidence that has not proved sufficient to satisfy the mind of a learned and distinguished judge. Judgment affirmed.

[Ed. Note.—For other cases, see Liens, Cent. Dig. §§ 57–59; Dec. Dig. ⇐22.]

Opinion by Mr. Justice McIVER, April 14th, 1884. J. J. Norton, for appellant. Murray, Breazeale & Shelor, contra.

REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT

OF

SOUTH CAROLINA

VOLUME XXI

CONTAINING CASES OF NOVEMBER TERM, 1883, AND OF APRIL TERM, 1884

BY ROBERT W. SHAND

STATE REPORTER

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(21 S.C.)

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DURING THE PERIOD COMPRISED IN THIS VOLUME

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HON. WILLIAM D. SIMPSON.

ASSOCIATE JUSTICES.

HON. HENRY McIVER. HON. SAMUEL McGOWAN.

CIRCUIT JUDGES.

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THIRD	"	"	THOMAS B. FRASER.
FOURTH	"	"	JOSHUA H. HUDSON.
FIFTH	"	"	JOSEPH B. KERSHAW.
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SEVENTH	"	"	WILLIAM H. WALLACE.
EIGHTH	"	"	JAMES S. COTHRAN.

ATTORNEY-GENERAL.

HON. CHAS. RICHARDSON MILES.

SOLICITORS.

1*st Circuit*—W. ST. J. JERVEY.
2*d Circuit*—F. H. GANTT.
3*d Circuit*—J. J. DARGAN.
4*th Circuit*—H. H. NEWTON.
5*th Circuit*—R. G. BONHAM.
6*th Circuit*—T. C. GASTON.
7*th Circuit*—D. R. DUNCAN.
8*th Circuit*—J. L. ORR.

CLERK OF THE SUPREME COURT.

A. M. BOOZER.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED IN THIS VOLUME.

Hon. WILLIAM D. SIMPSON, Chief Justice.
Hon. HENRY McIVER, Associate Justice.
Hon. SAMUEL McGOWAN, " "

21 S. C. *1

*REEVES v. TAPPAN.

(November Term, 1883.)

[1. *Executors and Administrators* ⟸128.]

Until the act of 1880, the executor of an executor in this State represented the first testator, and was invested with all the powers conferred by the will upon the first executor as executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 531, 532; Dec. Dig. ⟸128.]

[2. *Powers* ⟸30.]

A mere naked power conferred upon the executor as an individual cannot be exercised by his executor, but where the power is conferred upon the executor in trust and virtute officii, it survives and passes to his executor. Powers considered and classified.

[Ed. Note.—Cited in Bredenburg v. Bardin, 36 S. C. 203, 15 S. E. 372; Dick v. Harby, 48 S. C. 528, 530, 26 S. E. 900; Rice v. Coleman, 87 S. C. 349, 69 S. E. 516, Ann. Cas. 1912B, 1016.

For other cases, see Powers, Cent. Dig. § 92; Dec. Dig. ⟸30.]

[3. *Executors and Administrators* ⟸128.]

Testator by his will directed his executor to pay his debts and a specific legacy in money, and then devised and bequeathed all the residue of his estate to his brother L. in trust for the use of L.'s children, to be divided among them share and share alike. L. was appointed executor of the will with full power to execute the same and to sell any of the real or personal estate and to invest proceeds as trustee for his children. L. qualified and afterwards died, leaving S. his sole executrix. *Held*, that the pow-

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ers conferred upon L. passed at *his death to his executrix, and that a sale and conveyance by S. of a lot of land of the first testator was a valid sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 531, 532; Dec. Dig. ⟸128.]

[4. *Powers* ⟸30.]

L., by his will, authorized his executrix to sell for certain purposes any of the lands of the first testator outside of the city of C. *Held*, that this did not prevent S. from selling lands of the first testator in C., under the power conferred in the first will.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 92; Dec. Dig. ⟸30.]

[This case is also cited and explained in Reeves v. Brayton, 36 S. C. 385, 397, 399, 400, 402, 15 S. E. 658.]

Before Hudson, J., Richland, April, 1883.

This was an action commenced in August, 1881, by Sarah N. Reeves, Eliza A. Lewis, substituted trustee under the will of Robert N. Lewis, and others, against Henry L. Tappan, Edwin F. Gary, and Geo. L. Dial, administrator, for the recovery of a lot of land in the city of Columbia. The plaintiffs are the children of D. B. Lewis, and claimed the land under the will of their uncle, Robert N. Lewis. The defendants claimed under deed from Sarah B. Lewis, sole executrix of D. B. Lewis, who was sole executor of R. N. Lewis. This deed conveyed the land in question to Tappan and Gary in 1872, for the alleged consideration of $10,000. The whole case turns upon the legal construction of so much of the wills as is stated in the opinion.

The presiding judge charged the jury as follows:

The plaintiffs sue, as devisees under the will of R. N. Lewis, to recover the land devised to them; they have joined a trustee. The land is in the possession of Tappan and Gary. The plaintiffs must recover on the strength of their title. It is a pure question of title, and has nothing to do with feelings or mercy.

The question here is a nice one. The parties must prove a right to the immediate possession. Ordinarily a grant is shown; if not, then to a point where title is presumed, or, then, to a common source. These children have a conveyance from their uncle. Tappan and Gary have a deed from the executrix of the executor of R. N. Lewis. Both claim to hold from R. N. Lewis. When this state of things exists we need not travel in the past. Can the deed of the executrix prevail against the children? If the deed prevails, then Gary and Tappan take the property. If that deed fails, then the children take.

The will of R. N. Lewis makes D. B. Lewis a trustee in trust for the children, and then

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appoints Daniel B. Lewis executor, *with power to sell and reinvest, &c. It has been asserted here, by one of the counsel for the defence, that some of the best lawyers in the State have given the opinion that the title of Mrs. Lewis was good. It may be so, but it seems to me that a prudent man would hesitate before he would take the title of an executor of an executor under circumstances similar to those in this case, and I ask you, as men of common sense, if you saw that the trustee was dead, would you not hesitate to take the deed of the representative of the trustee?

The executor is empowered to sell and to reinvest. The idea of the testator was that he might want to sell to pay debts "and change investments, or to invest and reinvest for the benefit of the devisees, at his discretion." That was a special trust and confidence in his brother "which he could not devolve on another." When he died that trust ended. I charge you that, under the wills, Mrs. Lewis, the executrix, whilst she could discharge ordinary duties, yet had no power by the will or by law to give a title.

Another title is introduced here—a tax title. Before it could avail the defendants, it became necessary for them to show that all the steps had been taken to make it a good title. Nothing of this kind has been attempted. Without this, this title avails nothing. As far as I know, this is the law of the case.

I am requested to charge you, "That the defendants, Gary and Tappan, having purchased the premises set forth in the complaint from Sarah B. Lewis, mother of plaintiffs, as executrix of D. B. Lewis, executor of R. N. Lewis, from whom the plaintiffs derive title, and the plaintiffs having acknowledged the receipt of the purchase money by the executrix by incorporating the deed of Gary and Tappan in their complaint, such an equitable defence is made as precludes these plaintiffs from recovering these premises in this action."

This proposition is erroneous, and hence refused. By incorporating the said deed in their complaint, the plaintiffs do no more than allege that the defendants, Gary and Tappan, purchased said land of Sarah B. Lewis, as executrix, at and for the sum of ten thousand dollars; but this is not an acknowledgment that the plaintiffs received the

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money or any part thereof, but is *a declaration that the land was sold and the money received by one who had no authority so to do.

As matter of law, I instruct you that Mrs. Lewis had no power to execute a title to defendants.

As to the question of damages, the counsel for Gary and Tappan having agreed that $200 would be a reasonable sum, that should be the amount, if you conclude that the plaintiffs are entitled to any.

The verdict was for plaintiffs without damages.

The defendants appealed upon several grounds, variously stated in twenty-three exceptions, to the judge's charge and his refusals to charge.

Messrs. R. A. Lynch and L. F. Youmans, for appellant.

Messrs. F. W. McMaster and James M. McMaster, contra.

The statute of uses executed the use in the children of D. B. Lewis, and the executor had only a naked power or common law authority to limit new uses at his discretion. 1 Spears, 356; 2 McCord, 252; 17 S. C., 545. This power is discretionary, and necessarily confined to the individual to whom it is given. Lewin Trusts, 538; Perry Trusts, §§ 248, 308, 473; 1 Sug. Pow., 126; 7 Cow., 187; 2 Wend., 1; 3 Brev., 242; 4 Bibb, 307; 5 Met., 462. The discretionary power given to D. B. Lewis is not coupled with a trust. There is no trust until after the trustee has exercised his discretion, which he never did. And the power of sale here can be executed without the legal estate being in the trustee. 4 Strob. Eq., 74. The fee is in the cestuis que use, subject to be divested by the exercise of the power. The language of the will shows that the trustee was not to take the fee. Otherwise, why give the executor power to sell the "real or personal estate." 5 East., 162. But if not executed while D. B. Lewis lived, it certainly was at his death. For the discretion was purely personal, and was therefore extinguished at his death and was incapable of delegation or transmission. The power was given to D. B. Lewis and to him alone. The statute makes transmissible only the ordinary duties of an executor. At

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Lewis' death *the trust became passive and was therefore executed. Co. Lit., 112b; 1 Sug. Pow., 214, 319; 2 Wms. Ex'rs, 810n; 16 Ves., 27; 5 Paige, 387; 10 Cush., 571; 2 Atk., 88; 4 Kent, 330; 6 Rich. Eq., 23; Perry Trusts, 292, 294, 320; Lewin Trusts, 253–4; 17 S. C., 550; 11 Id., 71; 11 East., 377; 2 Salk., 679; 2 McCord, 252.

March 18th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This case involves the title to valuable real estate in the city of Columbia, now in the possession of the defendants, Tappan and Gary, and the main question before the court is as to the power of an executor of an executor to sell under the will of the first testator. It it admitted that had the executor of the first testator sold and conveyed the property in dispute in his life-time, as did his executrix after his death, that the title of defendants, as purchasers, would have been perfect and complete, at least so far as the plaintiffs are concerned. But it is denied that his executrix could sell; and inasmuch as the defendants, in one of their defences, claim through the sale made by the executrix, the main question, as we have said, when the case is stript of all of its unnecessary surroundings, is as to the power of the executrix of the executor under the will of the first testator.

To determine this question, the two wills must be examined, to wit, the will of Robert N. Lewis, in which his brother, D. B. Lewis, was the appointed and qualified executor, and the will of the said D. B. Lewis, in which his wife, Sarah B. Lewis, was the appointed and qualified executrix. The portions of these two wills necessary to be examined and considered are as follows: In the fourth clause of the will of Robert N. he devised and bequeathed "All the rest, remainder, and residue of my estate, both real and personal, to my dear brother, Daniel B. Lewis, of the State of Texas, in trust, nevertheless, upon the following uses and trusts, that is to say, for the use, benefit, and behoof of the children of my said brother, to be divided amongst them share and share alike, and not to be subject or liable to any of the individual debts, liabilities, or contracts of my said brother." He then nominated and appointed his "said brother, Daniel B. Lewis," his ex-

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*ecutor, "with full power to execute the will," and "with full power to sell any of my real or personal estate," except the lot specially devised to Emily Bateman and Nicholas Eugene Lewis, and also with full power to compound debts due him without application to any courts of law or equity, and also to invest or reinvest the proceeds and residue as trustee for his children, at his discretion.

Daniel B. Lewis, after qualifying and partially administering the estate, died testate, appointing his wife Sarah his executrix. In the second clause of his will he said: "I desire that the will of my deceased brother be carried out as he has directed; that is, after all outstanding debts have been paid, the residue, both personal and real, to be equally divided among my legitimate children, that may be living at the time of distribution," &c., &c.; and directing in the third clause that the annual income derived from the rest of said property be used in the education and raising of his children; and if this should be insufficient, then all the lands of the estate of R. N. Lewis outside of the city of Columbia be sold to answer that purpose.

As has already been stated, Sarah B. Lewis qualified as executrix of this last will, and becoming thereby executrix also of the first, sold and conveyed the real estate in question to the defendants, Tappan and Gary, for $10,000, which sum was afterwards paid to her by the said purchasers. These purchasers afterwards mortgaged the premises to one Asa Burke, now deceased, of whose estate the defendant Dial is the administrator with the will annexed.

Was the sale of Sarah B. Lewis, executrix, to Tappan and Gary a valid sale? There is no doubt Sarah B. Lewis made the sale as executrix of Robert N., and it is also certain that she received the full amount of the purchase money as said executrix, and there is some evidence that she used it for the purposes of the estate; but the question recurs, Did she have the power to sell? It will not be questioned that up to the recent act of 1880, the executor of an executor represented the first testator, in this state, as in the other states. This has been familiar law, announced in many decided cases and found in all the text books upon the subject, and it prevailed in our state, as elsewhere, until the act above referred to, which was passed

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in 1880, since the occurrences here*in, and therefore having no application here. Under this principle Sarah B. Lewis, when she qualified as executrix of her husband, became eo instanti, it will be conceded, executrix of Robert N., and was thereby invested with all the powers, under the will of the said Robert, with which her husband as executor thereof had been clothed. I mean all such powers as belonged to him as executor, and with which he had been intrusted by his testator, to the proper discharge of his duty as said executor. "The executor of an executor is to all intents and purposes the executor and representative of the first testator." 2 Black. Com., 506. If so, he can certainly do all that the first executor, as executor, could do.

This then brings us to the question, whether Daniel B. could have made this sale as executor of his brother Robert, in the discharge of his executorial duties and functions, or was the power of sale, which it is admitted the will of Robert conferred upon him, a mere naked power, independent of and unconnected with his office as executor? Was it a mere personal trust in Daniel as an individual, and to be exercised by him, and by him alone, as an individual and not as executor? If the power conferred was of this latter kind, then it died with him, and the sale made by his executrix was without

authority, and therefore illegal and void. But if it was of the former character, then it was transmissible, and the will of Daniel continued it, and kept it alive, and his executrix having exercised it, her conveyance is legal, and therefore binding upon all the parties in interest.

The turning point then is, using the ordinary terms in such cases, was the power conferred a naked power, or was it coupled with a trust? This is always a question of intention, which can be determined only by reference to the terms of the will; for, as was said in Franklin v. Osgood, 14 Johns., 527, "A reference to the terms of the will is the only course by which to determine whether a naked power only is intended to be given, for even if the terms made use of in creating the power, detached from other portions of the will, confer merely a naked power to sell, yet if the other provisions of the will evince a design that, at all events, the lands are to be sold in order to satisfy the whole intent of the will, it is not a naked power, but is

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coupled with a trust and in*terest." "A power to sell for the payment of debts would be such a power." 1 Sug. Pow., 111, note.

In De Saussure v. Lyons, 9 S. C., 499, this court drew the distinction between a naked power and a power coupled with an interest in trust, holding the former to be an individual power, and to be exercised only in the manner authorized by the creator, and the latter to be attached to the interest or trust reposed, and consequently to be moulded by the character of that interest or trust—concluding that when a power of sale, for instance, is found conferred in the will upon the executor, as a material part of the means placed in his hands by the testator for carrying out the provisions of the will, it attached to the office of executor and not to the individual named. So that in such case, any one holding the office became at once, by virtue of that fact, invested with the power. This principle is sustained in that case by the citation of numerous cases where it was enforced.

Now looking at the will of Robert N. Lewis as a whole, and especially to the terms of the fourth clause, it seems clear that the power of sale was attached to the office of his executor, and was conferred solely as a means of carrying out the provisions of the will. The will is simple in terms and easily understood. It directs the debts to be paid, then a certain lot is devised to Emily Bateman and her son Nicholas, and $5,000 in cash is bequeathed to her for herself and child; then the rest, remainder, and residue to Daniel B. Lewis, his brother, in trust, to be divided equally among the children of his said brother. Then the appointment of Daniel B. as executor, with full power to execute the will, and in express terms, with full power to sell any of his real estate or personal except the lot devised to Emily Bateman.

Now what other purpose could the testator have had in view in conferring the power to sell any portion of his estate upon the executor, except as a means of discharging his duties as such executor? It was incumbent on the executor to pay the debts and to pay to Emily Bateman the sum of $5,000. It was also his duty to turn over the remainder, rest, and residue to the trustee for the use, benefit, and behoof of his children, so as to be divided amongst them, share and share alike, and so that the proceeds might be invested at the discretion of the trustee; or,

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at least, we *are at a loss to see what other object the testator had in giving this full power, so explicitly expressed, to the executor but to enable him to put the estate in a shape to meet the requirements in the will, to wit, the payment of debts and of the legacy to Emily Bateman, and an equal division of the remainder among the children, their shares to be held by a trustee, and subject to investment at his discretion. It certainly could not have been intended as a mere naked power conferred upon Daniel B. Lewis as an individual, and with no object in view.

Powers like this may be divided into three classes: 1. A naked common law power, like a power given to an attorney or agent, to do any act; 2. A power coupled with an interest in the donee; and 3. A power which, when detached from the other parts of the will in which it is found conferred, would seem to be a mere naked power, but yet, when the whole will is considered, it appears that it was conferred to satisfy the whole intent thereof, and was intended to enable the executor to exercise fully his executorial duties. In the first class no one but the party named can execute the power, and upon his death it expires. Co. Litt., 112, 113, 181; Shep. Touch., 429; Powell Dev., 292, 310. In the other two the power survives and is transmissible, and when vested in an executor may be exercised by his executor. Bergen v. Bennett, 1 Cai. Cas., 15; 3 Salk., 277; 3 Atk., 714; 2 P. Wms., 102; Brent's Case, W. Jones, 252; Cro. Car., 282; Powell Dev., 297, 307; Sug. Pow., 141; Cro. Car., 382; Cro. Eliz., 26; 3 Binn., 49.

We regard the power in the case before the court as belonging to the last class. It was certainly more than a mere power of attorney to sell, which could be exercised only by the party named for his principal, and it does not therefore belong to the first class. But there was no legal interest in the property given to the executor; on the contrary, the legal title was given to D. B. Lewis as trustee, to be held by him as such trustee for the use and benefit of his children; and therefore it was not a power coupled with an interest in the sense that

the executor was entitled to any portion thereof. This excludes it from the second class. It was a power, however, coupled with a trust, the trust being the executorship, and it was conferred upon the office of

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*executor so as to enable the party filling that office, whoever he might be, to properly discharge its functions and duties, and therefore it is of the third class.

The weight of authorities hold that such a power survives, and is transmissible. Our conclusion therefore is, that this power having been exercised by the executrix of D. B. Lewis as executor of Robert N. Lewis, her sale to Tappan and Gary is unimpeachable, at least for the want of authority. Franklin v. Osgood, 14 Johns., 553, and the cases there cited; Uldrick v. Simpson, 1 S. C., 283; Co. Litt., 113, note a; Taylor v. Benham, 5 How., 233 [12 L. Ed. 130]; Drayton v. Grimke, Bail. Eq., 392.

Did the will of D. B. Lewis limit the power of his executrix in the execution of the will of Robert N.? Waiving the question whether the executor of an executor can only exercise such duties and powers with reference to the first estate, as the second testator may authorize him to exercise, yet we do not find any limitation placed by D. B. Lewis on the powers of his executrix as to the will of Robert N. D. B. Lewis recognized the fact that his executrix would become the executrix of his testator, Robert N., and seeing possibly that it might become necessary to sell some of the real estate for the education and raising of his children, he decided that if such became necessary, that the lands outside of the city of Columbia should be sold; but there is no inhibition interposed as to the general power of sale found in the will of Robert. That was left intact. And if, as we have concluded, it was a power virtute officii, when the office was created by Robert N. in his will, it remained a part of that office as long as the same existed, or at least so long as the duties of said office required it to exist, for their proper discharge.

We think the Circuit judge erred in charging the jury that the power of sale conferred in the will of Robert N. was a special trust and confidence in his brother, which he could not devolve, and that when he died the trust ended. On the contrary, we think this power was attached to the office of executor, and Mrs. D. B. Lewis having become by operation of law in possession of said office, she was legally authorized to execute this power; and having done so by the sale to the defendants, Tappan and Gary, said sale is valid.

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*After reaching this conclusion, the other questions raised in the case disappear, and therefore need not be considered.

It is the judgment of this court, that the judgment of the Circuit Court be reversed.

A petition was filed for a rehearing of this case, but it was refused by an order passed April 26, 1884.

PER CURIAM. We have carefully considered the petition for rehearing filed in this cause, and do not see that any errors or omissions in the former judgment are made to appear prima facie. Nor do we see that any new views are suggested which require the further consideration of the court. The judgment of this court is, that the petition for rehearing be dismissed.

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21 S. C. 11

CHAFEE & CO. v. RAINEY.

(November Term, 1883.)

[1. *Judgment* ⇐306.]

The concluding order of a Circuit decree was directly contrary to the whole tenor of the decree. Upon the matter being brought to the judge's attention by a letter from the attorney of the losing party, the judge wrote to the clerk of court, directing a change in the order, stating that the concluding sentence as written was an error. *Held*, that it was a mere clerical error, which the Circuit judge could correct on an ex parte application, and that the act of the clerk under the order of the court was the act of the court itself.

[Ed. Note.—Cited in Garlington v. Copeland, 32 S. C. 71, 10 S. E. 616; Henlein v. Graham, 32 S. C. 308, 10 S. E. 1012; Ruff v. Elkin, 40 S. C. 79, 18 S. E. 220; Knox v. Moore, 41 S. C. 360, 19 S. E. 683; State v. Fullmore, 47 S. C. 39, 40, 24 S. E. 1026; Allen v. Cooley, 53 S. C. 445, 31 S. E. 634; Lorick & Lowrance v. Motley, 69 S. C. 570, 48 S. E. 614.

For other cases, see Judgment, Cent. Dig. §§ 586, 598; Dec. Dig. ⇐306.]

[2. *Judges* ⇐29.]

A judge may render a decree in a cause heard before him in one Circuit, after he has entered upon the duties of another term in another Circuit; and so, too, he may then direct the correction of mere clerical errors in a judgment rendered by him on a previous Circuit.

[Ed. Note.—Cited in Barrett v. James, 30 S. C. 335, 9 S. E. 263; State v. Nathans, 49 S. C. 228, 27 S. E. 52; Muckenfuss v. Fishburne, 65 S. C. 575, 44 S. E. 77.

For other cases, see Judges, Cent. Dig. § 149; Dec. Dig. ⇐29.]

[3. *Homestead* ⇐2.]

If, at the time of levy, a condition of things exist entitling defendant to homestead, he may properly claim it. Thus, where judgment was obtained against the head of a family, and he afterwards ceased to be such, but again, and before levy made, married a wife, he is entitled to his homestead exemption as against such judgment.

[Ed. Note.—Cited in Rollings v. Evans, 23 S. C. 327; Munro v. Jeter, 24 S. C. 34; Gray, Sullivan & Gray v. Putnam, 51 S. C. 101, 28 S. E. 149; Ex parte Goldsmith, 68 S. C. 538, 47 S. E. 984.

For other cases, see Homestead, Cent. Dig. § 3; Dec. Dig. ⇐2.]

4. This case distinguished from Pender v. Lancaster, 14 S. C., 25 [37 Am. Rep. 720], and Jones v. Miller, 17 S. C., 380, and Pender v. Lancaster explained and limited.

[This case is also cited in Bank of Manning v. Mellett, 44 S. C. 386, 22 S. E. 444, without specific application.]

Before Aldrich, J., Georgetown, March, 1883.

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*The opinion fully states the case. The original decree of the Circuit judge was as follows, omitting its statement of facts:

Mr. Dozier, with great force and ingenuity, contended that the defendant Rainey is not entitled to the exemption, because his second wife having died in June, 1880, and his children not living with him, he was not the head of a family; that the lien of the judgment attached, and his subsequent marriage in June, 1881, did not divest that lien, and, therefore, the lot No. 55, in which he had lived with his previous wives and children, was subject to levy and sale.

After the adoption of the constitution of 1868, our Supreme Court, as it was then constituted, seemed inclined to give the most liberal construction to the article providing for the homestead exemption. They treated it as a favored tenure for the support of the family of the insolvent debtor, whose reverses had reduced them from affluence to poverty, and doubtless this was the benevolent intention of the framers of the constitution. Evidently it was intended to meet any final process, issued from any court, for any debt contracted before or after the adoption of the constitution. But the decision in Gunn v. Barry [15 Wall. 610, 21 L. Ed. 212], of the United States Supreme Court, suddenly arrested this inclination, and this beneficent purpose of the constitution was treated as against public policy and the binding obligation of contracts. This was so obvious that the legislature found it necessary to pass several acts giving construction to the constitutional provision and enlarging the restrictions placed thereon by the court.

I am convinced, from a careful consideration of the debate on the adoption of this section, reported in the journal of the convention, that the benevolent idea of Mr. Jefferson was the controlling thought of those who had the framing of that instrument. That distinguished statesman and philosopher, whose political sagacity was as far-reaching as his benevolence was wide, in the dawn of our independence thus eloquently writes: "When the war is over and our freedom won, the people must make a new declaration; they must declare the rights of man, the individual, sacred above all craft of priesthood or government—they must, at one blow, put an end to all the trickeries of English law, which, garnered up in the charnels

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of ages, bind the heart and soul with *lies. They must perpetuate republican truth by making the homestead of every man a holy thing, which no law can touch, no juggle wrest from his wife and children. Until this is done, the revolution will have been fought in vain."

This idea of the sacredness and inviolability of the homestead was more readily adopted by the new states than by the old. Experience had taught them that the debtor class was more frequently the victim than the creditor class, the latter too often seducing the former into expenditures that ruined his fortunes and deprived his wife and children of the shelter of the family roof-tree; that capital is ever waging perpetual war against labor. Hence the constitution of 1868 introduced this protection for the helpless and innocent family, and the legislature has since approved the benevolent purpose, so that I hold it to be the duty of the courts to perpetuate this truth: "That the homestead of every man is a holy thing, which no law can touch, no juggle wrest from his wife and children."

Now, Rainey was entitled to his homestead in February, 1874, when Chafee & Co. obtained their judgment. It was not assigned to him until January 19th, 1883, and it is contended that the lien of the judgment attached after the death of the second wife, in June, 1880, because, his children having married and moved away from the homestead, he was not the head of a family. Is not this the very "juggle" and "trickery" that Mr. Jefferson speaks of? How can it be maintained that the man is not the head of a family because his children have married and gone off? Filial relations cannot be thus dissolved. The children of the daughter and the son are taught to regard the grandparents with as much affection, respect, and reverence as their own parents, and to look to the old homestead as the place where they have the right to go and be welcomed and protected. Suppose the husband of Rainey's daughter dies, leaving her a desolate widow, with destitute children. Is it the spirit and intention of the law that she, with her orphans, shall be turned from her father's house because a ruthless creditor has levied an execution after the death of her mother, and while she was absent from the home of her nativity? I cannot think so.

Section 1,995, page 579, of the General

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Statutes, provides for *the filing, approval, and recording of the return. "And upon such return being recorded in forty days after the proceedings have become final, the title to the homestead so set off and assigned shall be forever discharged from all debts of said debtor then existing or thereafter contracted." In this case the levy was made on December 6th, 1882; the homestead assigned to him January 19th, 1883. Why? Because, from February, 1874, the date of the Chafee judgment, he had a wife and chil-

dren living with him, and the plaintiff in the execution making no levy, there was no necessity for him to claim his exemption. But after the death of the wife, and the marriage and removal of the children, although he had taken another wife, who was then living with him, the plaintiff claims that, in the interval between the death of his second wife and his marriage to his last wife, the lien of the execution vested, and the subsequent marriage cannot divest it.

Pender v. Lancaster, 14 S. C. 25 [37 Am. Rep. 720], is relied on to support this position. But that is a very different case. The property levied on there was a horse, and was advertised for sale by the sheriff. The defendant married the day before the sale. The court very properly say: You cannot defeat a vested lien by marrying a wife twenty-four hours before the sale. This would be using the law to practise a fraud. The credit extended to you was on the faith of that horse, and the law can afford you no aid. Here the credit was not extended to Rainey on the faith of his homestead, in lot No. 55, or on the probability of his wife dying and his children marrying and moving off, for the creditors were fully apprised that he was the head of a family. By section 1,998, page 580, "no waiver of the right of homestead, however solemn, made by the head of a family at any time prior to the assignment of the homestead, shall defeat the homestead provided for in this chapter." If the defendant, in execution, cannot defeat the homestead by the most solemn act, how can it be defeated by operation of law?

I think this disposes of the question, and the application for homestead is dismissed with costs.

Mr. R. Dozier, for appellant.
Mr. LeGrand G. Walker, contra.

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*March 22, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. These two cases, involving the same question, were heard and will be considered together. The questions are: 1. Whether the respondent is entitled to claim a homestead as against the judgments of the appellants; 2. Whether the circuit judge had the power to correct a mistake in his decree after it was filed.

The facts out of which these questions arise are as follows: The judgment in favor of Chafee & Co. was recovered on February 11th, 1874, and that in favor of Johnson on June 24th, 1875. There is also "a judgment in favor of Lavinia Burridge for $97.24, dated June 24th, 1875, on record, but unrenewed." In all these judgments the causes of action arose since the adoption of the present constitution. The respondent Rainey has been married three times, and resided, with his several wives, on the lot in which the homestead has been assigned to him, viz., with the first wife from April, 1862, to November, 1876, when she died; with his second wife from May, 1878, to June, 1880, when she died; and with his third wife, who is still living, from June, 1881, to the present time. The respondent during all this time had children living, but not residing with him, being only temporary visitors to the homestead at various times. He also had servants at the homestead continuously from the date of his first marriage.

Under executions issued in the above stated cases, the sheriff on December 6th, 1882, levied on two lots, Nos. 55 and 56, in the town of Georgetown, and on December 20th, 1882, the respondent required the sheriff to have his homestead set off to him. Appraisers were accordingly appointed, who on February 16th, 1883, made their return, assigning as a homestead to respondent lot No. 55, which they valued at $1,300, and certified that the same was not susceptible of a division. In accordance with the statute, the surplus, $300, was paid to the sheriff, and the other lot, No. 56, was sold by the sheriff for $600, and this sum, together with the surplus above mentioned, was applied by the sheriff to the executions in the order of priority. The judgment in favor of Chafee & Co. was satisfied, leaving a balance in the sheriff's hands, insufficient, however, to satisfy the other judgments.

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*The appellants duly filed exceptions to the claim of homestead: 1. Upon the ground that the judgments were a vested lien upon both of the said lots "while the respondent was a single man without a family, and before he became the head of a family, and his subsequent marriage cannot divest the already vested right of the creditor." 2. Because the property assigned as a homestead exceeded in value the amount exempt, as such, under the constitution and laws. The exceptions were argued before Judge Aldrich at March term, 1883, of the court for Georgetown, and on May 1st, 1883, he filed his decree, in which, after elaborately discussing the question raised by the first exception, and showing most unmistakably that, in his opinion, the exception was not well founded, but that respondent was entitled to his homestead exemption, he concluded his decree in these words: "I think this disposes of the question, and the application for homestead is dismissed with costs."

On May 12th, 1883, Judge Aldrich, on the application of defendant's attorney, and without notice to the adverse party, filed the following order, which, after stating the cases as above, and the venue, is in these words: "I have received a letter from Mr. Walker, attorney for Rainey, in which he informs me that, in my decree in this case, I close the same by saying: 'The application for homestead is dismissed with costs.' This is an error. I should have said: The exceptions

to the return are overruled with costs. The clerk is directed to amend the original decree, and file this supplemental order with it as his authority for so doing."

The plaintiffs appeal upon the following grounds: 1. "That the judgments in the above cases became a vested lien on the realty in which a homestead is set up while the defendant was a single man without a family, and before he became the head of a family, and his subsequent marriage cannot divest the already vested right of the creditor. 2. Because his honor having filed his decree dismissing the application for homestead, had no right, on ex parte application, to reverse his own decree without notice to the opposite party, and certainly had no right to instruct the clerk of the court to do so."

We will consider the second ground of appeal first. It is perfectly clear that the concluding words of the decree of Judge

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*Aldrich, as originally written, not only did not express the judgment which he intended to announce, but expressed precisely the opposite of such intention. Indeed, strictly speaking, there was no "application for homestead" before him for consideration. The homestead had already been assigned in the mode prescribed by law, and the only question before him was whether the exceptions to such assignment, filed by the creditors, should be sustained or overruled. That was the question which he considered, and after arguing to show that such exceptions were not well founded, he concludes by saying, "I think this disposes of the question," and then adds the words which have given rise to the difficulty, and which were not responsive to the question he had been considering, viz., "And the application for homestead is dismissed with costs." It is quite manifest, therefore, that the addition of these words was a mere clerical error, which, in our opinion, he had full authority to correct. As is said in 2 Dan. Ch. Pr., 1233, in speaking of rectifying decrees: "In cases, however, in which a clerical error has crept into the decree, or in which some ordinary direction has been omitted, the court will entertain applications to rectify it, even though it has been passed and entered. * * * It is, nevertheless, to be observed, that it is a principle of the court, that no alteration can be made in a decree on motion without a rehearing, except in a matter of clerical error or of form, or where the matter to be inserted is clearly consequential on the directions already given."

It is said, however, that even granting the power to make the correction, it could not be exercised upon a mere ex parte motion without notice to the adverse party. Where the error corrected is purely clerical, as in this case, we can conceive of no reason why notice should be given to the adverse party. It is a matter solely for the consideration of the judge who committed the error. And what light the adverse party, if notified, could throw upon the question, whether the error complained of is a clerical error, we do not readily perceive. Besides, the authorities are clear that no notice of a motion to correct a clerical error, or an error of form in a judgment, is necessary. Giles v. Pratt, 1 Hill, 239 [26 Am. Dec. 170]; Ashmore v. Charles, 14 Rich., 63. Nor do we think that there is anything in the objection that the

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correction was made by the *clerk under the order of the judge, instead of being made by the judge with his own hand. The clerk is the officer of the court, and any mere ministerial act which he does by the order of the court is the act of the court itself.

Again, it is urged that Judge Aldrich, as judge of the second Circuit, after the adjournment of the court in Georgetown, the last court in the third Circuit, no longer had any jurisdiction in cases arising in that Circuit. The brief does not show the facts necessary to base this position upon, but assuming that we are bound to take judicial notice of such facts, we do not think that the position can be sustained. Surely it cannot be said that the judge of the second Circuit, when assigned under the statute to hold the courts of the third Circuit, loses jurisdiction of all causes within that Circuit so soon as the last court of such Circuit has been adjourned. If so, then it would be necessary for him to file all his judgments before adjourning the last court of such Circuit, which in many cases, would be a practical impossibility, and hence cannot be a correct construction of the statute. Having, as he must have, jurisdiction to prepare and file his judgments after the adjournment of the last court, when necessary, he must also have the power to put such judgments in proper form by correcting any mere clerical errors that may have crept into them.

This brings us to the consideration of the first ground of appeal. There can be no doubt that when these judgments were recovered, and when the causes of action upon which they are based arose, Rainey, as the head of a family, was entitled to claim the homestead exemption. The question therefore is, Does the fact that, after these judgments were recovered, he became a widower and not the head of a family during the comparatively short periods between the death of his first wife and his marriage with his second, and between the death of his second wife and his marriage with his present wife, deprive him of the right of now claiming such exemptions when he is the head of a family? It will be observed that no attempt was made to enforce the executions issued on the judgments in these cases, during either of the periods when Rainey, by reason of the death of his first two wives,

was not the head of a family, but that the levy was made on December 6th, 1882, sometime after he had again become the head of

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a *family; and the only question for us to decide is, whether he is now, under the present condition of things, entitled to the exemption of his homestead.

As we have held in Elliott v. Mackorell, 19 S. C., 238, and Ex parte Ray, 20 S. C., 246, the right of homestead guaranteed by the constitution is not an estate, but a mere right of exemption. It is nothing more than a prohibition against the use of the process of the courts for the collection of debts in certain cases, and when a certain condition of things is found to exist. Whether the homestead provision in the constitution divests the lien of a judgment, is not, in our judgment, a question pertinent to the present inquiry. It unquestionably forbids the enforcement of a judgment, except in the excepted cases provided for in the constitution, by levy and sale of the homestead of one who is the head of a family. When he became the head of a family, is not the question. The real question is, Does the condition of things exist under which the constitution forbids the use of the process of the courts in enforcing the collection of debts? If they do exist, then we are at a loss to perceive by what authority any officer or any court can refuse obedience to this plain mandate of the constitution.

These creditors knew when their debts were contracted and when their judgments were recovered that they could not enforce them against the homestead of their debtor while he was the head of a family, and they must be presumed to have extended credit to him with that understanding. And if they did not choose to enforce them while Rainey was not the head of a family, and while they had free use of the process of the court, they cannot now enforce their claims against the homestead of their debtor while he is the head of a family, and while the condition of things exist under which the constitution absolutely forbids the use of the process of the courts. We do not see how this view in any way interferes with any vested right of these creditors, and we are entirely satisfied that the respondent is entitled to claim his homestead exemption.

The case of Pender v. Lancaster, 14 S. C., 25 [37 Am. Rep. 720], is much relied on by the appellant, and while some of the remarks made by the former chief justice in that case

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do seem to support the view con*tended for by the appellant, we do not think that the point decided in that case, which alone is authority, will sustain his position. That was an action to recover damages from the sheriff, for the sale of a horse, which was levied on before the plaintiff became the head of a family, though he married before the sale took place, and claimed that the horse was a work animal, and exempt from levy and sale. It did not appear that the debtor, in that case, had even taken any steps to have any property set apart to him as exempt under the homestead laws, in the mode prescribed by statute, but simply brought the action for damages in making the sale. It is quite clear that the action could not be maintained. The sheriff having made the levy before the debtor had become the head of a family, as he had a perfect right to do, acquired a title to the property levied on, and the debtor no longer had the possession or the right to the possession thereof. The sheriff's title was absolute and perfect, and continued so until the property was sold under the execution, or the execution was otherwise satisfied.

So that, even if the debtor, in that case, after he became the head of a family, had demanded that his property exempt from levy and sale should be set off and assigned to him, the property levied upon could not have been so assigned to him, as it was then not only out of his possession, but he then had no right or title to it; and in the event which occurred he never afterwards acquired any such right. As is said by Nott, J., in McClintock v. Graham, 3 McCord, 244, "when a sheriff levies on personal property, it becomes his own for all legal purposes. He can maintain an action for it, even against the debtor himself, at any time before the sale or satisfaction of the debt. When the execution is satisfied, if otherwise than by the sale of the property, the right of the debtor recurs, and the right of the sheriff ceases to exist against him. It still, however, remains against every other person." While, therefore, we assent to the decision in the case of Pender v. Lancaster, we do not indorse all of the reasoning employed by the former chief justice in delivering the opinion.

So, too, we do not think that the analogy sought to be drawn from the decision in Jones v. Miller, 17 S. C., 380, in reference to a claim of dower, holds good. Dower is an

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estate, while home*stead is not. If the wife, by her marriage, acquires an inchoate estate of dower in lands, upon which an incumbrance or lien has been previously created, she, of course, must take such estate subject to such lien or incumbrance, as any purchaser would do. But homestead not being an estate, but simply the right of exemption, which the constitution declares shall exist whenever a certain condition of things is found, stands upon a very different footing. The debtor, when he becomes the head of a family, does not thereby acquire any new estate, which would be subject to any prior incumbrance, but he simply places himself in a condition

in which the constitution forbids the use of the process of the courts in selling for debt a certain portion of his property.

The judgment of this court is, that the judgment of the Circuit Court, as corrected by the order filed May 12th, 1883, be affirmed.

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21 S. C. 21

STRICKLAND v. BRIDGES.

(November Term, 1883.)

[1. *Executors and Administrators* ⟸473, 474.]
The sole heir at law of a distributee of an intestate estate cannot maintain an action for account against the administrators of the first intestate. The action must be brought by an administrator of the distributee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2042; Dec. Dig. ⟸473, 474.]

[2. *Executors and Administrators* ⟸ 473, 474.]
An administrator de bonis non is a necessary party to an action for an account of the administration by the first administrators.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2042; Dec. Dig. ⟸473, 474.]

[3. *Payment* ⟸66.]
It is error to rule that after twenty years the legal presumption of payment cannot be rebutted.

[Ed. Note.—Cited in Nobles v. Hogg, 36 S. C. 328, 15 S. E. 359.

For other cases, see Payment, Cent. Dig. §§ 176–188; Dec. Dig. ⟸66.]

[4. *Appeal and Error* ⟸959.]
No matter what were the reasons given, the refusal of a Circuit judge to permit an amendment, whereby a new party (not known to exist) would be substituted for a sole plaintiff, will not be disturbed.

[Ed. Note.—Cited in Suber v. Chandler, 28 S. C. 382, 387, 6 S. E. 155.

For other cases, see Appeal and Error, Cent. Dig. § 3826; Dec. Dig. ⟸959.]

5. Jennings v. Springs, Bail. Eq., 181, explained, and its present authority doubted.

[This case is also cited in Baker v. Hornick & Co., 51 S. C. 316, 28 S. E. 941, without specific application.]

Before Aldrich, J., Marlboro, June, 1883.

The opinion fully states the case.

Mr. C. P. Townsend, for appellant.

The complaint is sufficient. 18 S. C., 469.

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No proof that *twenty years have elapsed since last return. Presumption commenced to run at death of administrator. 16 S. C., 184; 5 Rich. Eq., 31; 3 Hill, 335; Harper, 287. Plea of payment should be specially pleaded and opportunity offered to contest it with proof. See 17 S. C., 488; 3 Strob., 450. This is an action against a trustee. 14 Rich. Eq., 176; 14 S. C., 485. This plaintiff can sue the administrator and the sureties in equity. 2 McCord Ch., 209; McMull. Eq., 485; 2 Rich. Eq., 123; 6 Rich. Eq., 266; and has legal capacity to bring this action. 1 Rich. Eq., 23; 11 Id., 403; Gen. Stat., § 1885; 9 S. C., 253. There are no creditors and no necessity for administration. There is a distinction between a creditor and a distributee. Rice, 350. A creditor must claim through an administrator. The cases in 1 McCord Ch., 506, and 2 Id., 170, do not apply, and are explained in 1 Rich. Eq., 123. An administrator de bonis non of W. D. Bridges is not necessary. Gen. Stat., §§ 1896, 1903; 1 Rich. Eq., 123. It would be so, if the action was by a creditor. 1 Wms. Ex'rs, 363; 9 S. C., 253; 16 Id., 432. Administration on Dorcas Odom's estate is not necessary; there are no debts, and she is a sole distributee. 2 Nott & McC., 213.

Mr. Knox Livingston, contra.

March 22, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The action in this case was commenced April 12th, 1883. And the plaintiff in her complaint alleges: 1. That Wm. Beverly departed this life intestate on December 5th, 1857, leaving a personal estate, and that his only heirs at law and distributees were his two aunts, Elizabeth Wise and Dorcas Odom. 2. That administration of his personal estate was duly committed to Wm. D. Bridges and Eliz. Wise. 3. That Wm. D. Bridges died in February, 1864, leaving a will, and that the persons named as executors therein having duly renounced, administration cum test. an. of his estate was duly granted to the defendant, Eliza D. Bridges. 4. That Elizabeth Wise died intestate on June 14th, 1878, and letters of administration upon her estate were duly granted to the defendant, John Wise; and that Dorcas Odom died intestate in May, 1868, "leaving as her

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*only heir at law the plaintiff, Mary Ann Strickland, and that she owed no debts at the time of her death, and left no property except her interest in the estate of the intestate, William Beverly." 5. That Wm. D. Bridges and Eliz. Wise, upon their appointment as administrators as aforesaid, executed the usual administration bond, with the defendant, John Covington, and one Charles Cottingham as sureties, and that the said Cottingham departed this life intestate July 21st, 1875, and the defendant, C. M. Weatherly, as clerk of the Court of Common Pleas, is now his administrator. 6. That the said Wm. D. Bridges and Eliz. Wise have never accounted as administrators of the estate of Wm. Beverly, nor have their personal representatives so accounted since their death. 7. "That the plaintiff and the children and grandchildren of Elizabeth Wise are the only heirs at law of the said Wm. Beverly, deceased, and are entitled to whatever may be found in the hands of the personal representatives of his administrators on an accounting, or may be recovered on the administration bond." 8. That the estate of Eliz. Wise is insolvent, she having left no property except her interest in the estate of Wm. Beverly. Wherefore

the plaintiff demanded judgment that Eliza D. Bridges and John Wise should account for the actings and doings of their respective intestates as administrator and administratrix of the estate of said Wm. Beverly, and that judgment be rendered against them, as well as against said John Covington and said Weatherly, as sureties on the administration bond, for whatever balance may be found due upon such accounting, and that such balance may be distributed amongst the several parties entitled thereto, according to their respective legal rights.

The exhibits filed with the complaint show that the inventory and appraisement of the estate of Wm. Beverly was made on December 31st, 1857, and that sales were made from time to time between January 3d, 1859, and January 6th, 1860, and that the last return made by Wm. D. Bridges, as administrator, showed a balance in his hands on January 1st, 1863, of $660.25.

The defendants interposed a demurrer upon the following grounds: "I. That the plaintiff has not legal capacity to sue. II. That there is a defect of parties in the omission of the administrator de bonis non of the estate of

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William Beverly, deceased, *and the administrator of Dorcas Odom, deceased." At the trial they also put in an oral demurrer, "that the complaint does not state facts sufficient to constitute a cause of action."

The case was heard on the demurrer by Judge Aldrich, who subsequently filed his decree, in which he held that "an administration on the estate of Dorcas Odom is necessary to enable her heirs at law to receive her interest in the estate of William Beverly, deceased," and also that "an administrator de bonis non of the estate of William Beverly, deceased, is a necessary party, who alone can demand an accounting from the personal representatives of the former administrator," and he therefore sustained the demurrer. He goes on, however, to say that he would give the plaintiff leave to amend by making the necessary parties, if he could see that it would be of any service to her. But the action having been commenced twenty-five years after the execution of the administration bond, and more than twenty years after the last return was filed, he thought that such a lapse of time would raise such a presumption of payment as that it could not be rebutted; and that as a plea of payment would be a perfect defence to the plaintiff's claim, it would be useless to protract the litigation by granting leave to amend, and therefore he declined to do so.

The plaintiff appeals, substantially, upon the following grounds: 1. Because of error in holding that the plaintiff did not have legal capacity to bring the action, and that the administrator of Dorcas Odom is a necessary party. 2. Because of error in holding that an administrator de bonis non of Wm. Beverly is a necessary party. 3. Because of error in holding that a plea of payment arising from presumption of lapse of time could be sustained before any plea or answer was put in. 4. Because of error in refusing leave to amend, upon the ground that the action would be defeated by a plea of payment.

There can be no doubt that when a plaintiff brings his action he must state in his complaint the facts necessary to show that some legal or equitable right to which he is entitled has been invaded or violated by the defendant, or that such right is so threatened, as to cause him irreparable damage, if not restrained or prevented by the order of the court. In other words, he must state facts showing that he has a cause of action

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against some one *or all of the defendants against whom he complains. Now, in this case it seems to us quite clear that the plaintiff has not stated facts which, being admitted, show that she has any cause of action whatever against all, or one, or more of the defendants. The object of the action, as stated in the complaint, is to require an accounting from the administrators of the administrators of Wm. Beverly, deceased. Now, unless the plaintiff is a creditor or distributee of the estate of Wm. Beverly, she has no right to demand any such accounting, and therefore has no cause of action. But it appears from the statements made in her complaint that she is not either a creditor or distributee of that estate.

Her mother, Dorcas Odom, and Elizabeth Wise are stated to be the sole distributees of the estate of Wm. Beverly, and the fact that her mother subsequently died, leaving her as her sole heir at law and distributee, cannot make her a distributee of Wm. Beverly's estate. The heirs and distributees of a deceased person are fixed and ascertained by the condition of things as they existed at the time of the death of such person, and at that time the only heirs of Wm. Beverly were Elizabeth Wise and Dorcas Odom. It is quite clear, therefore, that the only person who is entitled to demand and receive the interest of Dorcas Odom in the personal estate of Wm. Beverly is her administrator, and until one is appointed, no one has a right to demand or receive such interest, and, of course, no one has any cause of action to enforce such demand.

So, too, we agree with the Circuit judge that an administrator de bonis non of Wm. Beverly is a necessary party. These views are so fully supported by the authorities that we do not deem it necessary to go into any discussion of them. Bradford v. Felder, 2 McC. Eq., 168; Petigru v. Ferguson, 6 Rich. Eq., 378; Read v. Read, 8 Rich. Eq., 145; Kaminer v. Hope, 9 S. C., 253; Stevenson v. Wilcox, 16 S. C., 432; Villard v. Robert, 1 Strob. Eq., 393, besides other cases cited in respondent's argument.

We are therefore entirely satisfied that the demurrer was properly sustained.

The only remaining inquiry is whether there was any error of law in refusing the plaintiff leave to amend. Motions to amend are addressed to the discretion of the court,

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and therefore are not, *ordinarily, appealable. It is argued, however, in this case that the Circuit judge based his reason for refusing leave to amend upon an erroneous proposition of law, and therefore a proper case is presented for our review. It is true that Judge Aldrich, in discussing the question of amendment, does state, as a reason for refusing the leave, that, in his opinion, "after twenty years the legal presumption of payment cannot be rebutted"—a proposition which we cannot fully indorse. Boyce v. Lake, 17 S. C., at page 489 [43 Am. Rep. 618]. Yet we are not called upon to review the reasons given for a Circuit judgment, but simply to determine whether the judgment itself is right.

Upon this we can have no hesitation. As we have seen, the plaintiff has no cause of action whatever, and therefore there was nothing to amend by. The only amendment, if it may be so called, which would have answered any practical purpose, would have been to substitute an entirely new plaintiff in the form of an administrator of Dorcas Odom, and that, too, when it did not appear that there was any such person in existence. As was held in Trumbo v. Finley, 18 S. C., 305, even under the liberal principles of the code, a plaintiff cannot be permitted to amend by substituting a wholly different and new cause of action; and upon the same principle, where, as in this case, a plaintiff shows that she has no cause of action, it would seem that an amendment substituting another person as plaintiff, who may have a cause of action, would not be allowable, especially where it does not appear that there is any such other person in existence.

It is true that there is a case (Jennings v. Springs, Bail. Eq., *181), in which it was held that it was within the discretion of a chancellor to permit the plaintiff "to amend his bill, upon the payment of the costs of such amendment, by substituting the names of the executors of William Pressley for his own; the bill having been filed by him, as their agent, and his own name erroneously inserted as complainant." But it will be observed that the court express no opinion as to the propriety of allowing such an amendment, and simply confine themselves to the remark that it was within the discretion of the chancellor. We have not been able to find any case in which Jennings v. Springs,

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has been *recognized and followed,[1] though there is a case (Lancaster v. Seay, 6 Rich. Eq., 111) in which, while it is mentioned by Dunkin, Ch., in his Circuit decree, there is nothing to show whether it was approved or disapproved, except that the learned chancellor declined to exercise the discretion which Jennings v. Springs held he could exercise, doubtless on account of the staleness of the claim, and dismissed the bill.

So that, even if Jennings v. Springs still be authority (about which there may be some doubt in view of the provisions of section 194 of the code of 1882, as construed in Trumbo v. Finley, supra), it at most only decides that such an amendment is within the discretion of the chancellor, and if so exercised it will not be disturbed; but whether such discretion, by which a new action is, practically, authorized under the guise of an amendment, should be exercised, is a totally different question. In this case the staleness of the claim, especially as no reason was suggested to account for the long delay, was an amply sufficient reason for refusing the leave to amend, as in Lancaster v. Seay, supra; and the further fact, that the amendment would practically amount to the bringing of a new suit, was another sufficient reason, as was held in Porter v. Cain, McM. Eq., 84.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

[1] The learned justice has evidently overlooked the citation and statement of this case in Coleman v. Heller, 13 S. C., 496. In that case the Circuit judge substituted a new plaintiff at the trial, and gave defendants no time to answer. This court held that it was error not to give defendants time to answer, but, as to the substitution, say (p. 495): "It was in the discretion of the Circuit judge at the trial, in furtherance of justice, to grant an order striking out the name of one person and inserting that of another as plaintiff."—REPORTER.

21 S. C. 27

LIBERIAN EXODUS JOINT-STOCK STEAMSHIP CO. v. RODGERS.

(November Term, 1883.)

[1. *Corporations* ⇨514.]

Where a plaintiff corporation alleged its corporate existence, and defendant answered such allegation by a denial of knowledge or information sufficient to form a belief, the plaintiff's corporate existence or capacity to sue is not in issue.

[Ed. Note.—Cited in American Button-Hole, Overseaming & Sewing Mach. Co. v. Hill, 27 S. C. 165, 3 S. E. 82; Lummus Cotton Gin Co. v. Counts, 98 S. C. 147, 82 S. E. 393.

For other cases, see Corporations, Cent. Dig. § 2056; Dec. Dig. ⇨514.]

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[2. *Pleading* ⇨382.]

*Matters which are causes of demurrer under section 165 of the code of procedure (except as provided in section 169) can only be objected to by demurrer when they appear upon the face of the complaint, or when not so appearing, by special allegations thereof in the answer. They cannot be put in issue by a general denial.

[Ed. Note.—Cited in Palmetto Lumber Co. v. Risley, 25 S. C. 315; Suber v. Chandler, 28 S.

C. 386, 6 S. E. 155; Kerr & Co. v. Cochran, 29 S. C. 61, 63, 6 S. E. 905; Walpole v. City Council, 32 S. C. 553, 11 S. E. 391; Land Mortgage Investment & Agency Co. v. Williams, 35 S. C. 372, 14 S. E. 821; Ober v. Blalock, 40 S. C. 36, 18 S. E. 264; Hankinson v. Charlotte, C. & A. R. Co., 41 S. C. 16, 19 S. E. 206; Mickle v. Congaree Const. Co., 41 S. C. 397, 19 S. E. 725; Stoddard v. Aiken, 57 S. C. 137, 35 S. E. 501; Blackwell v. British American Mtg. Co., 65 S. C. 116, 43 S. E. 395; Montgomery v. Seaboard Air Line Ry., 73 S. C. 505, 53 S. E. 987.

For other cases, see Pleading, Cent. Dig. §§ 1280–1294; Dec. Dig. ⟸382.]

3. Commercial Insurance and Banking Co. v. Turner, 8 S. C., 110, recognized and followed; and this case distinguished from Chicora Company v. Crews, 6 S. C., 243.

Before Cothran, J., Charleston, February, 1883.

The opinion states the case. The order of the Circuit judge refusing a motion to set aside the order of nonsuit was as follows:

There is no doubt that at common law, in a suit brought by a corporation, it was necessary for the plaintiff to prove themselves duly incorporated by competent authority, on the plea of the general issue. Ang. & Ames Corp., § 634. In some of the states, and notably in New York, to relieve corporations from the expense and inconvenience of preparing in every case of an action by a corporation, where the general issue was pleaded, to prove its charter, the common law rule was modified and the defendant was required, if he really desired to litigate that question, to plead in abatement or bar that the plaintiffs were not a corporation. No such legislation has been adopted in this state, and the common law rule was accordingly recognized and applied in Chicora Co. v. Crews, 6 S. C., 243, where the defendant was permitted to attack the corporate existence of the plaintiff in an action brought to recover the value of property which came into his possession as the plaintiff's agent. There is nothing in the cases cited by the movants (S. & A. R. R. Co. v. Ezell, 14 S. C., 285; Chubb v. Upton, 95 U. S., 665 [24 L. Ed. 523]; Eaton v. Aspinwall, 19 N. Y., 119) in conflict with the rule laid down in Chicora Co. v. Crews. In all those cases the defendants sought to take advantage collaterally of mere irregularity in the organization of the suing corporation, and it was held that they could not do so.

But if my construction of the act of 1874 be correct, then this is not a case of defective organization under the charter or act of incorporation, nor of erroneous proceedings

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after the neces*sary steps were taken to the assumption of corporate powers; but there is an absolute want of proof that any corporation was ever called into being which had the right to sue or be sued in its corporate name. To cases of this sort, the rule contended for is wholly inapplicable.

For the same reason, I am of opinion that the movants cannot succeed upon the second ground upon which their motion is based; that is, that the existence of the corporation cannot now be assailed collaterally, but must be attacked in the manner prescribed by section 426 of the code, in a proceeding instituted by the attorney general. That section and the other sections immediately preceding and succeeding it, referring to the same subject, assume the existence of a corporation. The ground taken here by the defendant, and to which I agree, is that the plaintiff is not a corporation. This case falls under the decision of the Supreme Court in the case of the Chicora Co. v. Crews, supra, and as a decision of that court, unreversed and unreviewable by me, I am constrained to follow it, and to refuse the motion to set aside the nonsuit; and it is so ordered and adjudged.

Mr. S. J. Lee, for appellant.

Messrs. Lord & Inglesby, and S. Hyde, contra.

March 22, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action to recover $7,325 on the following contract:

"Charleston, December 1st, 1879.

"I will sell and convey all my right, title, and interest in the Azor, unto the Liberian Exodus Joint Stock Steamship Co., for the sum of twenty-six hundred and seventy-five dollars. This offer to be accepted and the above amount of twenty-six hundred and seventy-five dollars paid into my hands on or before November 11th, 1880, otherwise this offer to be null and void.

(Signed,) "F. S. Rodgers."

Paragraph I. of the complaint alleged: "That the plaintiff is and was, at the date of the agreement hereinafter mentioned, a

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*body corporate under the laws of the state of South Carolina;" to which the defendant answered as follows: "That he has no knowledge or information sufficient to form a belief as to the truth of the allegation contained in the first paragraph of the complaint."

The plaintiff proved that on November 8th, 1879, the bark Azor was bought by the defendant from the U. S. marshal for $2,950, $450 of which being furnished by the plaintiff, and the bill of sale was taken in the name of the defendant. On June 7, 1880, the defendant sold the Azor for $4,500. The plaintiff also offered in evidence a charter of incorporation from the clerk of the Court of Common Pleas of Charleston county under the act of 1874 (reënacted as chapter XXXIX. of Gen. Stat.), upon the subject of "corporations organized under general statutes," granting to certain persons, under the

name and style of "The Liberian Exodus Joint Stock Steamship Company of Charleston, S. C.," the right to carry on and conduct the business of "transporting passengers and freight along the Atlantic sea-coast and high seas in general;" that the company in 1877 organized under this alleged charter of incorporation, and carried on business as such in Charleston up to the commencement of this suit. The plaintiff then rested.

When the plaintiff closed their testimony, the defendant moved for a nonsuit on the grounds: 1. That the act of 1874 was unconstitutional. 2. That there was no proof that the plaintiff had complied with the conditions prescribed in the said act precedent to their right to obtain a charter. And 3. That there was no authority in the act for the incorporation of a navigation company. The Circuit judge held that at common law it was necessary for the plaintiff to prove themselves duly incorporated by competent authority; that "in some of the states, notably in New York, to relieve corporations from the expense and inconvenience of preparing in every case of an action by a corporation, when the general issue was pleaded, to prove its charter, the common law rule was modified, and the defendant was required, if he really desired to litigate that question, to plead in abatement or bar that the plaintiffs were not a corporation. No such legislation has been adopted

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in this state, and the common *law rule was accordingly recognized and applied in the case of The Chicora Company v. Crews, 6 S. C., 243." And, thus taking the view that the general denial in the answer put in issue the existence of the corporation of the plaintiffs, he held that there was no corporation, and granted the nonsuit on the third ground taken, that the clerk of the court, in granting the charter "to carry on the business of transporting passengers and freight along the Atlantic sea-coast and high seas," had acted beyond the scope of his authority under the act aforesaid, and the charter was void.

From this order the plaintiff appeals to this court, upon the following grounds: 1. Because his honor erred in granting a nonsuit, there being evidence to sustain every material allegation in the plaintiff's complaint, and the plaintiff was entitled to the verdict of a jury on the evidence. 2. Because the defendant having contracted with the plaintiff as a corporation, or as doing business under a corporate name, cannot in this action question its corporate existence and his honor erred in not so deciding. 3. Because one who contracts with a corporation, or acting corporation, or copartnership, doing business under a corporate name, cannot defend himself against a claim on such contract, in a suit by the corporation, by denying its corporate existence; and it was error not to so rule. 4. Because a corporation, either de jure or de facto, can only be attacked and its charter taken away in a suit by the attorney general of the state, and his honor erred in not so ruling.

From the view which the court takes of this case, it will not be necessary or even proper to consider now the questions, whether the charter granted by the clerk to the plaintiffs is utterly without authority and void; or whether the defendant, having contracted with the plaintiffs assuming to act as a corporation and in their corporate name, is estopped from now denying that they are in fact such a corporation. It seems to us that the pleadings as disclosed in the "case" did not put in issue the existence or legality of the plaintiffs' corporation; that the defendant, having put in only a general denial, thereby waived the right to assail the charter of incorporation, and it

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was unneces*sary for the plaintiffs to have put it in evidence, and it may be regarded as not in the case.

We think legislation has been adopted in this state, as in New York, requiring a defendant, when sued by a corporation, and desiring to question its right so to sue, to give the plaintiff notice of such intention in advance, either by demurrer, plea in abatement, or special answer. Where the objection is that the plaintiff has not legal capacity to sue, our code, as well as that of New York, requires such objection to be made in a particular manner. If the alleged want of legal capacity to sue appears upon the face of the complaint, the proper course is for the defendant to demur under subdivision 2 of section 165 of the code. If it does not appear upon the face of the complaint, then it is incumbent on him to take the objection by answer; and if such special objection is not taken, either by demurrer or answer, the defendant shall be deemed to have waived the same. Code, §§ 168, 169.

In this case the objection to the plaintiff's capacity to sue was not made by demurrer, for the very good reason that it did not appear upon the face of the complaint, as that only stated that "the plaintiff is and was, at the date of the agreement hereinafter mentioned, a body corporate under the laws of the state of South Carolina." Then did the defendant, as required, make the objection by answer?

The only answer made to this part of the complaint was "that he has no knowledge or information sufficient to form a belief as to the truth of the allegation contained in the first paragraph of the complaint." This was only one of the modes of making a general denial under section 170 of the code, which declares that "the answer of the defendant must contain a general or special denial of each material allegation of the complaint contested by the defendant, or of any knowl-

edge or information sufficient to form a belief," &c. Did this general denial put in issue, in the manner required, not only the general merits of the case, but also the legal capacity of the plaintiff to sue as a body corporate? As we understand it, the authorities both of New York and of this state hold that it did not.

It may be true that a general denial un-

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der the code, like the *general issue under the old practice, as a rule throws upon the plaintiff the onus of proving all the material allegations of his complaint; but it seems that for special reasons the code makes an exception as to those matters which are set down in section 165 as causes of demurrer, and of them the second is "that the plaintiff has not legal capacity to sue." As to the matters so set down in the section indicated, the objection must be specially taken either by demurrer or answer; and if not so taken, "the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action." Under a general denial, the defendant cannot insist that plaintiff has not legal capacity to sue, when that fact does not appear upon the face of the complaint. Wait Anno. Code, 248, note, citing Dillaye v. Parks, 31 Barb., 132; California Steam Navigation Co. v. Wright, 8 Cal., 585. Or that there is a defect of parties plaintiff. Abbe v. Clark, 31 Barb., 238; Commercial Insurance and Banking Co. v. Turner, 8 S. C., 110.

The case of Turner, last cited, is one of our own, and is binding authority. There the plaintiff alleged that it was a corporation, and the answer was a general denial. It was held that when the plaintiff alleges in its complaint that it is a banking corporation of another state, and the answer merely denies each and every allegation, setting forth no objection to the action on the general ground "that the plaintiff has not legal capacity to sue, or that there is a defect of parties plaintiff" as required by section 167 [now 165], the plaintiff will not be required at the trial to prove its capacity to sue. The fact that the plaintiff in that case was a foreign corporation did not touch the point. In the judgment of the court, Judge Willard stated our view of the law as follows: "Sections 170 and 171 of the code [now 168 and 169] require that certain matters of defence shall be set forth by demurrer or by answer, in order to be available to the defendant by way of defence. The matters thus referred to are embraced in section 167 [165], and are as follows: 'That the plaintiff has not legal capacity to sue; or that there is a defect of parties plaintiff or defendant; or that sev-

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eral causes of action *have been improperly united.' If no such objection be taken, section 171 [169] declares that the defendant shall be deemed to have waived the same. * * * The clear intention of these sections is that the defendant shall give, by his demurrer or answer, specific notice that he intends to rely on one or more of these specific defences, if he wishes to make them available. A general denial of all the facts alleged in the complaint is not a compliance with these requirements of the code. The object of these provisions is to relieve the plaintiff from the necessity of preparing to meet such objections on the trial, unless notified by the pleadings that the defendant intends to rely on one or more of them," &c.

It has been said that there is no rule of pleading more universal than that, by pleading to the merits, the defendant admits the capacity of the plaintiff to sue; and no reason can be shown why a corporation should be placed on a different footing in this particular from a natural person. Ang. & Ames Corp., § 633; Prince v. Commercial Bank of Columbus, 1 Ala., 241.

We do not regard the case of The Chicora Co. v. Crews, 6 S. C., 243, cited and relied upon in the court below, as in conflict with this view. In that case the main defence was that the company had been chartered by the state legislature during the civil war, then recently ended, for the purpose of running the blockade and importing arms, and was therefore void as against public policy. It does not appear that the defendant was allowed to make the defence under a simple general denial. From reading the report of the case, it would seem that the unconstitutionality of the charter, which was the main defence, was specially made either by demurrer or answer. The referee, M. P. O'Connor, Esq., states that "the gravamen of the defence set up grows out of the alleged fact that plaintiffs, having been organized covertly to run the blockade, they have no status in court. * * I do not deem it necessary for the purposes of the case to consider any but the one issue of law which is raised, and upon the determination of which the case must stand or fall." It no where appears in the report of the case that there was only "a general denial," or that the question was made at all. If such was the fact, the case was decided wrong, and must

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be regarded on that point as *overruled by the subsequent case of the Banking Company v. Turner, above quoted.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the case remanded for a new trial.

21 S. C. 35

FELDER v. COLUMBIA AND GREENVILLE RAILROAD CO.

(November Term, 1883.)

[1. *Carriers* ⟸408.]

The complaint alleged that plaintiff purchased at A a through ticket to C, over railroad lines E and F, and on the route lost her trunk, for which she demanded damages of F. *Held*, that in failing to allege that E and F were joint contractors, or that the trunk had been received by F, the complaint did not state facts sufficient to constitute a cause of action.

[Ed. Note.—Cited in Matthews v. Charleston & S. Ry. Co., 38 S. C. 431, 17 S. E. 225, 37 Am. St. Rep. 773.

For other cases, see Carriers, Cent. Dig. §§ 1557–1571; Dec. Dig. ⟸408.]

[2. *Carriers* ⟸408.]

The sale of a through ticket over two or more connecting lines of railroad is not evidence of a joint contract between such roads whereby one should become responsible for the default of another.

[Ed. Note.—Cited in Dunbar v. Port Royal & A. Ry. Co., 36 S. C. 117, 15 S. E. 357, 31 Am. St. Rep. 860; Seibels v. Northern Central Ry. Co., 80 S. C. 139, 145, 61 S. E. 435, 16 L. R. A. (N. S.) 1026.

For other cases, see Carriers, Cent. Dig. § 1560; Dec. Dig. ⟸408.]

[3. *Carriers* ⟸408.]

In action against a railroad company for the value of a trunk lost on a connecting line before it reached the defendant's road, a nonsuit was properly ordered, there being no evidence of a joint contract between the two railroads.

[Ed. Note.—Cited in Agnew v. Adams, 24 S. C. 89.

For other cases, see Carriers, Cent. Dig. §§ 1557–1571; Dec. Dig. ⟸408.]

4. This case distinguished from Bradford v. South Carolina Railroad Company, 7 Rich., 201 [62 Am. Dec. 411].

[This case is also cited in Wallingford & Russell v. Columbia & G. R. Co., 26 S. C. 263, 2 S. E. 19, as to facts.]

Mr. Justice McGowan concurred in the result.

Before Hudson, J., Richland, April, 1883.

This was an action by Marion H. Felder against the Columbia and Greenville Railroad Company. The opinion states the case.

Mr. Andrew Crawford, for appellant, cited 47 Iowa, 82; 5 Rich., 17; 49 N. H., 1; Ang. Car., 4, 5, 93; Story Bail., § 506; 11 Wend., 571; 1 Stark., 272; 2 Bing., 170; 19 Wend., 329; 7 Rich., 201; Story Cont., § 655; 22 Barb., 118; 3 Story, 485.

Messrs. Pope & Haskell, contra.

March 26, 1884. The opinion of the court was delivered by

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*Mr. Justice McIVER. The plaintiff brings this action to recover damages for the loss of her trunk and its contents while travelling over a line of connecting railroads, of which the defendant is one, from Atlanta, Georgia, to Columbia, South Carolina. The material allegations of her complaint are as follows: "That during the month of December, 1881, and on or about the twenty-seventh day thereof she was a passenger on board of a train which left Atlanta that day over the Atlanta and Charlotte Air Line Railroad, she having purchased a ticket from that point to Columbia, South Carolina, by way of the Atlanta and Charlotte Air Line Railroad over the Columbia and Greenville Railroad." Next follows an allegation "that while travelling over the lines of road and along the route provided by the terms of her ticket, at the time indicated in the foregoing paragraph, the said railroad officials took charge of this plaintiff's baggage, to wit, a sole-leather trunk, * * which said trunk from that time has never been restored to the owner thereof, although repeated demands have been made for its restoration." And finally it is alleged: "That although this plaintiff and her baggage were carried for hire, yet these defendants, not regarding their duty, did not use proper care therein, but by the negligence and improper conduct of their servants said trunk and contents where wholly lost, to the damage of the plaintiff eight hundred dollars."

For a defence to this action the defendant insists, first, that the complaint does not state facts sufficient to constitute a cause of action against this defendant; second, upon a general denial of the allegations of the complaint above set forth; third, that defendant never undertook to carry and deliver the trunk alleged to have been lost, and that the same had never been delivered to or received by defendant.

The testimony adduced on the part of the plaintiff is fully set out in the "Case," and was to the effect that the plaintiff, by her agent, bought a through ticket from Atlanta to Columbia; that the baggage master in Atlanta was requested to check the trunk in question, along with other baggage belonging to the party with whom the plaintiff was travelling, to Columbia, who replied that he had no through checks, but that it was all

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right, and they *would go through to Columbia all right, and wrote something on the trunks; that the trunk in question was first missed at Seneca City, and has not been seen since, the witness saying, "To the best of my knowledge it was not put on the Columbia and Greenville train;" that there was a connection of roads from Atlanta to Columbia by way of the Atlanta and Charlotte Air Line Road over the Columbia and Greenville Road during the time of the alleged loss of the trunk; that through tickets were sold over this route from Atlanta to Columbia, and vice versa; that the several roads of the line received compensation from the gross amount for which the through ticket sold according to the number of miles

travelled on each of the roads; that there was an arrangement existing among these roads composing this line of travel having in view the diverting of travel from other lines which stretched out from Atlanta to the same point; that A. Pope was the general passenger agent of this line of roads, and had very large powers in relation to matters of passenger travel and their baggage; that he had authority to bind the roads in matters relating to his department, but could not override the authority of the presidents of the several roads, under whose authority he made the rates of transportation at important points; that said A. Pope, in replying to a letter of plaintiff's counsel, stated that a search for the missing trunk was being conducted under the direction of the general baggage agent, and that "if a liability is established upon either one of the roads at interest, viz., the A. & C. A. L. or G. & C. R. R., a properly audited claim for the value of the trunk will be promptly paid."

At the conclusion of this testimony on behalf of the plaintiff, a nonsuit was moved for and granted, upon the ground that "there was a total failure to prove any liability of the defendant company, as the loss had been proved to have occurred before defendant's line was reached, and that there was no evidence of any contract by which defendant could be held liable for loss of baggage on other lines."

The plaintiff appeals upon the following grounds: "1. That the railroads constituting the line, viz., the Atlanta and Charlotte Air Line and the Columbia and Greenville Railroads were joint contractors for the carriage

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and delivery of passengers and *their baggage, and as such responsible for the loss of the latter. 2. That it was proper practice to sue the Columbia and Greenville Railroad Company for the loss as proved in this action, they being one of the contractors. 3. That there was abundance of testimony in the cause sustaining the foregoing exceptions which should have been submitted to the jury for them to pass upon." The remaining ground of appeal having been abandoned, need not be stated.

It is quite clear that the Circuit judge was entirely right in holding that there was an entire failure to prove any independent liability on the part of the defendant company, for there was not only no testimony tending to show that the missing trunk had ever been delivered to or received by defendant, but the plaintiff's own witness testified that the trunk was missed at Seneca City, before reaching defendant's line, and that to the best of his knowledge it was not put on the Columbia and Greenville train. The correctness of this seems to be recognized by the appellant, for in her exceptions the only point she makes is that the defendant was a joint contractor with the Atlanta and Charlotte Air Line Railroad, to whom the trunk was delivered, and as such liable for the negligence of that company; or at least that there was sufficient evidence of such joint contract to require that the question should have been submitted to the jury.

The first and fundamental difficulty in the way of the plaintiff seems to us to be this, that there was no allegation in her complaint of any such joint contract, and no allegation that the trunk in question was ever delivered to or received by the defendant company, and hence the complaint failed to state facts sufficient to constitute a cause of action against this defendant, and for that reason should have been dismissed. But even assuming that the complaint did contain such allegations, we think that there was an utter lack of evidence to sustain either allegation. As we have already said, there was not only no evidence to sustain the last mentioned allegation, but the testimony distinctly disproved it. So that the only inquiry is whether there was any evidence tending to show a joint contract between these railroad companies whereby the one should become re-

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sponsible for the *default of the other. We have looked in vain through the testimony for any such evidence.

Surely, the fact that through tickets were sold from Atlanta to Columbia and from Columbia to Atlanta affords no such evidence. Through tickets are oftentimes intended as much, if not more, for the convenience and advantage of the travelling public as for that of the railroads over which they are sold: and if the principle should be established that the sale of through tickets over a line of connecting railroads constituted evidence of a joint contract between such roads whereby one would become responsible for the defaults of another, the effect would doubtless prove very injurious to the interests and convenience of the travelling public. For if such were the rule, railroad companies would not be very likely to make these arrangements so conducive to the comfort and convenience of passengers, as the effect would be to make each of the companies composing the line, no matter how long it might be, guarantors of the conduct of each of the other companies. A passenger buying a through ticket from Columbia or New Orleans to New York, and sustaining some loss or damage somewhere along the route, might bring his action against the richest, best equipped, and most carefully managed railroad constituting a portion of the line, and recover damages from it, when in fact his loss or damage was sustained while travelling over a link in the line owned by a totally insolvent corporation, in bad order and carelessly managed.

But we need not discuss the question, for we think that the point has been distinctly ruled in the very case so much relied on by appellant, Bradford v. South Carolina Rail-

road Company, 7 Rich., 201 [62 Am. Dec. 411]. Nor do we think that there was anything in the other evidence adduced tending to show any such joint contract between these companies as would make one liable for the defaults of the other. All of the evidence is entirely consistent with the idea that the only arrangement between these companies was the usual one for the sale of through tickets, whereby passengers would be attracted to the line composed of these different railroads, for their own convenience, and none of it points to the assumption of any joint liability.

The case of Bradford v. South Carolina

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Railroad Company, *supra, mainly relied upon by appellant, differs materially from this case. In the first place, there was in that case a distinct allegation that the several companies composing the line from Chattanooga to Charleston were joint contractors, and the testimony principally, if not solely, relied upon by the court as sufficient to establish such joint contract was, not the through receipt which the courts said would not be sufficient to establish it, but the fact that the defendant company had published an advertisement, in which they announced to the public that "by a recent arrangement between the South Carolina, the Georgia, and Western and Atlantic Railroads, a through ticket for freight on cotton has been made from Chattanooga, Tenn., to Charleston, S. C., at the rate of sixty-five cents per 100 lbs. It is highly necessary, in order to insure correctness in the transaction of this business, that the agent of the South Carolina Railroad at Hamburg should be aware of the number of bales and marks of each shipment. Shippers are therefore earnestly requested to take duplicate receipts; one of which must, in all cases, be forwarded per mail to the above-named agent, in order to fix responsibility on this company. With these precautions, the business can and will be transacted mutually satisfactory to all concerned. The roads pledge themselves to give all practicable dispatch to cotton entrusted to them for transportation."

The words which we have italicized in the foregoing advertisement showed very clearly that there was a joint contract, and certainly the South Carolina Railroad Company, in the face of these words, could not deny it. The evidence showing that duplicate receipts had been forwarded to the agent at Hamburg, and thus the condition upon which the liability of the defendant company was to attach having been performed, that company could not deny it, even though the testimony seemed to show that the damage to the cotton in question was sustained before it reached the South Carolina Railroad; for that company had, by the terms of its advertisement, in effect, agreed that its responsibility should be fixed so soon as one of the duplicate receipts had been forwarded to its agent at Hamburg, which was done. The court, therefore, properly held that the evidence was quite sufficient to require that the question as to whether there

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was a joint *contract should be submitted to the jury. But in this case we find no such testimony, and we see no error on the part of the Circuit judge in granting the nonsuit.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Mr. Chief Justice SIMPSON concurred generally, but Mr. Justice McGOWAN only in the result.

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21 S. C. 41

LANIER v. BRUNSON.

(November Term, 1883.)

[1. *Trusts* ⇐316.]

A trustee who was appointed under the authority of a marriage settlement for the purpose, in part, of prosecuting certain claims held under the settlement, upon which claims judgments were afterwards obtained, is entitled to commissions on the amount received in compromise of such judgments, directly by the cestui que trust, but in the presence of the trustee and on their joint receipt.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 449; Dec. Dig. ⇐316.]

[2. *Trusts* ⇐315.]

Where a marriage settlement vested in a trustee the legal title of choses in action, the statute of uses does not apply, and the trust continues until the trustee divests himself of the legal title: and in whatever form he turns over the assets to his cestui que trust, he is entitled to his commissions.

[Ed. Note.—Cited in Blount v. Walker, 31 S. C. 26, 9 S. E. 804.

For other cases, see Trusts, Cent. Dig. § 433; Dec. Dig. ⇐315.]

[3. *Trusts* ⇐316.]

Where, in action by trustee and cestui que trust against others, judgment is rendered, in form, in favor of the latter, it is, in effect, in favor of both plaintiffs, and upon the money realized under such judgment the trustee is entitled to commissions.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 445-459; Dec. Dig. ⇐316.]

[4. *Set-Off and Counterclaim* ⇐46.]

In this action against the defendant individually, she asserted as a counter-claim a note due to her as executrix. *Held*, that a demurrer to this counter-claim was properly sustained, there being no sufficient allegation of her qualification as executrix, and the claim and counter-claim being in different rights.

[Ed. Note.—Cited in Pope Mfg. Co. v. Charleston Cycle Co., 55 S. C. 540, 33 S. E. 787.

For other cases, see Set-Off and Counterclaim, Cent. Dig. § 104; Dec. Dig. ⇐46.]

[5. *Set-Off and Counterclaim* ⇐46.]

There being no proof that the defendant was the appointed or qualified executrix, the counter-claim could not be sustained.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 100, 103-106; Dec. Dig. ⇐46.]

Before Kershaw, J., Edgefield, October, 1882.

The opinion states the case. The Circuit decree was as follows:

This case was heard upon exceptions taken to the report of the master by both plaintiff and defendant. Several questions were made, which shall be considered in their order.

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*1. Was the plaintiff entitled to commissions on money invested by him in the purchase of land, with the approval of the cestui que trust, and in accordance with the powers conferred upon him by the deed? A trustee is allowed commissions on all money received and paid out by him in due course of administration of the trust. If, therefore, the money expended in the purchase of the land in question was rightfully invested, of which there is no question, the trustee is entitled to his commissions upon the amount so paid. It would be a strange anomaly, if a cestui que trust could direct an investment of trust funds in the purchase of land, and by such investment defeat the just claim of the trustee to compensation for his services and responsibilities as trustee, and there is no propriety or equity in such a proceeding which will entitle the cestui que trust to claim the protection of this court against such a demand on the part of the trustee.

2. Money was loaned to one Cheatham, with the approval of the cestui que trust, upon a note and mortgage, which were turned over to defendant as part of the trust property. It turned out that the note was not wholly collected. Defendant excepts to the allowance of commissions on the whole amount of the note and mortgage. This question will be disposed of by overruling the exception upon the authority of the cases of Ball v. Brown, Bail. Eq., 374, and the decisions there referred to, of which Deas v. Spann, Harp. Eq., 176, may be considered the leading case. Where the trust estate consists of bonds, notes, or other choses in action, which the trustee turns over to the cestui que trust, and they are received as money, commissions are due upon such a transaction, as if the trustee had collected the securities and paid over the money.

3. The trustee recovered a judgment, which was agreed by the cestui que trust to be assigned to one Hollingsworth upon his paying her $5,000, and satisfying the costs and fees of the lawyers of the trustee who obtained the judgment—the whole amount to be paid by Hollingsworth not to exceed $7,061. This was regarded as a compromise arrangement, and was assented to by the trustee, who executed the assignment. The money was paid by Hollingsworth, according to the agreement, $5,000 to the defendant, and the balance, $1,861, to the costs and fees

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of the lawyers. *The master has allowed commissions on the amount paid to defendant only. Defendant excepts to the allowance of any commissions on this trust action, while plaintiff excepts, because commissions were not allowed upon the whole amount which Hollingsworth agreed upon as the utmost extent of his liability.

Both exceptions are overruled. The defendant's, on the authority of the cases cited above, and the plaintiff's, because this was a compromise made by the defendant, to which he assented, and which is the same, in effect, as if he had assigned the judgment to Hollingsworth upon the payment of $5,000, with an indemnity against the claims of his attorneys for their costs and fees. If the attorneys had been content to receive nothing from Hollingsworth and released him, as they might have done, would it be pretended that the plaintiff could have charged commissions on the sum they might have claimed for their services, but which they saw fit to remit? In no sense can the money paid by Hollingsworth to the lawyers under this arrangement be deemed equivalent to the receipt and disbursement of money by the trustee, and therefore the foundation for the claim of commissions does not exist.

4. The eighth exception of the defendant objects to any commissions being allowed the trustee, because she was entitled, after the death of her husband, to have the whole trust estate turned over to her. I am unable to find any question to discuss in this exception. If defendant was entitled to the estate after the death of her husband, and that estate consisted of choses in action, and other securities for money payable to the trustee, how could she receive the same, unless the trustee either collected the securities and paid over the money, or assigned them to her? In either case, as I have shown, he would be entitled to commissions.

5. The plaintiff excepts also to any finding of fact by the master, but I cannot conceive how he could have obeyed the order of the court, which required him to take the testimony and state the accounts between the plaintiff and the defendant, without a finding of facts, and this exception is also overruled.

6. The defendant's sixth and seventh exceptions are well taken. The plaintiff is estopped and cannot claim that the money received by him from the sheriff, and paid over

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to the defendant, was not *a part of the trust estate; at least, under the circumstances, the defendant cannot here be made liable to refund the amount should the contingency hereafter happen which the master has sought to provide for. We can only, in this action, deal with existing facts properly in evidence. These exceptions are sustained.

7. The last exceptions to be noticed are those of the plaintiff (the first and fourth) which complain that the master allowed the counter-claim set up by the answer. This

claim consists of a note which, it was said, was held by defendant's deceased husband, payable to him, and made by the plaintiff, which came to defendant's hands as executrix of her husband. The plaintiff demurred to this counter-claim, and objected to any evidence being received in regard to it. The plaintiff also excepts to a finding of the master, as matter of fact, that the deceased husband, Robert D. Brunson, left a will, or that defendant was executrix, because there was no proof of these facts. He also excepts to the allowance of the counter-claim, because the note, if the facts are conceded, could not be set up as a counter-claim.

These exceptions must be allowed. The answer does not contain a sufficient allegation to support the counter-claim, nor was the title of the defendant, as executrix, sufficiently proven. Nor can the note in question be the proper subject of a counter-claim in this action, not being due to defendant in the same right in which she is sued. The note is claimed to be due to her as executrix, while she is sued in her individual and personal character. She could not maintain an action on it in her own right, and consequently cannot set it up as a counter-claim in an action brought against her personally. Pom. Rem., § 751. It is not impossible that she might have made it the subject of an application to the court in proper form, in behalf of the estate which she claims to represent, so that whatever the plaintiff might recover in this action should be subjected to the payment of the debt, and it may be that after the recovery of judgment herein, some such relief may be had, especially if plaintiff is in insolvent circumstances; but as a counter-claim herein, it cannot be sustained for the reasons given.

It is therefore ordered and adjudged, That the report, as modified by this decree, be con-

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firmed and made the judgment of this *court, and that the defendant pay the plaintiff the sum of two hundred and forty-six 37-100 dollars, and also the costs of this action, to be adjudged by the clerk and by him inserted in the judgment, and that plaintiff have execution therefor.

Mr. W. H. Folk, for appellant.

Under our statutes, a trustee is entitled to commissions only on moneys, &c., received and paid away. Bail. Eq., 374. Lanier never received nor paid away this money, and he had no right to receive it, for the judgments were in favor of Mrs. Brunson and in her name. 11 S. C., 566. Besides, the husband being dead, there was no longer any trust. Speer Eq., 587. The cases cited by the Circuit judge—Bail. Eq., 374; Harp. Eq., 176—do not apply; for here the judgments were recovered by Mrs. Brunson. See 2 McCord Ch., 473. Lanier's consent was purely formal, and amounted to nothing. Under the circumstances of this case, the counter-claim was proper. Water. Set-off, §§ 10–17; 12 Am. Dec., 155; 10 Paige, 369; Bail. Eq., 156; 2 McCord, 185.

Messrs. Glover & Abney, contra.

As trustee acting, and for services rendered, Lanier was entitled to the commissions claimed. Statute of uses has no application to personal property. Speer Eq., 579, 593; 6 Rich., 315; 3 S. C., 78; 5 Id., 446. The trust was not executed at Brunson's death, the judgment was never assigned to Mrs. B., and the trustee's control continued. There must be delivery of possession to divest a trustee of the legal title to personalty. Hill Trust., 236, 248, and cases supra. Where otherwise executed, the beneficiary was in possession. At any rate, he is entitled to commissions. Pars. Cont., 793–99; Herm. Est., §§ 322, 417. But he constructively received the money. Bail. Eq., 374. And the trust deed expressly provides for compensation. 13 Rich. Eq., 195. The counter-claim was properly excluded. Code, §§ 170, 171; Pom. Rem., §§ 749, 750. And for want of proof.

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*March 26, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The facts out of which the questions made by this appeal arise are, substantially, as follows: The plaintiff having become trustee of the defendant under a marriage settlement executed by her in contemplation of marriage with her late husband, R. D. Brunson, commenced an action against James B. Griffin, the guardian of the defendant, and his sureties, to recover the amount due by such guardian, which resulted in judgments against the guardian and one of his sureties, as well as against the heirs at law, legatees, and devisees of another surety to whom lands had descended. This was done in accordance with one of the provisions of the marriage settlement, by which the trustee "is required, and shall have power, to make settlements with James B. Griffin, guardian, or with any person for said James B. Griffin, in whose hands the property, estate, and funds of said Margaret C. Hollingsworth (now Brunson) may be. * * * And the said trustee * * * is further empowered to bring suits, and take such steps for the collection and preservation of the property, money, and estate of said Margaret C. Hollingsworth, as he may deem proper and fit, and proceed against any person or persons who may be liable or bound to said Margaret C. Hollingsworth for any property, money, or estate appertaining or belonging to her, and as a compensation for such labor and trouble, the trustee shall be entitled to retain a reasonable sum from the trust funds to pay expenses and charges."

It seems, therefore, that one of the objects contemplated by the parties in executing the marriage settlement was to provide for the collection of the money due to the defendant by suit if necessary. Accordingly, as we have said, suit was brought by Lanier, in which he joined with him as plaintiffs the defendant and her husband. The latter, however, died October 1st, 1870, after the suit was commenced; but it does not appear that any notice was taken of that fact in the future progress of the case. Some time subsequently to the recovery of the judgments above mentioned a compromise was effected with John H. Hollingsworth, one of the parties against whom judgment was recovered, whereby be was to be discharged upon the payment to the defendant of five thousand

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dollars and her counsel fees and costs, *estimated at the amount of two thousand and sixty-one dollars, and accordingly a paper was drawn up, of which the following is a copy:

"State of South Carolina, County of Edgefield. } In Common Pleas.

"James A. Lanier et al., plaintiffs, against James B. Griffin et al., defendants.—Bill for account, &c.

"A decree having been made by the Supreme Court in this case, and judgment having been entered thereon, and a compromise having been made in the case between John H. Hollingsworth and M. Cornelia Brunson for the sum of seven thousand dollars ($7,000), the said Cornelia Brunson hereby remits to the said John H. Hollingsworth, who is a legatee and takes under the will of D. M. Hollingsworth, all the rights which the law gives to a surety who pays a debt, and further assigns, transfers, and sets over to John H. Hollingsworth all her right, interest, and title in and to said case, and in the judgments in said case, and her right against all the parties thereto against whom she may have claims, but all without recourse in any form against her, and without recourse upon her for costs and fees. The balance of attorney costs, $61, to be paid to General Gary by John H. Hollingsworth.

"M. C. Brunson.
10th January, 1881.
"J. A. Lanier,
"Trustee for M. C. Brunson.
"Witness: Thomas Thomson.
"Witness: W. H. Folk."

In pursuance of this compromise, John H. Hollingsworth paid over to the defendant the said sum of five thousand dollars in the presence of the plaintiff, who then claimed his commissions, but was induced to refrain from pressing his claim at that time, for fear of breaking up the compromise, being told that he could afterwards assert his claim. The testimony of Hollingsworth was that he refused to pay over the money unless Lanier signed the assignment of which the

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above is a copy. This action was *then brought by the plaintiff to recover commissions on the said sum of seven thousand dollars, and the defendant, amongst other defences, set up a counter-claim as follows: "That the said James A. Lanier is indebted to her as executor of Robert D. Brunson, deceased, by his note dated May 26, 1869, due at one day, in the sum of five hundred dollars, less a credit of $25, August 30, 1870, for cash loaned to him." To this counter-claim the plaintiff filed a demurrer upon the ground that it did not state facts sufficient to constitute a counter-claim; and that it is not a counter-claim to this action, the defendant having no right of action on the same in her individual capacity.

The case came before the Circuit judge upon the master's report and exceptions thereto, who held, so far as the questions involved in this appeal are concerned, that the plaintiff was entitled to commissions on the sum of five thousand dollars paid to the defendant, but not on the additional sum of two thousand and sixty-one dollars to be paid to her attorneys for fees and costs, and that the demurrer to the counter-claim should be sustained, upon two grounds: First, that the answer does not contain a sufficient allegation to support the counter-claim; second, that the note was not a proper subject of counter-claim in this action, not being due to the defendant in the same right in which she is sued; and rendered judgment accordingly.

From this judgment defendant appeals upon two grounds, the third being of too general a nature to require any notice from us, as has been frequently held: "1. Because of error in holding 'that the plaintiff was entitled to commissions as trustee on the five thousand dollars paid to defendant by John H. Hollingsworth,' the said plaintiff never having received nor paid out the same. 2. Because of error in holding 'that the note set up in discount by the defendant against plaintiff's claim for commissions was not a good and valid counter-claim or set-off against any and all demands of the said plaintiff.'"

The reasons given by the Circuit judge and the authorities which he has cited in support of his conclusions are so entirely satisfactory that we scarcely deem it necessary to add anything to what he has said. It is very manifest that one of the objects in having the plaintiff appointed trustee was to have

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the claim of *the defendant against the guardian properly prosecuted, as the marriage settlement not only authorized but required this to be done by the trustee. Now, when this duty was performed, and nothing remained to be done but receive the money which was the fruit of the litigation commenced

and prosecuted by the trustee, it would seem strange indeed if the mere fact that the money was paid into the hands of the cestui que trust instead of the trustee, who was present and ready to receive it, should deprive the latter of his claim to the usual compensation. The testimony shows that Hollingsworth refused to pay the money unless the trustee executed the assignment, which he accordingly did, and the case is, therefore, very much like the case suggested in the argument of respondent's counsel, of money being deposited in bank to the credit of a trustee, which, of course, could only be drawn out upon his check. Certainly, in such a case, if the trustee, accompanied by his cestui que trust or her agent, went to the bank, signed the check, and allowed the money to be paid directly into her hands, instead of his own, this would not deprive him of his right to commissions.

It is argued, however, that upon the death of Robert D. Brunson the trust terminated, and the plaintiff was no longer trustee, and the defendant had a right to receive directly her own money. Even if this were so, it would seem a little strange that no such suggestion appears to have been made until the trustee comes to claim compensation for the performance of the very duty for which he was appointed. But is it so? The marriage settlement contains no such provision; on the contrary, that instrument vested the legal title of the estate of the defendant, consisting solely of choses in action, personal property, in the trustee for the very purpose of enabling him to convert such choses in action into money; and even if there had been nothing further for the trustee to do, the property being personalty, the statute of uses would not apply, and until he had delivered possession, or in some other way divested himself of the legal title, the trust would continue. Harley v. Platts, 6 Rich., 315, and other cases cited by the respondent. When he did turn over the assets to his cestui que trust, whether in the form of money

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or in the form *of bonds or judgments, he would be entitled to commissions, under the authorities cited by the Circuit judge.

Again, it is argued that when Judge Carpenter rendered judgment in the original case of Lanier and others v. Griffin and others, he rendered judgment in favor of M. C. Brunson by name and not in favor of the plaintiffs in that action, and, therefore, she alone, and not the trustee, had the right to enforce such judgment and receive the money. While it is true that the judgment is, in form, in favor of Mrs. Brunson, who was the real party in interest, yet it must be manifest that this was not done under the view that the trust had terminated, or with the purpose of excluding any of the rights of the trustee. Nothing of the kind appears in the decree. Indeed, it does not even appear in that decree, as reported in 11 S. C., 567, when it was filed, or when Robert D. Brunson died, and it is quite clear that nothing whatever was intended to be adjudged as between the plaintiff, Lanier, and his co-plaintiff in that suit, Mrs. Brunson. The decree in that case was, in effect, though not in form, a decree in favor of the plaintiffs in that case, as it should have been. We do not think, therefore, that appellant's position derives any strength from the fact that the judgment in that case was nominally in favor of M. C. Brunson.

The second ground of appeal cannot be sustained. There was no sufficient allegation that the defendant was the duly qualified executor of Robert D. Brunson, deceased, and therefore the counter-claim was open to the demurrer interposed. But in addition to this, it would seem from the authority cited (Pom. Rem., § 751) that the note set up as a counter-claim, not being due to defendant in her own right, could not be pleaded as a counterclaim. Mrs. Brunson individually and Mrs. Brunson as executrix of the will of her husband are in law two distinct and different persons. Besides, even if the demurrer should have been overruled, the Circuit judge states that there was no evidence that the defendant had ever been appointed or qualified as executrix of her husband's will, and this statement is fully sustained by an examination of the testimony set out in the "Case"; and in the absence of such evidence, it is quite clear that the counter-claim could not be sustained.

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*Whether the defendant could not, by proper allegations and proofs, have obtained the benefit of the note set up as a counter-claim, or whether she may not still subject the amount recovered in this action to the payment of that debt, as intimated by the Circuit judge, are questions which are not now before us, and cannot, therefore, be considered or adjudged.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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21 S. C. 51

WHALEY v. JACOBSON & SON.

(November Term, 1883.)

[1. *Landlord and Tenant* ⇐5.]

A contract between a landlord and one M., which, taken as a whole, gave to M. the possession of the land for the year, was substantially a lease, and gave M. such an interest in the crops to be made thereon as enabled him to encumber it with liens for advances, subject to the landlord's lien for rent to the extent of one-third of the crop.

[Ed. Note.—Cited in McCutchen v. Crenshaw, 40 S. C. 511, 516, 19 S. E. 140.

For other cases, see Master and Servant, Cent. Dig. § 4; Landlord and Tenant, Dec. Dig. ⇐5.]

[2. *Agriculture* ⟸12.]

Where a landlord leased land to a tenant for a stipulated rent, and also agreed to make advances, which were to be repaid out of the crop, but the contract was not recorded nor filed, the landlord cannot, in action against the sheriff, recover for such advances the crop made by the tenant on this land, the sheriff having seized it under a warrant issued upon a merchant's recorded lien of later date, given by the tenant.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. § 41; Dec. Dig. ⟸12.]

[3. *Landlord and Tenant* ⟸244.]

A landlord, to secure a lien for advances made to his tenant, or for rent exceeding one-third of the crop, must comply with the same terms and conditions as are imposed by the statute upon all others.

[Ed. Note.—Cited in Nexsen v. Ward, 96 S. C. 328, 331, 80 S. E. 599.

For other cases, see Landlord and Tenant, Cent. Dig. § 984; Dec. Dig. ⟸244.]

Before Wallace, J., Orangeburg, May, 1883.

The opinion fully states the case.

Mr. T. B. Whaley, for appellant.

Mr. James F. Izlar, contra.

March 24th, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. On January 5, 1881, Lawrence M. Whaley entered into a written agreement with one Samuel Middleton as follows: "I, Samuel Middleton, do

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hereby agree to *plant and cultivate properly, in cotton and provisions, during the year 1881, at my own cost and expenses, thirty-five acres of L. M. Whaley's land in Orangeburg county, and at my own cost and charges to gather and prepare for market the crops to be made thereon, and to deliver the same in accordance with the directions of the said L. M. Whaley or his agent. I further agree to repair and keep in good condition the fencing around said land, in consideration of which the said L. M. Whaley hereby agrees to advance the said Samuel Middleton, during the year aforesaid, fertilizers and supplies, amounting to three hundred dollars, to be used in the cultivation of said crops; that the said Samuel Middleton shall occupy, during the year, the premises now in his possession; and after the said L. M. Whaley has realized twelve hundred pounds of lint cotton, and has also paid the advances to be made as aforesaid, with interest thereon, then the said Samuel Middleton shall have the residue of said crops," &c.

This contract was never indexed or recorded, but Middleton took possession under it. He got some supplies from Whaley under the contract, there being still a balance therefor of $116 due Whaley. During the year he desired other supplies, and in February he gave an agricultural lien for supplies to B. Jacobson & Son, merchants, to the amount of $135. This lien was properly indexed in the clerk's office, February 23, 1881. Middleton delivered the 1,200 pounds of lint cotton to the landlord, Whaley, but did not pay him the balance for advances by him. On December 29, 1881, B. Jacobson & Son procured from the clerk a warrant to seize the crop remaining in the possession of Middleton, and A. M. Salley, the sheriff, levied on cotton seed, fodder, hay, and rice straw, and was about to sell the same, when Whaley, the landlord, brought this action before a trial justice to recover possession of said articles as his property, there being still a balance due to him for advances made during the year.

The jury in the trial justice's court rendered a verdict for defendant, and the plaintiff appealed to the Court of Common Pleas. Judge Wallace affirmed the decision, and the plaintiff appeals upon the following exceptions: "1. Because under the agreement, Middleton's interest in the crop to be produced

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by his labor was *not such as to enable him in advance to subject it to a legal lien. 2. Because Middleton had no right to give a lien upon the crop which belonged to the plaintiff until the residue, or his share, was set apart and delivered to him. 3. Because in the cultivation of plaintiff's land Middleton was not his tenant, but his employé merely, and could not encumber with a lien more than his interest in the crop. 4. Because Middleton had no right or title to any of the produce until the residue was ascertained and delivered to him."

This court has held in several cases that a mere employé, who cultivates the crop of another for hire, either in money or a part of the crop, is not, in the sense of the agricultural acts, "a cultivator of the soil," and entitled, before a division of the crop, to dispose of it or encumber it with liens; but that one who is the owner, or entitled under contract or lease to the possession of the soil which he cultivates on his own account, may give a lien upon the crop thereon produced, subject, however, in the case of a lessee, to the right of the landlord to have his rent first to the extent of one-third of the crop, and that without recording or filing. Kennedy v. Reames, 15 S. C., 551; Richey & Miller v. DuPre, 20 S. C., 6; Carpenter v. Strickland, Id., 1.

The first question is as to the relation which Middleton bore to Whaley, the owner of the land. Did the contract make him a tenant or a mere employé? It is somewhat confused, and all of its parts are not consistent with each other; but taken as a whole, we think it gave Middleton possession of the premises, and was substantially a lease for a year. A lease is defined to be "in effect a conveyance of the possession of property (generally lands or houses) for a fixed period, and usually with the reservation of a rent." Rap. & Law. L. Dict., 735.

It is true that the stipulations which re-

quired Middleton to deliver the crops after they were gathered, "in accordance with the direction of Whaley or his agent," looks as if there was some intention to retain possession of the place; but, on the other hand, the stipulations that Middleton was to "occupy the place" and "keep it in repair," and that "the landlord would make advances to him," are only consistent with the idea of a temporary transfer of possession. Middle-

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ton was to occupy the premises, to *plant and cultivate cotton and provisions at his own cost and expense, and to repair and keep in good condition the fencing; in consideration of which he agreed to take advances during the year; "and after the said L. M. Whaley has realized 1,200 pounds of lint cotton, and has paid (we suppose Middleton) the advances to be made as aforesaid, with interest thereon, then the said Middleton shall have the residue of the crops," &c.

This contract is very different from that in Huff v. Watkins, 15 S. C., 83 [40 Am. Rep. 680] which gave the landlord "the entire control of the time and services of the employé in working his lands under his exclusive direction and control from sun to sun." "A servant, strictly speaking, is a person who, by contract or operation of law, is for a limited period subject to the authority or control of another person in a particular trade, business, or occupation." Wood M. & S., 2. We think Middleton was a tenant of the landlord, Whaley, and "a cultivator of the soil" in the sense of the agricultural acts.

Taking this as settled, Middleton had such an interest in the crop to be made as enabled him to encumber it with liens for advances, subject always to the rights of the landlord for his rent to the extent of one-third of the crop. But in this view, it is urged that the plaintiff also made advances, and being the landlord, his lien was "prior and preferred," whether it was registered or not. It was Middleton's covenant to take "the residue of the crop after these advancements were paid;" and if he had delivered the crop to the landlord in discharge of this obligation, Jacobson & Son could not have recovered their claim in money from him. See Kennedy v. Reames, supra. But Middleton did not so deliver the crop, which, remaining in his possession, was seized under the warrant of Jacobson & Son, and this gives rise to a different question, viz., whether the landlord had such title in the crop as to enable him to recover possession of it from the sheriff, not under agricultural warrant, but in an ordinary action for delivery of personal property.

As an ordinary lienee, he certainly had no such right, for several reasons, and especially because his lien was not recorded as required by law. As landlord he had the right to his rent to the limit before indicated.

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What was his rent? Was it limited *to the lint cotton delivered, or did it include also the payment of the advances made? Can the obligation of Middleton that these advances should be first paid be properly regarded as a part of the rent promised by him? The obligation to pay these advances was not in a separate paper, according to the usual form in such cases, but in the original rent contract, and we have little doubt that such agreement was one of the inducements which moved the landlord to grant the lease, and therefore to that extent was part of the consideration of the lease. But it was rather an unusual way of securing rent, and if it were possible so to consider it, we do not see how it could be estimated, especially in view of the limit in the amount of the landlord's lien. The whole amount could not be added as so much more consideration for the use of the land, i. e., rent, for the consideration is expressly declared to be for advances to be made.

The law favors the landlord, but we do not suppose that, in giving priority to rent, the legislature had in contemplation such contracts as this, or intended to do more than to secure the rent proper to the landlord, and then leave him to make agricultural advances to his tenants upon the same terms and conditions as to recording, &c., as were imposed upon all others. The law expressly declares such to be the intention as to so much of the crop as exceeds one-third, and we do not see why it should not be so construed in reference to advances made by the landlord to his tenant, which are not in its proper sense "rent."

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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GAFFNEY v. PEELER.

(November Term, 1883.)

[1. *Reference* ⊂⊃100.]

Where all the issues in a law case are referred to a referee to hear and determine, and to report the same, the right to file exceptions thereto being specially reserved, the findings of law and fact by the referee are open to review, upon proper exceptions, in the Circuit Court.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 157–168; Dec. Dig. ⊂⊃100.]

[2. *Reference* ⊂⊃68.]

A finding of fact by a referee, based upon incompetent testimony, is error of law.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 102; Dec. Dig. ⊂⊃68.]

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[3. *Evidence* ⊂⊃352.]

*Minutes of a stockholders' meeting of a corporation under whom plaintiff claims the land in dispute, and also declarations of a former owner, are inadmissible in support of plaintiff's title.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1398; Dec. Dig. ⊂⊃352.]

[4. *Husband and Wife* ⇐182.]
A married woman's estate of inheritance, prior to 1868, could be conveyed only in the mode prescribed by the act of 1795.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 714, 715, 719; Dec. Dig. ⇐182.]

[5. *Curtesy* ⇐8.]
Since the statute of distributions of 1791, there has been in this state no tenancy by the curtesy in fee simple estates.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. § 18; Dec. Dig. ⇐8.]

[6. *Estoppel* ⇐38.]
P., having an interest in land as an heir of his father, sold it to his mother, and then conveyed the entire fee to K., with covenants of general warranty: *Held*, that P. and those claiming under him were estopped from asserting against K. an interest in the land subsequently acquired by P. as an heir of his mother, or otherwise.

[Ed. Note.—Cited in Richardson v. Atlantic Coast Lumber Corp., 93 S. C. 258, 75 S. E. 371.

For other cases, see Estoppel, Cent. Dig. § 99; Dec. Dig. ⇐38.]

[7. *Appeal and Error* ⇐1008.]
This court has no power to review questions of fact passed upon by the Circuit judge in a law case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3960, 3962–3969; Dec. Dig. ⇐1008.]

[8. *Appeal and Error* ⇐172.]
Matters not presented to nor passed upon by the Circuit judge, nor made a ground of exception, not considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1070; Dec. Dig. ⇐172.]

[9. *Appeal and Error* ⇐1177.]
Action was brought against several defendants for the recovery of real property, plaintiff demanding judgment for the land described, or if entitled to only an undivided interest therein, then for division or sale; plaintiff being found entitled to the interest of only one of the defendants, the judgment of the Circuit Court dismissing the complaint was reversed and a new trial granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597–4604, 4606 4610; Dec. Dig. ⇐1177.]

Before Hudson, J., York, June, 1883.

This was an action by W. W. Gaffney against Daniel Peeler and others for the recovery of a tract of land, commenced in 1882. The defendants are the heirs-at-law of Daniel Peeler, sr. The plaintiff claimed under this same Daniel Peeler, sr., under the chain of titles stated in the opinion of this court. The releases to the widow were in the shape of bonds, whereby the obligor bound himself, on payment of the purchase money, to execute good titles to the obligee for his or his wife's share, or if partition should be ordered, then to execute a power to the obligee to receive the share awarded to the obligor. The first of these bonds bears date October 26, 1840, and was executed by Moses M. Dunn, husband of one of the distributees, to Anthony Peeler, and by intermediate bonds of others, and finally by bond of Anthony Peeler to Levicey Peeler, the widow, dated November 6, 1846, all of the shares were transferred, or attempted to be transferred, to Levicey Peeler, except that of Mrs. Moss, a widowed daughter, who resided on

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the place. But the married *daughters signed none of these bonds; they were executed by their husbands, two of whom have survived their wives. On March 14, 1863, Levicey Moss, widow, by a like bond, transferred her share to her mother.

There was no evidence of any deed from Gist to Daniel Peeler, jr., but plaintiffs introduced in evidence a minute of a meeting of the stockholders of the King's Mountain Iron Company, proved to be in the handwriting of R. V. Gist, approving a purchase of the property from Daniel Peeler, jr. A declaration of Gist that he had purchased the Peeler land for the Iron Company was also proved.

In 1842 all the children of Daniel Peeler, sr., had moved to Georgia, except Levicey Moss and Daniel Peeler, who remained with their mother on the place. This situation continued until March, 1863, when Levicey Peeler made her deed to Gist, about which time the land was abandoned by the Peeler family. In 1879 the defendants, heirs of Daniel Peeler, sr., and of his wife Levicey (who died in 1865), entered upon the land and held it adversely.

The Circuit judgment was as follows:

The plaintiff brings this action against the defendants to recover possession of a tract of 695 acres of land, which it is alleged they wrongfully withhold from him, and of which he is seized in fee. The defendants deny the title of the plaintiff, and lay claim to the said land as heirs-at-law of Daniel Peeler, sr., deceased, and of his deceased widow, Levicey Peeler. By the pleadings the action is one involving the title to real estate. No equitable feature is engrafted upon the action, neither in the complaint nor in the answer.

The parties, waiving trial by jury, and desiring a trial by the court, procured the issues of law and of fact to be referred to a special referee. Accordingly references were held and much testimony was taken, and this testimony, with the findings of fact and conclusions of law, and the exceptions thereto, bring the case for hearing before me. To the testimony and report of the referee, reference must be had for the detail of the facts, a statement of which I cannot incorporate into this judgment because they are so voluminous.

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*In such an action it devolves upon the plaintiff to shew perfect title in himself to the disputed land, in order to recover of the defendants who are in possession claiming title. The plaintiff must rely upon the strength of his own title, and not upon the

weakness of that of the defendants. It is in order therefore first to examine the title of the plaintiff as set up and ascertain its strength. If he has shewn a prima facie title, it will be in order then to examine the title established by the defence, so as to determine whether or not it be paramount to that of the plaintiff.

Both parties claim under Daniel Peeler, sr., deceased, to whom the land was granted by the state in July, A. D. 1819, and who died seized and possessed thereof about 1830. The following is the plaintiff's abstract of title which he claims has been sufficiently established:

1. Deed to the locus in quo bearing date May 6th, 1881, sold by virtue of an order of the Court of Common Pleas at the suit of T. J. Bell, who held it as agent of the creditors of the King's Mountain Iron Company.

2. Deed to the locus in quo by the sheriff of York to T. J. Bell, bearing date May 18th, 1880, the same having been levied on and sold by said sheriff at the suit of the said execution creditors of the King's Mountain Iron Company in 1869 and deed made in 1880, and possession taken by Bell in 1869.

3. Deed of Daniel Peeler, jr., bearing date June 12th, 1863, conveying the land to the King's Mountain Iron Company.

4. Alleged deed of Richard V. Gist shortly prior to the last named deed of June 12th, 1863, conveying said land to Daniel Peeler.

5. Deed March 14, 1863, of Levicey Peeler, conveying said land to R. V. Gist.

6. Deeds of the surviving children of Daniel Peeler, sr., conveying their respective shares of said land to their mother, Levicey Peeler, evidenced by bonds for title given at different days and times between 1840 and 1863, but mostly prior to 1846.

7. Death of Daniel Peeler, deceased, about 1830, seized in fee of this land, which was granted to him by the state July 19th, 1819, leaving him surviving his widow, Levicey Peeler, and ten children.

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*This abstract of plaintiff's alleged title I have formulated from the testimony, and it is very clear that if the evidence establishes it, he must recover of the defendants. The plaintiff has, by proper and sufficient proof, established the first, second, and third links in his chain of title. The deeds of conveyance are in evidence, and no question has been made as to their execution and delivery. By this proof the plaintiff has traced his title through successive owners of this land back to June 12th, 1863.

But the fourth link is missing. No deed from R. V. Gist to Daniel Peeler, jr., has been produced. There is no evidence that such a deed was ever made. Neither the original nor an office copy can be found, nor has any witness been produced to prove that such a paper ever existed. Betwixt the time when Levicey Peeler, the widow, conveyed to R. V. Gist, and the time when Daniel Peeler conveyed to the King's Mountain Iron Company, but a few months intervened, to wit, from March 16, 1863, to June 12, 1863, but how Daniel Peeler got title does not appear. To make it appear that such a transfer of title was made, the plaintiff introduced before the referee declarations of Gist, who is living in the state, and the minutes of the King's Mountain Iron Company, to the effect that Gist had bought the land from Levicey Peeler. But none of these declarations are to the effect that Gist conveyed to Daniel Peeler, jr., but are statements of other facts, from which we are asked to conjecture or infer that he did so.

All these declarations, even if admissible, when duly weighed, are insufficient to support the inference that Gist sold and conveyed the land to Peeler. But this loose hearsay testimony is clearly inadmissible in behalf of plaintiff's title. He claims under the King's Mountain Iron Company, and also under Gist, and the declarations of these persons in favor of their own title are inadmissible in behalf of the plaintiff. A witness for the defendants stated on his examination that while in Georgia he saw a paper purporting to be a bond for titles from Gist to Peeler in the possession of Peeler, but it had neither date nor witness. This does not cure the want of proof by plaintiff, and, intrinsically, is worth little as testi-

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mony. I conclude that this fourth *link in the plaintiff's chain is missing, and that it is unsupplied by proof.

It is suggested that we might conclude that the title of Gist was the title of the company, and thus make the connection. But such is not the plaintiff's allegation in his complaint, nor is there any legitimate testimony going to sustain such a conclusion. In fact, the circumstances negative this theory, because, if such were true, why would the company have taken title from Daniel Peeler, under whom they held and claimed? Why not take from Gist? If Gist bought for the company, there appears no reason at all why they should not have taken his title, instead of title from another. This theory has no evidence to support it, and is negatived by the circumstances. Now, it seems that T. J. Bell held the title of the King's Mountain Company for the period of ten years, and this might save the plaintiff's case, provided he could go beyond 1863 and connect himself with other owners of the land, the united possession of whom would cover a period of more than twenty years, so as to presume a grant from the state.

If he were making out his title before a jury, and proved title in Bell and his possession of the land for ten years or more, still he would be nonsuited, unless he could connect Bell with preceding owners and occupants of the land, whose period of owner-

ship would form a period of twenty years or more, from the plaintiff downward, in which the land had been owned connectedly and successively by citizens of the state under whom plaintiff claims. Subjected to this fundamental rule as to the mode of raising the presumption of a grant, the plaintiff would be nonsuited, because he stops short in his proof at June 12, 1863, which leaves him within the period of twenty years, and deprives him of the benefit of the presumption of a grant by the state.

But so far as Bell's title and possession are concerned, the plaintiff can derive little benefit therefrom, because that possession was interrupted, before the lapse of ten years, by the defendants, who, as heirs at law of Daniel Peeler, sr., and of their deceased mother, the widow, re-entered upon the land and ousted Bell, and still hold against the plaintiff. At the sale at which the plaintiff purchased this land, the defendants caused full and explicit notice, in writing, to be published, declaring their pos-

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ses*sion and title to this land. The plaintiff purchased with his eyes open, and, it is said, bought at a nominal price. He accepted the gage thrown down to him, and coming into this court to assert his title to the territory which he knew to be possessed and claimed by the defendants, he has failed in his venture under the most liberal construction of the rules of evidence and principles of law.

Now the plaintiff holds the title of Daniel Peeler, jr., to this tract of land. He is one of the heirs at law of Daniel Peeler, sr., to whom the land was granted by the state in 1819, and were it not that Daniel Peeler, jr., parted with his interest and estate as heir to his father long ago, the plaintiff would be entitled to recover that part, which is the one-fifteenth of the whole. But as far back as December 15th, 1842, he sold his interest to his mother, and her title thereto became absolute and perfect before she, in March, 1863, sold and conveyed to Gist.

I conclude, therefore, as a matter of fact, that plaintiff has failed to show title to the land in dispute, and hence cannot recover possession thereof from the defendants. All the findings of fact and conclusions of law of the referee at variance with the facts herein found and the principles of law herein announced are overruled.

I deem it unnecessary to examine in detail the merits of the defendants' title, as they are allowed to stand upon their possession of the land until ousted by paramount title. It would be very tedious to follow the learned referee in his various findings of fact and conclusions of law bearing upon the various and frequent transfers of title by the heirs at law of Daniel Peeler, sr., the one to the other. It is enough to say that I cannot agree with him in his views of the effect of the attempts of the husbands of Peeler's daughters to convey or to sell their wives' shares in this land. My own opinion is that Levicey Peeler, the widow, under a proper construction of the law and findings of fact, did get good and sufficient title to shares of such of the children as, being sui juris, sold to her; the lapse of time and possession curing the absence of proof of deeds. She also got title to the husbands' shares of their wives' parts in each case where the husband sold and survived the

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wife; but in cases where the wife *survived the husband, his previous attempt to convey conferred no estate, but the whole survived to the wife.

It is a mistake also in the referee to hold that in South Carolina, prior to 1868, a husband surviving the wife had an estate in curtesy to her separate real estate. The act of 1791, in my opinion, fixed his right as one of her heirs, and abolished the estate by curtesy in her fee simple estate by necessary implication. The provisions of that act are totally inconsistent with the estate of curtesy in the husband.

Should the plaintiff hereafter be able to put the defendants to the exact proof of title, it will be time enough for the court to adjudge in detail which of the defendants have, and which have not, title superior to that of the plaintiff. Having adjudged that he has not proved title, we are called on to go no further.

It is therefore ordered, adjudged, and decreed that the complaint be dismissed, and that the defendants have execution for their costs.

From this decree the plaintiff appealed upon the following exceptions:

It is respectfully submitted that his honor the presiding judge erred:

1. In overruling the finding of fact by the referee that R. V. Gist had conveyed the land in dispute to Daniel Peeler, jr., since, being a case at law, and all the issues having been referred to the referee: (a.) The said finding was not without evidence to sustain it. (b.) It was in accordance with the clear preponderance of the evidence. (c.) The evidence in support of the finding was conclusive, and there was no evidence to rebut it.

2. In holding that the alleged conveyance from Gist to Peeler was unsupported by the proof.

3. In excluding from the evidence the minutes of a meeting of the stockholders of the King's Mountain Iron Company, at which Gist, the agent of the company, and a stockholder, was present, and reported the purchase for the said company of the land in dispute from Daniel Peeler, offered to show: (a.) That Gist had conveyed to Peeler. (b.) And, generally, that Gist's title was in the company.

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*4. In excluding from the evidence the declarations of the said Gist in favor of the said company's title, made whilst its agent.

5. In holding that Levicey Peeler, when she conveyed to Gist, was not seized of the several interests of the married daughters and their husbands in the land in dispute.

6. In holding that the plaintiff took nothing by the deed of Daniel Peeler, jr., to the King's Mountain Iron Company, because he had previously conveyed his interest away, and that he can retain the possession, in the face of his own deed, against the plaintiff.

7. In adjudging that the plaintiff's complaint should be dismissed.

8. In holding that plaintiff, in his proof of a chain of successive possessions in preceding owners for twenty years, stopped short at June 12, 1863, the testimony being that Levicey Peeler, who sold to R. V. Gist, March 14, 1863, continued to hold until January 1, 1864, when she surrendered the possession to the King's Mountain Iron Company.

9. In not holding that the possession of the King's Mountain Iron Company was not broken by T. J. Bell, when he entered in 1869, but that he must be taken to have held under and for the said company until he accepted the sheriff's title, May 18, 1880, and because of such acceptance.

10. In not adjudging that the plaintiff is seized of all the right, title, and and claim that the said Gist ever held in the premises, and that he is entitled to recover the same, with damages for the withholding, according to the proof.

11. In not adjudging that Daniel Peeler, jr., and the other defendants who claim to hold as the heirs at law of Daniel Peeler, sr., and Levicey Peeler, are estopped from denying transfer of the said Daniel Peeler, jr.'s title, as one of such heirs at law, to the plaintiff or his grantors.

12. In not adjudging that the plaintiff was entitled, as against the said Daniel Peeler, jr., and the defendants claiming as aforesaid, to be let into possession of the premises to the extent of the interest of the said Daniel Peeler, as an heir at law of his father and mother, and to damages for the withholding, according to the proof.

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*13. In not recommitting the report to the referee for his findings of fact from the testimony not adjudged to be incompetent.

Messrs. C. E. Spencer and J. H. Rion for appellant.

Mr. James F. Hart, contra.

April 2d, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiff in this action seeks to recover possession of a certain tract of land in York county, "And that the title should be adjudged in the plaintiff in fee simple, and in the event that judgment in his favor should be for only an undivided interest in the same, the plaintiff will demand judgment that the premises aforesaid be divided between plaintiff and the parties in interest according to their respective shares, or if division in kind be impracticable, that the said premises be sold, and the proceeds divided as aforesaid." In his complaint he sets out his chain of title as follows:

1. A grant to Daniel Peeler, sr., dated July 19th, 1819.

2. Death of Daniel Peeler, sr., intestate, about 1830, leaving as his heirs at law his widow, Levicey, and ten children.

3. Releases from the children to the widow.

4. Deed from widow to R. V. Gist, dated March 14th, 1863.

5. Deed from Gist to Daniel Peeler, jr., date unknown.

6. Deed from Daniel Peeler, jr., to the King's Mountain Iron Company, dated June 12th, 1863.

7. Deed from sheriff of the interest of said company sold under execution to T. J. Bell.

8. Deed from clerk of court to plaintiff, dated May 6th, 1881, in pursuance of a sale made by him under proper proceedings for that purpose.

In the second count of the complaint, as it is called, the plaintiff simply sets up a claim that he is seized in fee of the premises in dispute, without specifying the sources of his title; and in the third count he claims that he was lawfully in possession of the premises in question, and that defendants unlawfully entered upon and disseized the plaintiff and forcibly keep him out of possession. The answers contained a general

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denial of the plaintiff's *title, and no further statement of what they contain need be made as the question turns upon the validity of plaintiff's title.

A trial by jury was waived, and an order was granted referring it to a referee, "to hear, determine, and report upon all the issues of law and fact raised by the said pleadings, with the right reserved to either party to file exceptions to said report, and to have the same heard in this court; it being understood that neither party waives the right to a subsequent trial by jury of the issues raised, whether Thomas J. Bell, Esq., through whom the plaintiff claims, acquired title to the property in dispute by possession subsequently to the execution sale, at which it is alleged he purchased the same."

Accordingly, the case came before the Circuit judge upon the report of the referee, with exceptions thereto filed both by plaintiff and defendants, and he held that the plaintiff had failed to establish the fourth link in the chain of title, as the Circuit judge stated the chain, but the fifth link in the chain of title as herein above stated; and

that as plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of his adversaries', who may rely simply upon their possession, he rendered judgment dismissing the complaint. The judge, however, does go on to express his dissent from certain legal propositions announced by the referee, in reference to the effect of the releases of such of the children of Levicey Peeler as were married women at the time—the papers claimed to operate as releases being signed by the husbands and not by their wives—and in reference to the right of the husbands to estates of tenancy by the curtesy, which are made the basis of one of the exceptions.

The plaintiff appeals upon numerous grounds, which are fully set out in the "Case," and need not be repeated here. The first and most material question made is, whether the judge erred in holding that the plaintiff had failed to establish any conveyance from Gist to Daniel Peeler, jr., the fifth link in the plaintiff's chain of title as we have stated it. The referee having found that such a conveyance was proved by the evidence before him, it is contended that as this is a case at law, the Circuit judge had no right to overrule this finding of fact, but was bound to accept it as a verdict of a jury. It will be observed, however, that the

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*terms of the order of reference plainly show that such was not the intention of the parties, but that all the findings of the referee, both of law and fact, were open to review, and under such an order of reference, as is intimated in Ross v. Linder, 18 S. C., 605, the parties would be estopped from making the question.

But in addition to this, where, as in this case, the finding of fact by the referee is based upon incompetent testimony, there surely cannot be a question as to the right of the judge to reverse such finding upon the ground of error of law. Here the referee based his finding of fact upon certain minutes made upon the books of the King's Mountain Iron Company, of which Gist was agent, and certain declarations made by Gist, which we think were clearly incompetent, amounting to nothing more than declarations of parties under whom the plaintiff claims, in favor of their own title. The question whether Gist had conveyed to Peeler was a question of fact, and the decision of the Circuit judge is conclusive. The point made in the argument, though not appearing very distinctly in the exceptions, that Gist, when he bought from Mrs. Peeler, though he took title in his own name, really bought for the company, and that the purchase money was paid out of the company's funds, rests upon the declaration of Gist and the minutes of the company, which, as we have seen, were incompetent testimony, and for this reason cannot be sustained.

Next, as to the effect of the papers claimed to operate as releases to Levicey Peeler of the interests of her several children. So far as the rights of those of them who were married women are concerned, we agree with the Circuit judge in the view which he has taken. The only mode by which a married woman, prior to 1868, could dispose of her estate of inheritance in land, is that prescribed by the act of 1795, and unless that mode is strictly pursued, the interest of the wife does not pass. McLaurin v. Wilson, 16 S. C., 402.

So, too, we agree with the Circuit judge that the necessary effect of the act of 1791 was to abolish the husband's right to hold as tenant by the curtesy lands of his wife which she held as tenant in fee simple. This question, so far as we are informed, does not seem to have been distinctly decided in any

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reported *case in this state, though Chancellor Dargan, in Wright v. Herron, 5 Rich. Eq., at page 446, in speaking of the effect of the act of 1791, says: "Upon the construction of this act it has been held, that the husband is not entitled to his curtesy in fee simple estates," notwithstanding the fact that he does go on to use language which would seem to imply that he was inclined to a different opinion.

It seems to us, however, that the necessary effect of this act was to abolish the husband's estate by the curtesy. The object of the act, as expressed in its title and preamble, was not only to abolish the right of primogeniture, but also to provide for the "equitable distribution of the real estates of intestates," as specially enjoined by art. x. § 5 of the constitution of 1790. Accordingly, in the first section, it declares, amongst other things, "that when any person possessed of, interested in, or entitled unto a real estate in his or her own right, in fee simple, shall die without disposing thereof by will, the same shall be distributed in the following manner," and then proceeds to provide for the various contingencies which may occur, and the mode of distribution in such contingencies, amongst others, as follows: "On the death of any married woman the husband shall be entitled to the same share of her real estate as is herein given to the widow out of the estate of the husband," etc. It will be observed that the language of the act is imperative, that the real estate of an intestate "shall be distributed" in the manner prescribed by the act, and therefore any other disposition of it would not be lawful.

It will also be observed that while the act nowhere recognizes the preëxisting estate of curtesy, it does, in section 6, expressly recognize, but does not undertake to create or re-establish, the preëxisting estate of dower. It will be further noticed that the act gives to the husband, not the same interest which a surviving wife would take out of the real es-

tate of her deceased husband, but "the same share of her real estate as is herein given to the widow out of the estate of the husband." It would seem to follow, therefore, that while the act of 1791 cannot be regarded as excluding the widow's right of dower, inasmuch as it expressly recognizes such right, it must be construed as excluding the right of curtesy, which is not recognized, and which, if

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allowed, would *disturb and defeat the mode in which the act declares the estate of an intestate "shall be distributed."

Looking to the special features of the act as above pointed out, we are unable to see the force of the view suggested by Chancellor Dargan, above referred to. His language is as follows: "But as the widow is allowed to elect between her distributive share and her dower, and as the act expressly declares that the husband shall be entitled to the same share in his deceased wife's real estate as it allows to the widow out of the husband's estate, would it not be a just construction to allow the husband his election between his distributive share and his curtesy, and this even in fee simple estates? Is there any case which adjudges this question which refuses him his election?" As we have seen, however, that while the act expressly recognizes the estate of dower, and shows by the plainest implication that the intention was not to abrogate, or in any way interfere with that estate, it does not recognize the estate by the curtesy, and its recognition or allowance would seriously interfere with and practically defeat the scheme of the act. Again, as we have said, the estate of dower is not "herein given," it is not created or provided for by the act, and it only gives to the husband "the same share of her real estate as is herein given to the widow out of the estate of the husband." There is, therefore, no ground for construing the act as intending to give to a surviving husband an equivalent estate to that of dower, for it expressly provides that his share shall be the same as that provided for the widow by the terms of the act, and the estate of dower is not so provided for.

It is true that there is a case (Gray v. Givens, 2 Hill Eq., 511) in which the husband was allowed to elect to hold his deceased's wife's lands, as tenant by the curtesy, or to take under the statute of distributions, but in that case the question was not raised or discussed. On the contrary, the bill itself prayed that the husband might be required to elect whether he would hold as tenant by the curtesy or take his share under the statute of distributions. The case cannot, therefore, be regarded as any authority upon the question under consideration.

In the case of Wright v. Herron, supra, the question arose whether a surviving husband

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was entitled to hold, as tenant by *the curtesy, the lands of which his deceased wife had held in fee conditional, and it was in discussing that question that Chancellor Dargan threw out the obiter dictum, in reference to estates held in fee simple, which has been quoted above. Inasmuch as the act of 1791, in express terms, applies only to estates held in fee simple, and could not well apply to an estate held in fee conditional, where by the very nature of the estate the succession is limited to a particular class of heirs, it is quite clear that the question in Wright v. Herron was a totally different one from that which we are called upon to determine. But even the question there presented does not seem to have been by any means free from difficulty, for at the request of two of the chancellors it was referred to the Court of Errors (6 Rich. Eq., 406), and that court being equally divided upon the question, it was referred back to the Court of Equity, which held that the husband was entitled to hold, as tenant by the curtesy, lands of which his deceased wife held an estate in fee conditional, and that decision has been subsequently approved in Withers v. Jenkins, 14 S. C., 597; but from what is said by the chief justice, at page 608, in delivering the opinion of the court, it is very apparent that a different conclusion would have been reached if the estate of the wife had been a fee simple instead of a fee conditional estate.

The next point raised by appellants' sixth, eleventh, and twelfth exceptions is as to the plaintiff's right to recover the interest of Daniel Peeler, jr. It seems that on June 12th, 1863, he conveyed, with general warranty, the premises in dispute to the King's Mountain Iron Company, whose title the plaintiff holds. The effect of this deed, containing a general warranty clause, was to convey to that company, and consequently to the plaintiff, not only whatever interest he then had, but also any that he might thereafter acquire. Reeder ads. Craig, 3 McC., 412; Harvin v. Hodge, Dud., 25; Starke v. Harrison, 5 Rich., 8. It is true that he had previously sold his interest as heir at law of his father to his mother, but if he subsequently acquired an interest in the land, either as heir at law of his mother, or otherwise, such interest would pass under his deed to the company. It is likewise true that the plaintiff introduced a deed from his mother conveying the land to Gist, but

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the defendants *contend that Gist abandoned his claim to the land in favor of the heirs at law of Levicey Peeler, of whom Daniel Peeler, jr., was one. Be this, however, as it may, we find Daniel Peeler named as one of the defendants in this action, and his deed to the King's Mountain Company will certainly estop him, as well as any who claim under him as heirs at law or otherwise (it being suggested in the argument that he has died since the commencement of the action),

from disputing the title of the plaintiff, who holds the title of said company. Upon this point, therefore, we think the Circuit judge erred, and that the case must go back.

This disposes of all the exceptions except those which raise questions of fact, which we have no power to review.

The point made in the argument, but not in the exceptions based upon what is called the third count in the complaint, that the plaintiff, without regard to title, is entitled to recover on account of his priority of possession, from which he was wrongfully ejected by the defendants, is not properly before us. It does not appear to have been presented to, and certainly was not passed upon by, the Circuit judge, and there is no exception raising the point.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

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21 S. C. 70

McNAIR v. INGRAHAM.

SAME v. SAME.

(November Term, 1883.)

[1. *Payment* ⟸66.]

After twenty years a judgment is presumed to have been paid, but it is a presumption of fact, and may be rebutted by proper acknowledgments.

[Ed. Note.—Cited in Sullivan v. Shell, 36 S. C. 581, 15 S. E. 722, 31 Am. St. Rep. 894.

For other cases, see Payment, Cent. Dig. §§ 176–188; Dec. Dig. ⟸66.]

[2. *Execution* ⟸98.]

An execution more than twenty years old was renewed by order of court, the defendant having failed to appear and show any cause in answer to a summons properly served upon him. *Held*, that this renewal was an acknowledgment by defendant that the judgment was a subsisting lien, that the matter was res judicata, and

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the renewal *execution valid, and that a sale of defendant's land thereunder gave title to the purchaser.[1]

[Ed. Note.—Cited in Freer v. Tupper, 21 S. C. 83; Colvin v. Phillips, 25 S. C. 232; Crenshaw v. Julian, 26 S. C. 287, 2 S. E. 133, 4 Am. St. Rep. 719; Sullivan v. Shell, 36 S. C. 580, 15 S. E. 722, 31 Am. St. Rep. 894; Babb v. Sullivan, 43 S. C. 440, 21 S. E. 277; Brantley v. Bittle, 72 S. C. 185, 51 S. E. 561.

For other cases, see Execution, Cent. Dig. § 202; Dec. Dig. ⟸98.]

3. This case distinguished from Tobin v. Myers, 18 S. C., 324.

Before Fraser, J., Chesterfield, April, 1883.

The opinion states the cases.

Mr. W. L. T. Prince, for appellant.

Mr. Knox Livingston, contra.

In action for the recovery of real estate, the plaintiff must recover on the strength of his own title. Tyler Eject., 72; 14 S. C., 483; 15 Id., 268. In making a sale, there must be a valid process to which the sheriff can refer his authority: Rorer Jud. Sales, § 590; 1 Hill, 416; 1 Bailey, 618; 13 Rich. Eq., 246. In execution sales, both judgment and execution are necessary links in the title. Rorer, § 794; 1 Nott & McC., 408; 2 Id., 418; 18 S. C., 327. If either be wanting, the sheriff had no authority to sell, and the purchaser takes nothing. Ibid.; 3 Rich., 120; 14 S. C., 483. Over twenty years had elapsed since the entry of judgment, and therefore it was presumed to have been paid. 2 Hill Ch., 234; 1 Rich. Eq., 55; 3 Strob., 450; 5 Rich., 501; 14 S. C., 100; 17 Id., 485; 18 Id., 328. The issuing, and renewal by summons, of the executions did not rebut this presumption of payment, for the presumption begins to run from the entry of judgment, and subsequent admissions must be such as would revive a debt barred by the statute of limitations, and that is an express promise to pay. Dudley, 121; Harper, 355; 2 Bailey, 278; 6 Rich., 117; 15 Id., 374; 14 S. C., 102. There was no such promise in the defendant's default of appearance. If the summons had been issued before the expiration of twenty years, would a plea of payment in an action afterwards brought on the judgment fail? If not, then a fortiori not here. The order on the default was not res judicata of the question here involved. 2 Sm. Lead. Cas., 424; 15 S. C., 576; 17 Id., 40; 18 Id., 209. The renewal of the execution was not

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*a revival of the judgment. 3 McCord, 419; 2 Strob., 218; Code, §§ 310, 424. Otherwise, a judgment could be collaterally renewed, and fatal defects therein would be cured, and the execution alone a sufficient proof of title. In Jackson v. Patrick, 10 S. C., 207, and Bull v. Rowe, 13 Id., 362, the plaintiffs sought relief from judgments which they had previously had an opportunity to attack. No such principle is here involved.

April 3, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. These cases were heard together. The first was an action to recover fifty-one acres of land, which the plaintiff purchased at sheriff's sale on March 6, 1882, under a judgment and execution obtained by one N. D. Stricklin in his lifetime, against the defendant, Peter Ingraham. The second was an action to recover possession of another tract of fifty acres of land, also purchased by the plaintiff at sheriff's sale on July 9, 1882, under the same judgment and execution against Peter Ingraham, the defendant, Thomas Ingraham, being in possession of this tract. The defence was, that at the time the lands were sold by the sheriff, he had no authority to sell, and therefore his conveyances of the two tracts to the plaintiff were both void.

[1] See next succeeding case, Freer v. Tupper.

It appeared that the judgment against Peter Ingraham had been recovered on September 21, 1859; that execution was duly entered thereon; that the judgment was destroyed by Sherman's army during the war, but the execution was not; that this execution having lost its active energy, one John J. Wilson, administrator of the said Stricklin, the judgment creditor, on January 1, 1881, procured to be issued his summons against the said Peter Ingraham, the defendant in execution, requiring him "to be and appear at the next term of the court, &c., and then and there to show cause, if any you can, why said execution should not be renewed according to law in favor of the said administrator," &c.; that the said Peter Ingraham was regularly served with said summons, but failed to make any defence; and that on June 2, 1881, an order was passed renewing said execution; which renewed execution was levied on those lands, which were at different times sold by the sheriff and purchased by the plaintiff, to whom the sheriff executed titles.

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*After the plaintiff had closed his testimony, the defendant moved for a non-suit, on the ground that the judgment was more than twenty years old and presumed to be paid, when the proceedings to renew the execution were instituted, and was therefore functus officio; and the renewed execution being a nullity, the sheriff had no authority to sell. The presiding judge granted the non-suit, and the plaintiff appeals to this court on the following exceptions:

1. "Because the plaintiff, having made a prima facie case, was entitled to go to the jury thereon.

2. "Because, admitting that a presumption of payment of the judgment would arise from lapse of time, the objection to plaintiff's case should have been urged as matter of defence, and not on motion for non-suit.

3. "Because the plaintiff should have been allowed the opportunity to rebut the presumption of payment.

4. "Because the defendant in execution is estopped from denying or attacking the title of the purchaser at sheriff's sale.

5. "Because the validity of the judgment is res adjudicata by the proceedings renewing the execution, and defendants are estopped thereby.

6. "Because the defendants are estopped from objecting to any error or irregularity in the proceedings under which the sale was made.

7. "Because the errors and irregularities in such case must be corrected by a direct proceeding for that purpose, and cannot be made available by way of a collateral attack."

The judgment was rendered on September 21, 1859, and the lands were not sold until 1882, more than twenty years thereafter; and we may say in passing, that if, in the meantime, there had been no act or admission on the part of the defendant in execution, or failure to act when properly called upon to do so, the presumption of payment from lapse of time would have been complete, and the sales by the sheriff void. But the presumption which arises from lapse of time is not one of law and conclusive, but of fact, and may be rebutted by acknowledgments, in analogy to the principles regulating admissions to take a case out of the statute of limitations. Boyce v. Lake, 17 S. C., 481 [43 Am. Rep. 618].

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*This being the case, we think the renewal of the execution after the lapse of twenty years from the date of its rendition, without objection on the part of the defendant in execution, was the most conclusive acknowledgment by him, that the judgment had been kept alive by admissions on his part, and was a valid subsisting lien at the time. Having had a formal opportunity to show that such was not the fact; that there had been no admissions or promises, and therefore the judgment must be presumed to have been paid, and having failed to do so when he was served with summons for renewal, he cannot now make the defence, but is bound by that kind of estoppel which is known as res adjudicata. The defence could have been made, indeed the proceeding challenged him to make it, and failing to make it, the result must be the same as if he had formally made it and failed. Ingram v. Belk, 2 Strob., 207 [47 Am. Dec. 591]; Jackson v. Patrick, 10 S. C., 197; Lawrence v. Grambling, 13 Id., 127; Trimmier v. Thomson, 19 Id., 253. The precise point was made in the case of Jackson v. Patrick, supra, where it was ruled as follows: "Where a judgment debtor served with a rule to show cause why the execution should not be renewed, has a valid defence which he neglects to make, he is estopped by the judgment renewing the execution, and cannot afterwards be relieved therefrom."

There is nothing in the case of Tobin v. Myers, 18 S. C., 324, inconsistent with the views here presented. The point ruled in that case was that "a judgment will be presumed paid after twenty years have elapsed since its entry, notwithstanding an ex parte renewal of the fi. fa. within that time." The attempted renewal there was only the act of the plaintiff in execution, without serving the defendant or giving him an opportunity to be heard on the question. The very ground upon which the estoppel proceeds is that the defendant had an opportunity to make the defence and failed to do so. As was said in that case, quoting from Dillard v. Brian, 5 Rich., 501: "To explain the indulgence, there must be some act or admission on the part of the defendant, showing the continuance of the debt. In the issuing, returning, and renewing of executions (by mere copy), the defendant has no action. It may be done and redone for forty years, and unless he is astute

enough to examine the clerk's and sheriff's
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offices, he will be ig*norant of the facts." Such, however, is not the case, where the defendant is served with the summons proposing to renew the execution.

The judgment of this court is, that the nonsuit in each of the cases stated in the title of this opinion be set aside, and said cases remanded to the Circuit Court for such further proceedings as may be thought necessary in conformity with the conclusion herein announced.

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21 S. C. 75

FREER v. TUPPER.

(November Term, 1883.)

[1. *Evidence* ⇐82.]

There is always a presumption in favor of legal process, regular in form.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. ⇐82.]

[2. *Mortgages* ⇐562.]

Under a decree of foreclosure which ascertained the amount due on a mortgage, directed a sale, and authorized execution to be issued for the deficiency, an execution might issue for the deficiency when ascertained, without further order of the court. This case distinguished from Warren v. Raymond, 12 S. C., 9.

[Ed. Note.—Cited in Parr v. Lindler, 40 S. C. 193, 200, 202, 18 S. E. 636; Cook v. Jennings, 40 S. C. 210, 216, 18 S. E. 640; Connor v. McCoy, 83 S. C. 172, 173, 65 S. E. 257.

For other cases, see Mortgages, Cent. Dig. § 1619; Dec. Dig. ⇐562.]

[3. *Mortgages* ⇐561.]

There being some presumptive evidence of a sale of the mortgaged premises before execution issued, the judge could not order a nonsuit; a verdict based upon the existence of such prior sale not disturbed.

[Ed. Note.—Cited in Agnew v. Adams, 24 S. C. 89.

For other cases, see Mortgages, Cent. Dig. §§ 1609–1621; Dec. Dig. ⇐561.]

[4. *Mortgages* ⇐562.]

Where a decree of foreclosure ordered land of one county to be sold in another, and execution to be issued for the deficiency after such sale, from which decree no appeal was taken, and subsequently the defendant made default to a summons requiring him to show cause why the execution issued in the case should not be renewed, neither he nor his vendee can dispute the title of a purchaser who bought under such renewed execution. McNair v. Ingraham, ante, 70, approved.

[Ed. Note.—Cited in Crenshaw v. Julian, 26 S. C. 287, 2 S. E. 133, 4 Am. St. Rep. 719; Patterson v. Baxley, 33 S. C. 358, 11 S. E. 1065; Sullivan v. Shell, 36 S. C. 580, 581, 15 S. E. 722, 31 Am. St. Rep. 894; McLaurin v. Kelly, 40 S. C. 488, 19 S. E. 143; Babb v. Sullivan, 43 S. C. 440, 21 S. E. 277; Ex parte Graham, 54 S. C. 171, 32 S. E. 67.

For other cases, see Mortgages, Cent. Dig. § 1618; Dec. Dig. ⇐562.]

Mr. Justice McIver concurred in result.

Before Wallace, J., Colleton, October, 1883.

Action by J. H. Freer, trustee, against George Tupper and J. Moreland Campbell, commenced in July, 1883. The opinion states the case.

Messrs. Boyle & Howe, for appellant.
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*I. Defendant's motion for non-suit should be sustained: First. (Exc. 3.) "That his honor erred in not holding that the decree of foreclosure in the said cause of Freer, trustee, v. Schultz, was not such a decree as authorized the issuing of an execution for its enforcement, as no definite sum of money was found by the terms of the decree to be due from Schultz to Freer, trustee, and contained no order for the payment of the same, and, therefore, that the plaintiff had failed to prove any title to the land claimed." 13 S. C., 254; 6 Id., 106; 12 Id., 27.

Second. (Exc. 1.) "That his honor erred in not holding that there being no evidence of a sale of the mortgaged premises, in the cause of Freer, trustee, v. Schultz, that plaintiff herein had failed to prove any title to the land claimed." Under §§ 12, 13, Gen. Stat. (1872), 474, the mortgagor had the right at any time before the sale to pay the mortgage debt, with costs, and, therefore, execution could not issue until the sale had taken place. The sale was a contingency upon which leave was granted to issue an execution; hence the necessity of proving that sale did take place. 12 S. C., 26; 17 Id., 163.

Third. (Exc. 2.) "That his honor erred in not holding that if the sale of the mortgaged premises, in the cause of Freer, trustee, v. Schultz, was in pursuance of the decree of foreclosure in said cause had in Charleston county, the same was null and void, said mortgaged premises being in the county of Colleton; and that if said sale was had in any other than the county of Charleston, contrary to the terms of the decree of foreclosure in said cause of Freer, trustee, v. Schultz, said sale was null and void, and, therefore, that the plaintiff had failed to prove any title to the land claimed." The sale should have been made at the place fixed by law for the sale of property under execution. Gen. Stat. (1872), 474, § 14. The sale of real property under execution must be made in the county where it lies. Code (1872), § 310. Where a place is fixed by law at which sales of real property must be made, a sale made at any other place is void. Rorer Jud. Sales, § 779, and authorities there cited. The decree of foreclosure orders the land to be sold in Charleston county; a sale made in any other county would therefore be void. Ibid, § 103; 1 Bail., 611. If this sale of the mort-
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gaged premises *under the decree of foreclosure was void, all subsequent proceedings were also void.

Fourth. (Exc. 4.) "That his honor erred in not holding that there being no evidence of any report of sale by the sheriff in the said cause of Freer, trustee, v. Schultz, there was no judgment in personam, and no judg-

ment upon which an execution could issue, and that, therefore, plaintiff had failed to prove any title to the land claimed." 12 S. C., 9; 13 Id., 254; 18 Id., 324; 1 Abb. Pr., 130; 8 How. Pr., 66; 10 Paige, 116.

II. Defendant is entitled to a new trial because his honor, the presiding judge, charged: First. (Exc. 1.) "That the failure of Schultz to answer the summons upon him to show cause why the execution in the case of Freer, trustee, v. Schultz, should not be renewed, relieved the plaintiff from the obligation of proving that any deficiency existed after the sale of the mortgaged premises, and may be considered by the jury as an admission by Schultz that the execution had been regularly issued." The failure to show cause why an execution should not be renewed cannot render a void judgment upon which it issued valid, nor does the case of Jackson v. Patrick, 10 S. C., 197, sustain the contrary as ruled by the Circuit judge. 13 How. Pr., 178; 8 Rich., 37; 3 Abb., 243; 2 Strob., 207; Freem. Exec., §§ 73, 81; 18 S. C., 324.

Second. And because his honor refused to charge: (Exc. 2.) "1. The jury are instructed that if they find the sale of the mortgaged premises, in the said cause of Freer, trustee, v. Schultz, was made in Charleston county, said sale was null and void, and their verdict must be for the defendant. 2. The jury are instructed that if they find the sale of the mortgaged premises, in the said cause of Freer, trustee, v. Schultz, was made other than in Charleston county, said sale was made contrary to the terms of the decree in said cause, and that said sale was null and void, and their verdict must be for the defendant." See supra.

III. His honor, the presiding judge, should have granted defendant's motion for a new trial, because the verdict was contrary to his honor's charge, because: (Exc. 1.) "That his honor, the presiding judge, having charg-

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ed the jury as requested by this defen*dant, 'that if they find there was no sale of the mortgaged premises, in the cause of Freer, trustee, v. Schultz, then their verdict must be for the defendant,' and there being no evidence whatsoever of said sale, said verdict was contrary to the law as charged by his honor." 16 S. C., 1.

(Exc. 2.) "That his honor, the presiding judge, having charged the jury, as requested by this defendant, 'that no execution could issue on the decree of foreclosure, in the said cause of Freer, trustee, v. Schultz, save for the deficiency ascertained and specified by the sheriff's report of sale in said cause,' and there being no evidence whatsoever that the sheriff ever made a sale or report of the same in said cause, said verdict was contrary to the law as charged by his honor, the presiding judge." Ibid.

Messrs. M. Glover and Henderson & Behre, contra.

April 8, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action for the recovery of a lot (2¼ acres) and the buildings thereon, near Summerville, Colleton county, known as the "Schultz lot." The plaintiff claimed as purchaser at sheriff's sale, and proved a deed to himself from Robert Black, sheriff of Colleton county, December 5, 1882, purporting to have been made in accordance with a sale by him as sheriff, under execution in the case of J. Hamilton Freer, trustee, v. F. C. Schultz. The defendant, Tupper, alone answered. He admitted the sale and conveyance by the sheriff to the plaintiff, but insisted that the whole proceeding was void for the reason that there was no judgment in the case which authorized the issuing of an execution against property; and that he afterwards, viz., February 5, 1883, purchased the said lot from the alleged debtor, Schultz, and leased it to J. Moreland Campbell, who is in possession of the same.

The record in the case of Freer, trustee, v. F. C. Schultz, was introduced, which showed that it was an action to foreclose a mortgage on "the Club House tract of land in St. George's parish," &c., instituted in Colleton county, but that by consent it was removed to Charleston county, that on July 16, 1874, Judge Graham made a decree of foreclosure,

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which, among other things, *provided as follows: "It is adjudged that the mortgaged premises * * * be sold at public auction, in the county of Charleston, by the sheriff of said county, upon the first Monday of November next, or upon some convenient salesday thereafter, upon the terms, &c.; that the said sheriff give public notice of the time and place of such sale, &c.; that out of the moneys arising from such sale (after deducting the amount of his fees, &c.), the said sheriff pay to the plaintiff, trustee, or his attorney, the sum of $108.98, for costs and charges in this action, and also to the plaintiff, or his attorney, the amount so reported due as aforesaid, viz., the sum of $994.75, * * * or so much thereof as the purchase money of the mortgaged premises will pay of the same, take receipt therefor, and file it with his report of sale; that he pay over and deliver the surplus money, or surplus proceeds of sale, if any, to the clerk of this court; * * * that if the proceeds of such sale be insufficient to pay the amount so reported to be due to the plaintiff, * * * the said sheriff specify the amount of such deficiency in his report of sale, and that the defendant, Frederick C. Schultz, be required by execution to pay the same to the plaintiff, and that the purchaser, or pur-

chasers, at such sale be let into possession on production of the sheriff's deed and a certified copy of the order confirming the report of sale," &c. This judgment of foreclosure was enrolled in Charleston on July 16th, 1874, and transcript thereof lodged in the clerk's office at Walterboro, Colleton county, on September 14, 1874, for decree $994.75, and costs $108.98.

On January 12, 1875, the clerk of Colleton issued an execution, which, after reciting the judgment of foreclosure, and stating that "the sum of seven hundred and thirty-three dollars and seventy-three cents ($733.73) is now actually due thereon," directed in the usual manner, that the said amount "be satisfied out of the personal property, or if not, &c., then out of the real property of the said judgment debtor," &c. This execution lay in the sheriff's office until April 20, 1882, when it was returned "unsatisfied." The defendant, Schultz, was served with summons to renew the execution, and having made default, Judge Hudson, on March 7, 1882, granted an order that the plaintiff have leave to renew his execution;

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and a renewed execution was *filed under which the house and lot in contention were levied and sold, and conveyed to the plaintiff.

When this evidence was offered, the defendant moved for a nonsuit, which was refused by the presiding judge, who submitted the case to the jury, and under the charge they found for the plaintiff the premises in dispute and $100 damages. The defendant, Tupper, made a motion for a new trial, and that being refused, he appeals to this court He made several requests to charge, some of which were charged and others refused by the presiding judge. It will not be necessary to copy them all here as they are in the "Case." We will only notice those which were refused, and as to which error of law is charged. Alleged errors of the judge in refusing to grant a new trial upon questions of fact cannot be considered here.

First in the order of time is the exception "that his honor erred in not holding that the decree of foreclosure, in the cause of Freer, trustee, v. Schultz, was not such as authorized the issuing of an execution for its enforcement, as no definite sum of money was found by the terms of the decree to be due from Schultz to Freer, and contained no order for the payment of the same, and, therefore, the plaintiff had failed to prove title to the land."

There is always a presumption in favor of legal process regular in form. The complaint in the case of Freer v. Schultz is not in the brief, and, therefore, we do not know its precise scope and purpose; but in the absence of proof to the contrary, we must assume that the action was not for what is called a "strict foreclosure" for the sale of the land and no more; but that it was in the usual form, and prayed not only for the sale of the land, but also judgment for the deficiency of the debt, if there should be any.

Taking this view and reading the decree of foreclosure carefully, it will be found that it adjudged three things: 1. That the sum of $994.75, besides the costs, were due by Schultz to Freer on the mortgage debt. 2. That the sheriff should sell the mortgaged premises at a future day (November), and pay to the plaintiff the amount so reported due, viz., $994.75, or so much thereof as the purchase money of the mortgaged premises

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will pay of *the same. And 3. "That if the proceeds of such sale be insufficient to pay the amount, &c., the sheriff specify the amount of such deficiency in his report of sale, and that the defendant, Frederick C. Schultz, be required by execution to pay the same," &c.

It seems to us that, taking the whole decree together, it did authorize an execution to issue for whatever might be the deficiency, if any. It is true that the precise amount for which it should issue was not named in the decree, for the reason that at the time it was rendered it could not be foreseen what the land would realize; but it directed the sheriff to make the sale and apply the proceeds, and that then the execution should issue for the "deficiency." It may be that it would have been the better practice for the plaintiff to reserve his final order until after the sheriff had made his report as to the sale, and then have moved for leave to issue execution for the exact balance in terms then ascertained; but there was a decree for the whole mortgage debt (subject to be reduced by the proceeds of sale), and we cannot say that it was fatally defective in failing "to authorize the issuing an execution for its enforcement."

In this respect the case is different from that of Warren v. Raymond, 12 S. C., 9, cited and relied on by the appellant. In that case, as we understand it, there was no instant decree for the whole debt, but the decree "directed a foreclosure and sale at a future day, unless a specified sum was previously paid, with the privilege to plaintiff, in case of deficiency, to enroll his decree and issue execution for the balance due; a money decree was instantly enrolled and execution issued for the whole sum specified. Held, that the enrollment and execution were erroneous, and created no lien on the defendant's property. Distinction drawn between this case and that of Blake v. Heyward, Bail. Eq., 208."

It is next contended: "That his honor erred in not holding that, there being no evidence of a sale of the mortgaged premises in said case of Freer v. Schlutz, there was no judgment in personam, and no judgment upon which an execution could issue, and that, therefore, plaintiff failed to prove any title

to the land." There is no doubt that the sale
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as directed, and application of *the proceeds on the debt, were conditions precedent to the issuing of the execution for the "deficiency;" and it seems to us that it would have been better if the sale by the sheriff and his return thereon had been put in evidence, especially as the judgment of foreclosure had not fixed the precise amount of the deficiency for which the execution should issue. But those were both questions of fact, and the order directing sale in November, and the time when the execution issued, January, 1875, after the time indicated for the sale, and the reduced amount ($733.73) for which it issued, as well as the presumption that the officers of court did their duty, afforded some evidence that there had been a sale, which the judge left to the jury, and, although there may have been some risk in it, we cannot say that he erred in so doing. He could not properly say there was no evidence upon the subject and non-suit the plaintiff on that ground. The jury must have found the fact that there had been a sale and proper application of the proceeds.

But assuming that the sale was made, it is still further ingeniously urged for the appellant "that his honor erred in not holding that if the sale was made in Colleton, it was void, as being in violation of the decree of foreclosure which ordered it made in Charleston; and that if it was made in Charleston, it was void under the general law of force at the time, which declared that a sale of real property under execution 'must be made in the county where it lies.' Code (1872), § 310." The defendant, Tupper, holds under Schultz, chargeable with plaintiff's prior claim as purchaser under an execution in a public office, and can make no defence which Schultz could not. Tupper is a privy in estate of Schultz, and could receive from him no higher rights than he possessed.

It will be observed that Schultz is not a party in this case, and has never made the defence which is now set up by his alienee. He was a party to the foreclosure proceedings instituted in Colleton county, but transferred, by his consent, to the county of Charleston. He did not appeal from the decree of foreclosure there made ordering the land sold in that county; and afterwards, when he was served in Colleton county with a copy of the summons proposing to renew
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the execution which had *issued in that county for the reduced amount of $733.73, he made no objection or defence to the same. If the land had never been legally sold in accordance with the decree rendered in Charleston by his consent, and the proceeds of sale properly credited, he then had an opportunity to make all such defences, and having failed to do so, neither he nor any one holding under him with notice can now make them, but is bound by that species of estoppel known as res adjudicata, and "must ever afterwards hold his peace." As was said in the late case of McNair v. Ingraham, ante, 74: "The defence could have been made —indeed, the proceeding invited him to make it, and failing to do so, the result must be the same as if he had formally made it and failed. Ingram v. Belk, 2 Strob., 208 [47 Am. Dec. 591]; Jackson v. Patrick, 10 S. C., 199; Lawrence v. Grambling, 13 S. C., 127."

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Mr. Chief Justice SIMPSON concurred.

Mr. Justice McIVER. I concur in the result, upon the ground that the question as to the legality and sufficiency of the judgment and execution was adjudged by the order to renew the execution; and Schultz being thus estopped from raising the question, one who claims under him since the sale is likewise estopped.

21 S. C. 83

R. GARVIN v. J. GARVIN.

(November Term, 1883.)

[1. *Execution* ⇐83.]

Under action to enjoin a judgment and execution and for account, a decree was rendered sustaining the judgment and giving leave to defendant to issue his execution for balance due in the former case and for the costs of this. Execution was accordingly issued, entitled of the later case, and the judgment debtor's lands were sold thereunder. *Held*, that this execution was duly authorized and rightly entitled, but if entitled wrong, that it was a mere irregularity, which did not render the execution void.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 179; Dec. Dig. ⇐83.]

[2. *Judgment* ⇐922.]

Where a decree found a balance due on a former judgment and directed execution for its
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enforcement, this second judgment absorbed *and superseded the first, and the clerk of court properly entered up judgment in such second cause for the amount so found due.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1753; Dec. Dig. ⇐922.]

Before Pressley, J., Aiken, February, 1883.

The opinion makes a full statement of the case.

[For subsequent opinions, see 21 S. C. 91; 27 S. C. 472, 4 S. E. 148.]

Mr. P. A. Emanuel, for appellant.

Messrs. Henderson Bros. and Croft & Dunlap, contra.

April 3, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was a motion to set aside an execution and sales of land made under it. The contest is between brothers, has now been waged for nearly

ten years, having been in this court twice before, and has become so complicated that it cannot be understood without a short summary of the facts.

In 1858, one John Fox loaned Robert Garvin $2,600, and took a note signed by Robert Garvin, John Garvin, William Meritt, and J. J. Howard. After the war (1868), the amount was reduced to $1,800, and a new note given by Robert Garvin, John Garvin, James Garvin, J. L. Garvin, and J. A. Garvin, all of whom confessed judgment on the note, which was entered in Lexington county, April 3, 1868. Payments were made on the judgment from time to time, some by Robert and some by John, which reduced the amount due to $359, on August 5, 1872. For this balance the judgment was assigned to Livingston, who transferred it to John Garvin, and he removed the judgment to Aiken county, and claiming that he was only surety and as such had paid for his principal the amount of $1,836.40, he claimed that the execution to that extent belonged to him under the act of 1849, and levied the property of Robert thereunder.

At this stage, Robert instituted proceedings against John, for the double purpose of enjoining the judgment on the ground that John was one of the principals and that the judgment was paid in full; and also for "an account," claiming that John was indebted to him in a large amount, $3,635.73, "for timber, lumber, cash loaned," &c. John an-

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swered that he was only surety *on the Fox note and judgment, and that he was entitled to the whole of the execution paid by him, $1,836.40, and that he owed Robert nothing on the large account claimed against him. He prayed that the complaint should be dismissed, but did not in terms pray for affirmative relief. The issues of law and fact were referred to J. M. Williams, Esq., as referee, who found the principal facts for John—that he was only surety on the Fox note, that he owed Robert nothing, and "that defendant (John) should have leave to enforce said judgment to the amount mentioned in his said execution, with interest from its date," &c. Exceptions were filed by Lee & Clyde, at that time attorneys for Robert. The case was heard by Judge Reed, who filed his decree September 14, 1877, as follows: "On reading and filing the report of J. M. Williams, Esq., special referee herein, and on hearing argument on the exceptions by S. J. Lee, Esq., for defendant, and Messrs. Croft & Henderson for plaintiff, it is ordered that the exceptions be overruled and the report of the referee herein be confirmed, and the plaintiff have leave to enter judgment in accordance therewith, and the same become the judgment of this court."

There was no appeal from this decree, but with the written consent of Lee & Clyde, attorneys for Robert, it was enrolled in form as a money decree of John against Robert, instead of simply dismissing the complaint, and leaving the old Fox judgment standing for the benefit of John to the extent of his payments as surety, but for the precise amount of those payments and costs. This judgment, after reciting the statements of the report and the order of Judge Reed, provides as follows: "It is adjudged that the appeal from the report of the referee be dismissed; that the defendant have leave to issue execution against the plaintiff for the sum of eighteen hundred and thirty-six 65-100 dollars, with interest thereon from the 9th day of May, 1876, on the judgment of J. H. Livingston, assignee of John Fox v. Robert Garvin, which said judgment has been assigned to the defendant, and that the defendant do recover of the plaintiff the further sum of four hundred and seventy-two 40-100 dollars, the costs, and that he have leave to issue execution for the same." This judgment was signed by the clerk of the court, under

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the seal of the *court, with this statement appended: "I agree to the within taxation of costs, and consent for within judgment to be this day entered up, and acknowledge service of copy on me. September 17, 1877. (Signed) Lee & Clyde, per Samuel J. Lee, plaintiff's attorneys."

On December 10, 1877, an execution entitled Robert Garvin v. John Garvin was issued upon and in conformity to the terms of the judgment for $1,836.65, besides interest and $472.20 costs and disbursements. This execution was levied on eight tracts of land of the defendant, Robert, and his interest in two other tracts, which were all sold by the sheriff of Aiken county on January 7, 1878, and purchased by John Garvin, to whom the sheriff executed titles.

Robert at first refused to surrender possession of the premises, but finally, as he alleges under duress, signed a lease attorning to John; but, in the meantime, having procured the assistance of other counsel, at the June term of the court for 1879, he made a motion before Judge Hudson to set aside the judgment under which the lands had been sold, which the judge refused, on the ground that the motion had not been made within one year as required by the code. The Supreme Court, holding that the motion might be made in two years under the act of 1869, then of force, to vacate erroneous judgments, reversed the order disclaiming jurisdiction. See 13 S. C., 160.

The matter went back, and in 1880 came up before Judge Pressley, who heard the motion on its merits, and refused to vacate the judgment as erroneous. From this refusal, an appeal was again taken to this court, which affirmed the judgment below, but in doing so said: "The alleged irregularities in the execution issued on the Fox judgment transferred to Aiken were not directly in the case. That execution, as we

understand it, had been superseded by the decree of Judge Reed, and was not before the court as a subsisting execution. If any irregularities exist in the last execution to carry out that decree, the Circuit judge made no ruling thereon, and the question is not before us." 14 S. C., 630.

Upon this, Robert Garvin renewed the struggle on the Circuit, alleging that the matter of irregularity of the execution at

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*least had not been adjudicated. This motion to set aside the execution came also before Judge Pressley, and he refused it, saying: "The former motion before me was to set aside the judgment, and no motion to set aside the execution was therein involved, except in so far as that would follow from setting aside the judgment. But if I am mistaken in that matter, and really failed to decide a point then before me, I now decide that the execution under which the sale was made in said case was clearly authorized by the decree of Judge Reed confirming the report of the referee, which expressly gave John Garvin leave to enforce said judgment, and that amounts to leave to issue execution for that purpose," &c.

From this order refusing to set aside the execution, Robert Garvin now appeals to this court, upon the following exceptions:

1. "That his honor erred in deciding that no motion to set aside the execution was involved in the former motion, except that which would follow from setting aside the judgment.

2. "That his honor erred in deciding that it was the duty of Robert Garvin to include the motion which he now makes to set aside the execution in his former motion, and that failing to do so, it is waived.

3. "That his honor erred in not deciding that, though irregularity was not mentioned in the notice of motion formerly before him as a ground for setting aside the execution, yet the evidence was before him, showing the irregularity as clearly as it is now made to appear; that his failure to decide this motion left it in statu quo, after the end of the term, as though no motion had been heard, and the act of the judge should not prejudice the rights of plaintiff; his motion was before the court then, and remained there until this decision, and it cannot be said that he has waived his rights, he having appealed to the Supreme Court upon the ground that the Circuit Court erred in not setting aside the execution, and that court refusing to pass upon the question because of failure of decision of the Circuit Court.

4. "That his honor erred in deciding that the execution under which the sale was made in said case was clearly authorized by the decree of Judge Reed; but he should have set it aside upon the following grounds:

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*5. "That the execution under which the plaintiff's land was sold was irregular, null, and void, because there were two executions issued under the seal of the Court of Common Pleas in the office of the sheriff upon the same judgment, upon which no return has been made, and that prevented another execution under the judgment of Robert Garvin by John Garvin being issued.

6. "That the execution issued from Lexington, dated April 6th, 1868, could not support the sale because it had been returned and was dead.

7. "That the execution dated August 5th, 1875, was irregular and void, because the execution issued on April 6th, 1868, had run four years, to April 4th, 1872; that it had to be returned at the May term of court for Lexington, A. D. 1872; that from the said May term, 1872, to August 5th, 1875, was more than three years, requiring a motion for leave to issue execution, and none such being made, said execution was irregular and void, and could not support the sale.

8. "That the execution did not conform to the judgment in Robert Garvin v. John Garvin, and was irregular and void, because it enabled the said John Garvin to enforce his judgment for costs obtained in that case in violation of the homestead laws.

9. "That leave was given to enforce the judgment upon which execution had been stayed; that no order which was passed could operate to destroy the lien of the execution of August 5th, 1875, and that the judgment in Robert Garvin v. John Garvin restored the execution to its former condition and status, requiring its return before another execution could issue for the amount of said judgment.

10. "That the levy under the said execution of date August 5th, 1875, made in October, 1877, and which is evidenced by the sheriff's advertisement, the order of injunction issued by Judge Wiggin in November, 1877, concludes the defendant that said execution was of vitality and force, requiring its return before another could issue."

This contest has been urged by Robert Garvin with such persistence, and with so many earnest and reiterated declarations of "wrong, injury, and injustice," that we have

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taken the trouble *to look back through the whole record, with more care than the question at issue actually required. Robert Garvin seems never to have realized the fact that, as soon as the report of referee Williams on the merits had been confirmed by the Circuit Court without appeal, the case was res adjudicata, and beyond the power of reconsideration by any court, except possibly upon a strong case of subsequently discovered evidence or fraud, which he failed to make. It may be that his lands sold for less than their value, at a forced sale for cash by the sheriff, to which possibly he contributed himself by forbidding the sale as illegal and

unauthorized; but, however much that may afford grounds for regret, it cannot be considered as a good ground for relief by the court.

As the assault upon the judgment was under the act of 1869, now repealed, which did not in express terms include executions, and the separate motion to set aside the latter, if made, was not pressed to a decision before Judge Pressley when the judgment was considered, we will now consider the question of irregularities in the execution. "Independent of statutory provisions, the Court of Common Pleas, by virtue of its own inherent right, from the general nature and intent of its jurisdiction, has always exercised the power of looking into its own records, and on motion affording that remedy after judgment has been entered up, which is obtained by writ of error in the English courts. Mooney v. Welsh, 1 Mill Con. R., 133; Bank of Pennsylvania v. Condy, 1 Hill, 210. The purpose is amendment, not destruction, and the end desired and sought must be in a mode through which it can likely be attained." Charles v. Jacobs, 5 S. C., 350.

Was the execution under which the sales were made so irregular and illegal as to avoid the sales? It seems to us that, when properly understood, the objections are purely technical, and amount to this, that the execution was called by the wrong name. The judgment entered in the case of Robert Garvin v. John Garvin, authorized the defendant (John) "to issue execution against the plaintiff (Robert) for the sum of $1,836.65, with interest thereon from May 9th, 1876, on the judgment of Fox v. Robert Garvin, assigned to the defendant, and that defendant do recover of plaintiff the further sum

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of $472.40, costs," &c. *Was this not judgment on a money decree for $1,836.65, and the further sum of $472.40? The execution issued for the precise sum authorized, but entitled of the case out of which it arose, Robert Garvin v. John Garvin, and not of the old Fox judgment for the use of John. We incline to think the execution was properly entitled of the case in which the judgment was rendered.

But suppose it had been styled (as contended it should have been) "John Fox for the use of John Garvin," how could that have benefited Robert Garvin? He makes the effort to show, first, that it should have been so issued; and, second, that if so, it would have been irregular and void, for the reason that the age and status of that old execution rendered it impossible to be renewed or revived. But it will be perceived that this view entirely overlooks the fundamental fact that the judgment giving leave to issue the execution cut up at once all such defences as to the old execution. The execution was certainly to issue, whether it went in the old name or put into a new form, to enforce judgment for the money paid by John, being, however, for the identical amount due on the old execution by Robert. We think the execution was authorized by the enrolled judgment, and that it properly retained the title of the judgment upon which it was based. But even if there was a misnomer as to the title, that could not be more than an irregularity, which did not render the execution absolutely void. Ingram v. Belk, 2 Strob., 208 [47 Am. Dec. 591]; Lawrence v. Grambling, 13 S. C., 120; Tobin v. Myers, 18 Id., 324.

But it is further ingeniously argued that if the enrolled judgment authorized the execution, the decree of Judge Reed did not authorize the judgment, which was enrolled, and a motion to correct the "abstract judgment book" No. 381 is made a part of the relief asked for. Section 286 of the code, in reference to a trial by jury, provides that "if a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict;" and section 289, in reference to a case heard by the court, provides that after the decision has been filed, &c., "judgment upon the decision shall be entered accordingly." Was this judgment entered according to the decision? There is some lack of clearness in the language used, but we think the decision, taken as a whole, substantially authorized the judgment.

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*There is no force in the fact that Judge Reed transposed the terms "plaintiff" and "defendant." John Garvin claimed to be "plaintiff" in the Fox judgment, but he was "defendant" in the case then being heard, brought by Robert Garvin; and hence the clerical error. A surety who has paid a judgment against his principal and himself may claim the original judgment as his own, under the act upon the subject supra; but he is not bound to do so. He may claim a new judgment for the money paid, and that is the simplest course when there is no conflicting lien. Judge Reed in substance gave John Garvin a judgment for the money he paid as surety. The words of the decree are that "the plaintiff (manifestly defendant) have leave to enter judgment." He confirmed the referee's report, which, as Judge Pressley said, "expressly gave John Garvin leave to enforce said judgment, and that amounts to leave to issue execution for that purpose."

If the intention had been simply to remit John, already in court, back to his right of subrogation in the Fox execution, then (as insisted) incapable of renewal, there would have been no propriety or sense in giving him instant "leave to enforce said judgment to the amount mentioned in his said execution, with interest from its date." That, on the contrary, unmistakably indicates present judgment, which superseded and absorbed as legal process the old Fox judgment and all

the executions issued at different times upon it, which, although functi officio, were kept on file probably as the evidence on which the final judgment was rendered. Besides, the three attorneys of Robert Garvin exressly assented to the judgment in the form in which it was enrolled.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

21 S. C. 91

J. GARVIN v. R. GARVIN.

(November Term, 1883.)

[1. *Appeal and Error* ⇐966.]

A refusal by the Circuit judge to continue a case is not error of law appealable to this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. ⇐966.]

2. The purchaser of the judgment debtor's lands under execution in the case of R. Garvin v. J. Garvin, ante, 83, is entitled to recover the same from such debtor.

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*Before Pressley, J., Aiken, February, 1883.

This case is supplemental to the case of R. Garvin v. J. Garvin, next case ante, p. 83, and the two were heard together in this court. The opinion sufficiently states the case.

[For subsequent opinion, see 31 S. C. 581, 10 S. E. 507, 17 Am. St. Rep. 48.]

Mr. P. A. Emanuel, for appellant.

Messrs. Croft & Dunlap and Henderson Bros., contra.

April 3d, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action for possession of a tract of land, containing 640 acres, being the homestead tract of Robert Garvin, the defendant, which had been sold by M. T. Holley, sheriff of Aiken county, and by him conveyed as No. 4 in the deed to plaintiff, John Garvin, of date January 7, 1878. This tract of land, with others, was sold under the judgment and execution considered in the opinion of this court, just pronounced in the case of Robert Garvin v. John Garvin, next case ante.

Both that case and this were heard at the same term of the court, but that of Robert to vacate the execution first in order. In that case the Circuit judge refused the motion, but notice of appeal was given. When this case was reached a motion was made for a continuance, on the ground that it could not be properly tried until after a final determination of the motion to set aside the execution under which the sale was made. The judge, considering all the facts which appeared in the former motion as before him in this, refused to continue the case and submitted it to the jury. Under the charge they found for the plaintiff the land in dispute and two hundred dollars damages.

The defendant appeals to this court upon the following exceptions: "1. That his honor erred in refusing to continue the case, inasmuch as the defendant was entitled to have his motion decided by the Supreme Court upon appeal relating to setting aside the executions upon which the plaintiff's title depended, he having shown by affidavit his intent to appeal, and being unable to attack the execution for irregularity in a collateral

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manner *under the decisions of this state. 2. That his honor erred in not charging the jury that the executions upon which the title of plaintiff depended were irregular, and that the defendant is entitled to have the motion fully decided before the hearing of issues therein. 3. That his honor erred in deciding that the executions upon which the plaintiff's title depended are not void, but sufficient to sustain the title of the plaintiff, notwithstanding the motion made."

In reference to the first ground of appeal, this court has often ruled, that refusal to continue a case is not error of law appealable to the Supreme Court, but that it is one of those matters which arise in the progress of a case, and must, from necessity, be left to the wise and prudent discretion of the Circuit judge.

The court is always reluctant to disturb vested rights. The appellant's counsel frankly states that "the agreement of counsel is that the exceptions state the judge's charge, and that the brief now before the court on appeal relating to the motion shall constitute the case herein, except as to the charge and exceptions. We may say that the entire case hinges upon the result of that motion. If decided against appellant, we have no case. If decided for him, then this appeal must prevail."

This is a correct statement of the relation of the cases to each other; and having affirmed the judgment below in the case of Robert Garvin v. John Garvin, it follows that the result must be the same in this.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

21 S. C. 93

DAVIS v. COLUMBIA AND GREENVILLE RAILROAD COMPANY.

(November Term, 1883.)

[1. *Trial* ⇐139.]

In the absence of all testimony in support of the material allegations in the complaint, a non-suit is proper; but where, in support of such allegations, there is any testimony, the weight, truth, and sufficiency of which are to be determined, the case must go to the jury. Cases cited.

[Ed. Note.—Cited in Couch v. Charlotte, C. & A. R. Co., 22 S. C. 561; Whitney Mfg. Co. v.

Richmond & D. R. Co., 38 S. C. 370, 17 S. E. 147, 37 Am. St. Rep. 767; Norris v. Clinkscales, 44 S. C. 317, 22 S. E. 1; Salinas v. C. Aultman & Co., 45 S. C. 290, 22 S. E. 889; Lyon v. Charleston & W. C. Ry., 77 S. C. 343, 58 S. E. 12.

For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. ⟸139.]

[2. *Death* ⟸165.]

In action by the administrator of a son against a railroad company to recover damages for killing the son, there being some evidence,

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*although of an uncertain character, showing a beneficial interest of the father in his son's life, this question was properly for the determination of the jury.

[Ed. Note.—Cited in Hall v. South Carolina R. Co., 25 S. C. 570.

For other cases, see Death, Cent. Dig. § 141; Dec. Dig. ⟸103.]

[3. *Master and Servant* ⟸265.]

While a brakeman on a freight train was signalling the engine at night, the cup of his lantern fell out, and the light was extinguished; he then descended to the cab and procured another. When returning to the top of the cab he was knocked off and killed: *Held*, that this did not prove negligence by the company in furnishing a defective lantern.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 886; Dec. Dig. ⟸265.]

[4. *Negligence* ⟸1.]

Negligence is a relative term; the surroundings are absolutely necessary to be ascertained before the question of negligence can be determined.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. ⟸1.]

[5. *Master and Servant* ⟸113.]

A brakeman, while returning at night by a ladder on the side of the car to his position on the top of the train, then in motion, was knocked off and killed by an old tank, which was closer to the track than was necessary, or than tanks, at this day, generally are: *Held*, that in this there was no evidence of any negligence by the railroad company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 213, 224–227; Dec. Dig. ⟸113.]

[6. *Trial* ⟸139.]

A non-suit in this case was therefore proper.

[Ed. Note.—Cited in Land v. Southern Ry., 67 S. C. 294, 45 S. E. 203.

For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. ⟸139.]

[This case is also cited in Altee v. South Carolina Ry. Co., 21 S. C. 551, 557; Agnew v. Adams, 24 S. C. 89; Carter v. Oliver Oil Co., 34 S. C. 211, 215, 13 S. E. 419, 27 Am. St. Rep. 815, and distinguished therefrom.]

Before Wallace, J., Greenville, April, 1883.

This was an action by Richard Davis, as administrator of his son, Richard J. Davis, against the Columbia and Greenville Railroad Company, to recover $20,000 damages for killing Richard J. while in the employment of the defendant. The intestate was killed on the night of May 20, 1881, and the action was commenced January 2, 1883. The opinion states the grounds of the action as alleged in the complaint.

Richard Davis testified that he depended on this and two other sons' exertions for his support; that he owned a house in Columbia worth $2,500, and received the income of a plantation, but that others were dependent on him; that deceased received $1 per day; never paid witness anything, but gave deceased's mother money and supplies, amounting to $8 or $10 a month, during which time deceased lived with witness and paid no board; when deceased was out of work witness supported him; while witness lived in Abbeville deceased and his brothers lived in the Columbia house, and he gave nothing to witness or to his mother.

J. A. Hall testified that he was engineer and Davis a train hand of freight train; at

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Piedmont latter got on top of train and *signalled with his lamp for witness to go ahead; noticed that lamp went out; as train passed Grove Station was signalled to stop; did so; went back and found Davis lying across the track dying; was struck on right side, body badly broken; thinks he was struck by projecting timbers of tank at Grove Station; deceased was required by rules of the company to be on top and keep a light at night; thinks tank was too close; it was removed three or four weeks afterwards; heard deceased say on day before that he had $14 to send his mother; was good train hand, sober, energetic, saving; ladder was on side of car next tank.

X.—Had been on road two years, but not now; pump was there when I came; freight train did not use this pump; deceased had never stopped there for water; was running twelve to fifteen miles an hour; heard that deceased was next man for promotion; cannot say how much too near tank was; was closer than any other; so near I had to take my head in from engine while passing; tank was removed soon afterwards.

John Cox testified that he and Davis were train hands on this train; Davis was on top and signalled engine; cup dropped out, because lamp was no account; he came down in cab to get another and at once started up ladder on side of car when he was struck by tank and rolled between car and tank; if lamp had been any account, the cup would not have fallen out; cannot tell when tank was removed; a few weeks afterwards; train hands are required to stay on top of cars and to keep a lamp.

X.—Railroad company furnish the lamps; when Davis came down he found another cup in the car; cup fastened in the lamp by springs on side; brakemen attended to lamps; did not hear Davis complain that night about lamp being out of fix; don't know who fixed the lamps that day.

XX.—Conductor makes requisition for lamps; his business to see that train has them; brakemen can't make requisition; when a new cup was put in the lamp I believe it was perfectly good; cup may be

pushed in far enough to hold, and yet fly out when the lamp is jerked to be swung around as a signal.

W. T. Davis testified: Was section master on this part of the road; the tank at Grove Station was from 12 to 18 inches closer than those now built are placed; in going up side

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of car, if a *person pulled himself hand over hand up, he might pass; but if not very careful, he would be knocked off; if a person went up the side of car on ladder, having to raise his feet and bend his body, he could not pass this tank without being struck.

X.—The tanks just after the war were closer than they are now; canvas pipes were used then, now iron pipes; at that time brakes were all inside the cars, now they are on top.

E. T. Kemp testified: In May, 1881, lived near railroad track at Grove Station; was there when Davis was killed; it was between 8 and 9 o'clock at night; the train was running very rapidly; did not stop at tank, but stopped soon after; trainmen ran back to tank; stayed half an hour, and went on; soon heard man was killed; went there and saw Davis dead; examined tank and saw where lantern struck it; saw where projecting timbers on which tub rested had been moved quarter of an inch; the tank was too near track for a person to climb up ladder between car and track when train was passing it; the sills on which tank rested projected toward track.

Dave Henderson testified: Am a carpenter; helped build a tank at Grove Station; after it was built went to Silver Street; got word from Carpenter, who was our boss, that it must be moved back; after it was moved Carpenter said it was still two inches too close; it was built when the road was in the hands of the receiver.

J. H. Roberts testified: Was section master on the section which this tank is on; heard Carpenter, supervisor of the road, say that the tank at Grove Station was too close to the road, and that it was no account; that he was going to move it; Carpenter had charge of tanks and bridges on C. & G. R. R.; the tank was taken down three or four weeks after the man was killed; the timbers of the tank were moved three-eighths of an inch where Davis struck it; the tank was too close to the track eighteen inches; it was an oversight of the company.

X.—Tank was removed upon completion of a new one a mile or so further east; new tank is filled from a spring by pipes; old one was filled from a well by a force pump; when canvas bags are used tanks have to be nearer than when iron pipes are used.

XX.—Can put plank under canvas pipe and have it as long as an iron pipe.

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*T. R. Davis testified: Am a brother of deceased; father's health has been bad for two or three years; my deceased brother and myself mainly supported the family; have been a conductor for a long time on C. & G. R. R.; it is the duty of conductors to make requisition for equipment of his train, and to see that they are all in good order; seven lamps are required; the tank was too near the track, and has been torn down; my brother has been on the road two months, and running on the freight from Hodges to Greenville two weeks; was next man in line of promotion.

X.—My brother contributed all he could to the support of the family; meals of train hands will cost about ten dollars per month; if train hand needs anything, it is his business to report it to conductor; if train hand were to come and say he wanted a good lamp, of course he could get it; the rent of house in Columbia is worth about $25 per month; my dead brother and myself paid all expenses of the family.

XX.—Duty of conductor to see that all equipments of train in good condition before he leaves terminal points.

The plaintiff closed and defendant moved for a non-suit, which was granted, no grounds being stated in the order.

Plaintiff appealed upon the following grounds:

"It is submitted that the Circuit judge erred in granting a non-suit: 1. Where there is any proof to sustain the allegations of the complaint the question must go to the jury. 2. The question of negligence was a mixed question of law and fact, and should have been submitted to the jury. 3. The question of negligence in this case should have been submitted to the jury, because it was proved that the railroad company had notice that tank was too near track. 4. Four witnesses having sworn that the 'tank was too close to track,' the judge should not have decided that there was no negligence. 5. The tank having been removed very soon after Davis was killed and being newly built, it should have been submitted to the jury whether this was not an admission of negligence on the part of the company. 6. The evidence being that it was the duty of defendant to furnish good lamps, and that of Davis being worthless, the jury should have passed upon negligence in this respect. 7.

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The proof showing *that tank was too near track, the defendant was liable for accidents to employés occasioned by improper or dangerous structures, if employé was in discharge of his duty. 8. Under the proof the company was liable to administrator for death of intestate. 9. Two witnesses having sworn that the supervisor of the road, charged with the management of the tanks of the road, had said this tank was too close to the track, and was no account, it was error in the presiding judge to say there was no evidence of negligence. 10. Because that his

honor erred in holding that the deceased was chargeable with knowledge of the dangerous proximity of the tank, it being in proof that he had only been on that end of the road two weeks, had never stopped at the tank for water, and passed it at night."

Mr. M. L. Bonham, Jr., for appellant.

This action is brought under Lord Campbell's act, Gen. Stat., §§ 2183-84. It is a question of negligence, which has been considered in 15 S. C., 453. The inquiry is, what is defendant's duty towards its employés? The servant takes the ordinary risks of his calling, but the master must provide safe and proper appliances and machinery. 1 Add. Torts, 603; 18 S. C., 262, 275; Wood M. & S., 749. If the defendant failed so to provide, it is liable. 52 Ill., 183; 55 Id., 492; 90 N. Y., 558; 29 Mo., 495; 46 Id., 163; 76 Pa. St., 389. The questions are, did the person injured know of the danger, or might he have known; did the master know, or might he have known? And these are questions for the jury. Therefore the non-suit was improper. In non-suits the inquiry is, what are the material allegations, and is there any evidence to sustain them? 19 S. C., 510. And a non-suit should be granted only where there is a total failure of evidence. 2 Bay, 126; 3 McCord, 131; 3 S. C., 1; 7 Id., 142; 18 Id., 607; 19 Id., 20, 30; 1 Strob., 203; 17 Wall., 657. The decision in Carter v. Railroad Company, 19 S. C., 20, must have related solely to the existence or non-existence of facts; it could not have intended to invest judges with the decision of facts, for this the constitution prohibits. The judge therefore erred, for there was un-

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questionably some evi*dence of negligence. The judge must have based his decision on supposed knowledge by the deceased of the danger, and that he assumed it as one of the risks of his calling. But, as we have shown, this was for the jury. See, too, 95 Pa. St., 211. The supervisor of the road said it was too close. Deceased could not have known this, for he had no opportunity of learning it. To hold him responsible for knowing it, was to charge him with contributory negligence, which is a matter of defense. 19 S. C., 20. But if he knew, defendant is still liable, if negligent. 31 Grat., 812; 76 Pa. St., 387. There was certainly evidence enough to carry the case to the jury. The plaintiff had a beneficial interest in the life of the deceased. Cool. Torts, 272; Wood Mayne Dam., 75, 93. The judge relied solely for his order on Gibson v. Erie R. R. Co., 63 N. Y., 449, which is in many particulars unlike the case at bar, and was decided by a divided court.

Messrs. Wells & Orr, same side.

Mr. J. C. Haskell, contra.

April 14, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This is an action brought by the plaintiff, appellant, as administrator of his son, Richard J. Davis, deceased, against the respondent, to recover damages for causing from negligence the death of the said Richard, who at the time of his death was in the employment of the respondent in the capacity of road hand on a freight train. At the close of plaintiff's testimony, on motion of the respondent, a non-suit was ordered.

The plaintiff's action is based upon an alleged beneficial interest in the life of the deceased, and negligence on the part of the company, the negligence consisting of an alleged failure on the part of the company to furnish the deceased with a safe lantern while in the discharge of a duty imposed upon him to ride on top of the conductor's cab attached to the train, running in the night time from Columbia to Greenville, and in negligently erecting and permitting a

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pump or tank to remain closer to the *track than the requirements and necessities of the company demanded, by which negligence, it is alleged, the deceased lost his life.

This sad event happened in this way: While the deceased was on top of the cab in the discharge of his duty, the bottom of the lantern dropped out and the light was extinguished, which made it necessary for the deceased to descend to the cab for another, and on his return to his post, by means of a ladder attached to the outside of the cab, the only means of reaching the top again, just at that moment the train passed the tank, the timbers of which struck the deceased and knocked him from the train, causing his death. The negligence relied on as the foundation for the action was in reference to the lantern and the tank. The non-suit was granted, in part at least, because in the opinion of the Circuit judge the plaintiff failed to introduce testimony as to those matters sufficient to entitle him to go to the jury.

The law as to non-suits in this state, settled and repeated in a number of cases from Bay's Reports down to the present time, is that an entire failure of evidence as to one or all of the material facts upon which the action depends, will alone authorize the granting of such motion. The plaintiff is required to state in his complaint the facts which constitute his cause of action. As a general rule it is not difficult to understand what the facts are, and when properly stated in the complaint and denied in the answer, they make the issue between the parties litigant, which is to be tried by the jury upon the testimony offered; and under our system, after the case reaches the jury, they are the sole judges whether these facts at issue have been proved. It is their duty to hear the testimony submitted, to weigh it, and to determine its force and effect.

In every case, however, a question may arise whether any pertinent testimony has been offered by the plaintiff to sustain his complaint. This, if it arises, is always a preliminary question, and before the case goes to the jury, and it is a question of law to be decided by the judge. If, in such case, no testimony directed to the facts at issue has been introduced (and this is for the judge to determine), a non-suit is proper. If, however, any testimony has been offered,

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whether in the estimation of the judge *true or false, the case must be submitted to the jury. It will be observed, then, that the preliminary question referred to, to be decided by the judge when it arises, in no way impinges upon the constitutional mandate, that the juries are the judges of the facts, and alone shall try them, while the judge shall decide the law. Because in this preliminary question there is no dispute as to the facts, or as to what has been proved, and therefore nothing for the jury to determine, but the question is, admitting the truth of the testimony as offered, is it pertinent? Does it touch the allegations in the complaint, the facts at issue?

There are some loose expressions in some of the cases to the effect that insufficient testimony will sustain a non-suit. These expressions should not be understood, however, as giving power to the trial judges to determine the quantum of testimony sufficient to prove an alleged fact, or to decide as to the truth, force, or effect of such testimony; but they should be interpreted in the sense rather of pertinency or relevancy. In fine, the rule is, that where there is any competent, pertinent, and relevant testimony offered to the facts in dispute, the case passes into the hands of the jury and beyond the judge; but where no such testimony is offered, it is the province and duty of the judge to non-suit. Thus understood, the rule is clear and it harmonizes the respective functions of the court and the jury, making our judicial system the complete and perfect system that it is; leaving the law to those who have made it a special study, and therefore better able to decide it—the judges—and the facts to those who, from their practical common sense, are perhaps best able to solve them—the jury.

The subject of non-suits has been discussed in this state in the cases here cited, and the rule established is as above stated, which may be succinctly expressed thus: In the absence of all testimony in support of the material allegations in the complaint, which is a question for the judge, a non-suit is proper; but where there is any testimony directed to said allegations, the weight, truth, and sufficiency of which are to be determined, the case must go to the jury. Brown v. Frost, 2 Bay 126 [1 Am. Dec. 633]; Hopkins v. De Graffenreid, 2 Bay, 187, 441; Singleton v. Hilliard & Brooks, 1 Strob., 218; Graff & Co. v. Caldwell, 7 Rich., 133;

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O'Neall *& Chambers v. S. C. R. R. Co., 9 Id., 465; Redding v. S. C. R. R. Co. 3 S. C., 9 [16 Am Rep. 681]; Ahrens v. State Bank, 3 S. C. 401; Boykin v. Watts, 6 Id., 83; Holley v. Walker, 7 Id., 144; Rowe v. G. & C. R. R. Co., Ibid, 167; Hogg v. Pinckney, 16 Id., 387; McCall v. Cohen, Ibid. 448 [42 Am. Rep. 641]; Carrier & Harris v. Dorrance, 19 S. C. 30; Carter v. G. & C. R. R. Co., Ibid, 20 [45 Am. Rep. 754].

Now apply these principles to the case under consideration. The action is properly brought under the act of 1859 (Gen. Stat., §§ 2183–84), under which the plaintiff is entitled to recover "such damages as the jury may think proportioned to the injury resulting from the death to the parties respectively for whom and for whose benefit it is brought." Admitting that the term injury in this act refers alone to pecuniary loss, and not to the wounded feelings of the survivors, or the sufferings of the deceased, yet we think there was some testimony taken from the father and the brother of the deceased on the subject of a beneficial interest—uncertain, it is true, but enough perhaps for the jury to consider. We will therefore pass on to the most important question, the question of negligence.

Actionable negligence is defined to be the absence of that care which men ordinarily bestow upon their business. The negligence complained of here is an alleged failure on the part of the company to do its duty in two particulars: First, in failing to supply the deceased with a safe and perfect lantern, on account of which his light was extinguished while on top of the car, and he was therefore compelled to descend to the cab for another, and then immediately to ascend again to his signal post, when the accident happened, and but for which it would not have happened; second, in erecting a tank so near the track as to cause injury and endanger the safety of the employés of the road, and in permitting this tank to remain in this close proximity to the road.

As to the act of negligence first alleged: There is no doubt that employers are required to use all ordinary care in furnishing their employés with safe and perfect utensils with which to discharge their respective duties, and to do their allotted work, and a failure to bestow this care will amount to actionable negligence. In this instance, no doubt, it was the legal duty of the de-

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fendant *to bestow reasonable and ordinary care in furnishing the deceased with safe lanterns by which he was expected to signal danger to the train from the top of the cab; but before the company could be made liable, or before even the question of negligence in this respect could be submitted to

the jury, it was necessary that some testimony directed to the point of failure to bestow this care should have been introduced. Was there such testimony offered? The testimony is direct that the deceased a short time before the accident happened was at his post on the cab, with his lantern lighted; that he signalled the engine ahead; that the cup of the lantern dropped out; that he came down into the cab and procured another, and then started back up the ladder on the side of the car, when this awful calamity overtook him.

This is all the testimony in reference to the lantern, except that the witness who testified to these facts also stated generally that the cup of the lantern dropped out, because it was "no account." No doubt it was the duty of the deceased when his lamp went out to procure another as speedily as possible, and no doubt he adopted the only course possible at the time to procure another; but it will be seen that the turning point in these different steps was the extinguishment of the light. It was this that necessitated all the rest. Is there any testimony as to the cause of the extinguishment of the lantern connecting the defendant therewith? Take the matter as stated by the witness, to wit, that the cup dropped out, and this was because the lantern was "no account." Does this connect the defendant with the result? Does the whole or any part of the testimony go to the point that the defendant had failed to exercise reasonable and proper care, such as men ordinarily bestow on their business in furnishing the deceased with safe lanterns?

We find not a word in the testimony on that subject, at least none to the precise point necessary to inculpate the defendant, to wit, that the deceased was using a defective lantern, because of the fact that defendant had negligently furnished him with such; on the contrary, it appears that the deceased procured another from the cab, which we suppose was safe and perfect, as there is no testimony to the contrary. He might have taken that one at the first. That he did not was perhaps his own negligence,

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*rather than that of the company. We think there was an entire absence of all testimony directed to the negligence of the company as to the lantern.

Next, as to the proximity of the tank. The testimony is very clear that the deceased was killed by the timbers of this structure, and it appears therefore that whether the tank was closer to the track than was necessary for the purposes of the road, yet it was close enough to crush a person who happened to be on the outside of the car as it passed. It also appears that the supervisor of the road, Mr. Carpenter, had said that it was too close; one of the witnesses said it was 18 inches too close, and it was established that it was about that much closer than tanks are now located; hence iron pipes had come into use instead of rubber, and hence the brakes have been put on top of the cars instead of inside. It further appeared that notwithstanding the fact of its proximity, yet a person might go up the ladder hand over hand with safety. This was the entire testimony as to the tank. These were all necessary facts, but admitting them all, where is the testimony as to the main link in the chain by which the company is to be connected with the event complained of. Where is the testimony to the point that there was the absence of due care, or such care as is ordinarily bestowed in such cases by the company in building this tank so near the track? The fact that a structure is built so near a railroad track that a man hanging on the outside of a car would be struck in passing (and this is all the testimony), is not in itself any evidence of negligence, at least it would not be evidence in every case.

Negligence is a relative term. What would be negligence under one state of facts might be entirely free from negligence under another. No doubt it is the legal duty of a person engaging in any business dangerous to others to exercise due care in providing against such dangers, and the absence of such care as the case requires would be negligence, but at the same time the character of the danger, whether remote or proximate, probable or possible, would be a material fact in determining the question of negligence, growing out of the care bestowed in guarding against it. In other words, the fact of negligence would, in a given case, greatly depend upon the character of the

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danger to *be apprehended, whether thus remote or proximate, possible or probable. And it would be impossible to determine the question without evidence upon this essential fact. Much greater care is necessary when a train of cars is crossing a highway than when passing along its track at a point distant from a highway. And much greater care must be observed along a crowded street than in the open country. The surroundings are absolutely necessary to be ascertained before the question of negligence can be determined.

Now in this case the deceased was knocked from the train and killed while he was upon the ladder on the outside of the car when the train was passing this structure, and, it is true, that such an accident could not have happened had the tank not been located as it was. But whether the danger of such an accident happening at that point and in that way was of such a character as to have required the company to locate this tank a few inches back, was a material fact in determining whether due care had been exercised, and consequently a material fact

on the question of negligence. In locating this tank, did ordinary or reasonable care or foresight demand that the company should foreknow, or even apprehend, that it was probable, remote or otherwise, that the lantern of a brakeman who was posted on the top of the conductor's cab, and required by the rules of the company to remain there, would go out just as the train was approaching this point, and at the moment that it swept by, that this brakeman, after descending to the cab for a second lantern, would be on the ladder returning to his position?

It seems to us that these facts, or at least some facts showing the character of care that should have been bestowed, and that it was absent, the danger to be apprehended, and that it was not provided against, or something of that kind, were material facts on the question of negligence before that question could be properly submitted to a jury. But we find no testimony in the record directed to these points. The substance of the entire testimony is, that the tank was close enough to the track to strike one who happened to be on the outside of the car when the train was passing that point; that the deceased was on the outside at this precise moment and was killed; but there was

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no testimony *that in locating this tank so near, the company, in view of such a conjuncture of circumstances, or of any danger resulting therefrom, failed to exercise reasonable care, such care as men ordinarily exercise in the conduct of business. In the absence of such testimony the non-suit was not without authority of law.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

Mr. Justice McIVER concurred.

Mr. Justice McGOWAN dissenting. I cannot concur. It seems to me that the question of proper care on the part of the company should be considered with reference to the event which actually occurred, and not the probabilities in advance, whether the concurrence of circumstances necessary to produce it might or might not take place.

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21 S. C. 106

YORK COUNTY v. FEWELL.

(November Term, 1883.)

[1. *Appeal and Error* ⟸843.]

Where respondent consents in writing that the judgment of the Circuit Court shall be reformed in the particulars complained of by the appellant, all is conceded that could be obtained by an appeal; and, therefore, the appeal will not be considered.

[Ed. Note.—Cited in Doty v. Crawford, 39 S. C. 5, 17 S. E. 377.

For other cases, see Appeal and Error, Cent. Dig. § 3335; Dec. Dig. ⟸843.]

[2. *Highways* ⟸19.]

Special commissioners appointed for the purpose having laid out a highway between two towns, the Board of County Commissioners assessed the damages sustained by the land owners, and on appeal to the Circuit Court, the amount of damages was referred to a jury, on the testimony already taken. *Held*, that this was error, and that the proper mode of proceeding to obtain a condemnation of the right of way was that indicated in sections 1550 et seq. of General Statutes.[1]

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 29; Dec. Dig. ⟸19.]

Before Kershaw, J., York, March, 1883.

The opinion fully states the case.

Mr. C. E. Spencer, for plaintiff.

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*Messrs. Hart & Hart, for defendant.

April 14th, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. Sundry citizens of York county having filed a petition in the office of the county commissioners of said county praying for the opening of a new road from Ebenezer to Rock Hill, three special commissioners were appointed by the Board of County Commissioners, under the provisions of subdivision 9 of section 611 of the General Statutes of 1882, to lay out said road, and also to asseses the damages sustained by the persons over whose land said road should pass. These special commissioners filed their report on August 21st, 1882, designating the route of said road, estimating its width at thirty feet, and assessing the damages of the land holders, amongst others to the defendant, S. M. Fewell, $250. To this report exceptions were filed by said Fewell on three grounds: 1. Because the compensation allowed is insufficient. 2. Because the width of said road was established at thirty feet, instead of twenty feet, as provided for by law. 3. Because it is not the best and shortest road between the two designated termini.

The Board of County Commissioners having heard the report and the exceptions thereto, together with the evidence adduced in support of said exceptions, confirmed the report, from which action of the board the defendant appealed to the Circuit Court, upon certain grounds set out in the "Case," but not necessary to be recited here. The appeal was heard by Judge Kershaw, who rendered judgment, holding, first, that, in view of the conflict of testimony as to whether the compensation allowed was sufficient, it was proper that that question should be referred to a jury. Second. That the objection as to the width of the road was not tenable, as he could find no law limiting the width of a

[1] All this was prior to the act of 1883, § 5, 18 Stat., 632, which provides a manner for obtaining the right of way in such cases.—REPORTER.

public road to less than thirty feet. Third. That the necessity for the road in question, as well as the propriety of the route selected, are matters so much in the discretion of the commissioners that in the absence of any manifest unfairness or impropriety the court would not interfere. He therefore adjudged that the question of the amount of compensation which should be allowed the defendant, Fewell, be referred to a jury "upon the tes-

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timony *already taken herein," and that in all other respects the decision of the county commissioners be affirmed, and "that upon the finding of the jury upon the question of damages, the appellant have judgment for the amount by them to be determined, upon the approval of the same by the judge presiding at the rendition of the verdict."

From this judgment both parties appeal, the plaintiff upon the following grounds: "1. For that his honor, the Circuit judge, erred in referring the question of compensation to a jury, and in not sending it back to the county commissioners to appoint a new board of special commissioners to assess the damages, as contemplated by law; or in not himself appointing said special commissioners for said purpose. 2. For that his honor erred in referring the said question of compensation to a jury 'upon the testimony already taken herein,' whereas it should have been submitted to the jury de novo, or at least without any restriction upon the right of either party to introduce such testimony as he might be advised to offer. 3. For that his honor erred in not making the judgment for the amount of damages (when determined) conditional upon the appropriation of defendant's land by the plaintiff or its agents."

The defendant's appeal is based upon the ground that there was error in establishing the width of the road at thirty feet instead of twenty feet. Before the "Case" was settled or agreed upon, the attorney for the plaintiff served a written notice on the attorneys for defendant consenting to a reformation of the judgment, so that the width of the road should be fixed at twenty instead of thirty feet, as provided by section 1064 of General Statutes of 1882, which seems to have been overlooked on the Circuit. This, it seems to us, disposes of the appeal on the part of the defendant, as it concedes to him all that he could obtain by the judgment of this court sustaining his appeal.

It only remains, therefore, to consider the appeal on behalf of the plaintiff, but under the view which we take of the case, it will not be necessary to consider the grounds in detail. It seems to us that the parties have entirely mistaken the mode of proceeding provided by law for ascertaining the amount of compensation to which a land holder,

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whose land may be appropriated *for a public highway, shall be entitled. The constitution (Art. I. § 23) provides that "private property shall not be taken or applied for public use, or for the use of corporations, or for private use, without the consent of the owner, or a just compensation being made therefor;" but it does not provide any mode by which the amount of such compensation shall be ascertained. That was left for the legislature to do. Accordingly, in section 1550 of the General Statutes and those immediately succeeding, provision is made for the purpose: "Whenever any person or corporation shall be authorized by charter to construct a railway, canal, turnpike, *or other public highway*," &c. (the italics being ours). Subdivision 9 of section 611 of the General Statutes, under which the parties seem to have proceeded in this case, makes no provision for the assessment of the amount of compensation to which a land holder may be entitled whose land is appropriated for the use of the public as a highway by the special commissioners therein authorized to be appointed. It simply authorizes the Board of County Commissioners to appoint special commissioners to lay out public highways, and after they are so laid out, then for the purpose of acquiring the right of way, the mode prescribed by section 1550 et seq. must be pursued.

It is true that some of the language employed in these sections would seem to indicate that they were intended to apply to railway and other like companies; but as the constitution expressly declares that private property shall not be taken or applied even to public uses without the consent of the owner, or without just compensation being made therefor, and as there does not seem to be any other law providing a mode by which the amount of such compensation shall be ascertained, we think the fair and necessary construction is, that the mode prescribed by these sections must be pursued when private property is to be taken or applied to the use of the public by the establishment of a public highway. We think, therefore, that it was error to refer the question of the amount of compensation to which the defendant was entitled to a jury to be determined by them upon the evidence previously taken; but that, on the contrary, the amount of such compensation should be ascertained in the mode hereinabove indicated.

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*The judgment of this court is that the judgment of the Circuit Court be reversed.

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21 S. C. 110

MONTS v. KOON.

(November Term, 1883.)

[*Witnesses* ⟸159.]

In a proceeding to revive an execution, instituted by the administrator of the assignee, the Circuit judge erred in permitting defendant to testify that he had placed two notes in

the hands of the deceased assignee to collect. Code, § 400.

[Ed. Note.—Cited in Rapley v. Klugh, 40 S. C. 143, 18 S. E. 680; Corbett v. Fogle, 72 S. C. 319, 51 S. E. 884.

For other cases, see Witnesses, Cent. Dig. § 669; Dec. Dig. ⟹159.]

Before Kershaw, J., Lexington, September, 1882.

The opinion states the case.

Mr. G. T. Graham, for appellant.

Messrs. Meetze & Muller, contra.

April 14th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. One Levi Monts, of Lexington county, in 1872, obtained judgments against J. L. Koon, Thomas L. Boyd, and David Shealy, separately, on a joint and several sealed note for the sum of $217.79, upon which executions were issued in 1873. In June, 1872, Monts assigned these judgments to William Fort, who has since died. Thomas L. Boyd and Shealy have also died since said assignment. H. Arthur Fort is the administrator of William Fort, and the defendants, David Counts and Jesse M. Shealy, are the legal representatives respectively of Boyd and David Shealy, deceased. The proceedings below were instituted in behalf of Arthur Fort, administrator of William Fort, to renew the executions, it being alleged that their active energy had expired, and the defendants were summoned in separate proceedings to show cause why said execution should not be renewed. The defendants, Koon and Counts, answered, pleading payment by certain notes which Boyd in his life-time had placed in the hands of William Fort, after the judgments had been assigned to him.

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*The cases came first before Judge Witherspoon, and it appearing that the defendants desired a trial by jury, the judge ordered an issue. At the next term they came on for trial before Judge Kershaw, the case against Koon coming up first. In the progress of this case, the defendant, Koon, was presented as a witness for the defence, who testified that he had placed certain notes in the hands of William Fort for collection. At this point, the plaintiff objected, and claimed that the witness could not testify as to transactions between himself and William Fort, under section 415 of the code [now section 400]. The objection was sustained, but the court held that the rule had not been violated thus far, as the witness had only stated his own action.

After other testimony and a charge from the judge, this case went to the jury, and the one against Counts was taken up. While this was in progress, and before it reached the jury, a verdict for the defendant in the first case was returned and published, the jury having found a verdict showing that the judgment had been satisfied; whereupon the second case, the one against Counts, was ordered by the judge to be withdrawn from the jury, and that the motion to renew the execution therein be refused, stating in the order that "the jury in the first case having found the judgment against the principal satisfied, no renewal can be had against the surety."

The appeal raises three questions: 1. Whether the evidence of the defendant, Koon, as received, was in conflict with section 415 of the code? 2. Was it error of law for the Circuit judge to withdraw the case from the jury and to order the motion therein refused, under the circumstances stated? 3. Did the judge invade the province of the jury in his charge as to the facts of the case?

Section 415 of the code is somewhat complex and cumbersome in its phraseology, and it is sometimes difficult to determine the question of its applicability to a special case. It is admitted, however, in this case, that the parties occupied that relation towards each other which rendered that section pertinent, and would have excluded any testimony from the defendant, Koon, as to any "transaction or communication" between himself and William Fort, deceased; but the Circuit judge,

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recognizing this *fact, held that the testimony admitted was not in violation of the rule, as it was only a statement of what the witness had done, and therefore was not a transaction or communication in the sense of the section between himself and the deceased Fort. We think the judge was in error in drawing this distinction. The foundation of the defence was payment, payment by certain notes, which Koon in his answer claimed that he had placed in the hands of Fort for collection, and the evidence admitted was intended to sustain this defence. It showed that Koon had placed these notes in the hands of Fort, and it involved not only the act of Koon in putting the notes in Fort's hands, but also the act of Fort in receiving them. This was certainly a transaction between the two, and therefore the testimony was in violation of the section of the code under consideration.

The cases must be remanded on this ground; hence it will be unnecessary to consider the other exceptions.

It is the judgment of the court that the judgments below be reversed and the cases remanded for new trials.

21 S. C. 112

BLACKWELL v. RYAN.

(November Term, 1883.)

[1. *Specific Performance* ⟸121.]

In suits for specific performance, the contract must be established by competent and satisfactory proof, such as is clear, definite, and certain. The Circuit judge sustained in his findings of fact.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387–395; Dec. Dig. ⟸121.]

[2. *Vendor and Purchaser* ⟸196.]

A vendor has the right in equity to claim specific performance of a contract for the sale of land, and in such proceeding to have decree for payment of unpaid purchase money or a sale of the land therefor, but he is not entitled to recover rents and profits from the vendee.

[Ed. Note.—Cited in Tant v. Guess, 37 S. C. 497, 16 S. E. 472.

For other cases, see Vendor and Purchaser, Cent. Dig. § 406; Dec. Dig. ⟸196.]

[3. *Equity* ⟸87.]

To such an equitable proceeding, the statute of limitations as such has no proper application.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242–244, 395; Dec. Dig. ⟸87.]

[4. *Vendor and Purchaser* ⟸82.]

A subsequent agreement in this case between the vendee and the administrator of the vendor *held* not to have changed the relative condition of the parties.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 138, 139; Dec. Dig. ⟸82.]

[5. *Adverse Possession* ⟸63.]

One who goes into possession of land under a contract to purchase it, cannot acquire title against the vendor by the statute of limitations, until payment of the purchase money; neither can the widow of such vendee after his death.

[Ed. Note.—Cited in McSween v. McCown, 23 S. C. 351; Watts v. Witt, 39 S. C. 369, 17 S. E. 822; Peake v. Young, 40 S. C. 59, 18 S. E. 237; De Hihns v. Free, 70 S. C. 351, 49 S. E. 841; Good v. Jarrard, 93 S. C. 241, 76 S. E. 698, 43 L. R. A. (N. S.) 383.

For other cases, see Adverse Possession, Cent. Dig. § 343; Dec. Dig. ⟸63.]

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[6. *Adverse Possession* ⟸63.]

*Although there was in this case a positive and unequivocal assertion of adverse right made to the vendor by the widow of the vendee, still the bar of the statute cannot as such be interposed to a proceeding on the equity side of the court for specific performance of an executory contract.

[Ed. Note.—Cited in Poston v. Ingraham, 76 S. C. 170, 56 S. E. 780.

For other cases, see Adverse Possession, Cent. Dig. § 353; Dec. Dig. ⟸63.]

[7. *Specific Performance* ⟸105.]

But where, as in this case, there has been long and unexplained delay, the original parties are all dead, the widow of the vendee has been in uninterrupted possession for more than fourteen years asserting exclusive ownership, and other circumstances are adverse to the claim, a Court of Equity will not decree specific performance of the contract in favor of the vendor. The Court of Equity, in exercising discretion, will follow, as far as practicable, the analogies of the law.

[Ed. Note.—Cited in Gregory v. Rhoden, 24 S. C. 99; Hodge v. Weeks, 31 S. C. 282, 9 S. E. 953; Wagner v. Sanders, 62 S. C. 89, 39 S. E. 950; Hellams & Gray v. Prior, 64 S. C. 300, 42 S. E. 106.

For other cases, see Specific Performance, Cent. Dig. § 327; Dec. Dig. ⟸105.]

[This case is also cited in Rapley v. Klugh, 40 S. C. 144, 18 S. E. 680, and distinguished therefrom.]

Before Fraser, J., Edgefield, June, 1883.

The opinion fully states the case. The Circuit decree, omitting such matters as are repeated in the opinion, was as follows:

Putting together the testimony of Mr. Griffin as to the admission of James Blackwell to him of the amount repaid to him by B. Jabez Ryan, the testimony of Mrs. Ryan, (somewhat indefinite it is true,) as to the amount paid on his bond out of her interest in the estate, real and personal, of John Dobey, and the fact that this agreement between Landon Tucker, the administrator of James Blackwell, and B. Jabez Ryan, carefully provided for the payment of the moneys paid by him on said bond, and that the same shall be first paid out of the sale of the hotel, and makes no mention of any amount due to his intestate's estate from payments made by him in his life-time, I must conclude that nothing remains unpaid by B. Jabez Ryan except the amount paid on the bond by Landon Tucker, $500 February 7th, 1860, and $2,000 July 7th, 1863, and the interest thereon. The $500 payment was certainly not made with reference to Confederate money, as it was before the war. The $2,000 was made on a bond executed long before the war, and extinguished it pro tanto at a specie valuation, and B. Jabez Ryan, in his agreement with Landon Tucker, never set up any such claim as that it was subject to be scaled.

The rental value of the property for 1868 to 1870 was about $300 per annum; from that time to the present about $200 per annum; but I do not think that the defendants

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are in any *event accountable for rent. The plaintiffs, if entitled to anything, have a right to the unpaid money and interest, and to have the land sold for the payment. They cannot have interest and rent both.

Mrs. Frances Ryan, the defendant, widow of B. Jabez Ryan, and her children, have been in the possession and in the receipts of the rents and profits ever since the death of her husband. If this was all, I would think that the plaintiffs would have a right to have the hotel and lot sold for the payment of the money paid out by Landon Tucker, and the interest, under the agreement between himself and B. Jabez Ryan, to be divided between Landon Tucker and the heirs of James Blackwell in such manner as they have seen fit to agree to amongst themselves. Soon,

however, after the death of B. Jabez Ryan, some three months, Mrs. Ryan says in her testimony: "I had a conversation with Landon Tucker. He wanted me to sign an instrument of writing about this property. I told him it was my property, and that I would not leave it unless by fire or death."

An uncompleted contract to convey is an equitable mortgage. Adams Eq., 123. The land becomes in equity the property of the vendee, and the purchase money that of the vendor. * * * On the death of the vendor, it will pass to his executor, for whom the devisee or heir will be a trustee. Ibid, 140, 141. If a man has entered into a valid contract for the purchase of land, he is treated in equity as the equitable owner of the land, and the vendor is treated as the owner of the money, and the purchase money is treated as the personal estate of the vendor, and goes as such to his personal representatives. 2 Story Eq., § 790.

Landon Tucker, then, is the person who, either in his own right or as administrator, was competent to deal with the payment of it. He alone could give a valid receipt for the same, and he had a right to enforce this lien on the hotel and lot as in case of an ordinary mortgage, without making the personal representatives a party, and proceeding against the heirs alone, unless a decree is sought against the personal representatives. Mrs. Ryan and her children, in their answer, set up title in themselves and claim the benefit of the statute of limitations.

The Supreme Court of the United States

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liken the relations of *landlord and tenant to the relations of mortgagors and mortgagees, and consider that there is no more propriety in refusing a lessee, who has openly disavowed the title of the landlord, the protection of the statute, than there is any other fraudulent, trustee, from the time the fraud is discovered. There is no rule in law or equity which makes it a matter of duty to do so. All the cases, however, show that every presumption is in favor of possession in subordination to the title of the true owner, and that the adverse possession must be made out, not by any inference, but by clear and positive proof of a claim on the part of the tenants and of an acquiescence on the part of the landlord who is knowing to the same. Aug. Lim. (6 edit.), § 444, citing Zeller v. Eckert, 4 How., 289.

In the case referred to, the court seems to have been considering the case of a tenant and landlord, but says that they are like the relations of mortgagor and mortgagee, and thence deduces the principle which is applied to the former. It seems to be a wholesome rule to be applied in all cases where parties occupy similar relations. In the case of Norton v. Lewis, 3 S. C., 31, the question of the right to set up the statute of limitations against a mortgage was reopened and the plea was not allowed in that case. The Supreme Court in that case says that the defendants "do not allege anything in the character of their possession amounting to an active opposition to the claim of the mortgagee, but rely on the naked fact of holding as purchasers under title derived from the mortgagor." It is true that the court does not say what would have been the effect of active opposition to the mortgagee, but enough is said to prevent that case from being an authority, that in no case can the statute of limitations be set up against a mortgage.

In the case before me, Mrs. Ryan very emphatically claimed the property, and announced to the creditor her determination not to give it up, and that she claimed it as her own. She has continued with her children in possession, and she is in the receipt of the rents and profits more than ten years consecutively immediately before the commencement of this action, February 27th, 1882. Landon Tucker had a right then, early in 1868, under his agreement with B. Jabez Ryan, to the

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rents and profits of the *hotel and lot, and has allowed fourteen years to pass without taking any steps by law to assert his rights, and that, too, after he had been informed in a most positive manner by Mrs. Ryan that she claimed the hotel and lot as her own, and did not intend to leave it. He could have forced a sale after January 1st, 1869.

The question is not here made as to the liability of Elbert Ryan as administrator of B. Jabez Ryan, and no judgment will be rendered upon it; but I think that the plea of the statute of limitations set up by the defendants against the sale of the house and lot to pay any alleged balance due to Landon Tucker, either immediately or as administrator of James Blackwell, deceased, must be sustained. It is therefore ordered and adjudged that the complaint be dismissed.

Messrs. W. T. Gary and Ernest Gary, for appellants.

Messrs. Butler & Simkins and Bettis & Wardlaw, contra.

April 14th, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. In November, 1856, the real estate of John Dobey, previously deceased intestate, was sold by the commissioner in equity for Edgefield district for partition under orders in the case of John L. Dobey et al. v. Matilda Dobey et al. At this sale, B. Jabez Ryan bid off the Planters' Hotel at the price of $6,510, payable half in one year and the other half in two years; but he could not comply with the terms of sale, and his friend, James Blackwell, assumed the bid, gave bond with surety for the amount, and, as we suppose as a matter of course (although it is not expressly stated), took title from the commissioner.

At the time of the sale, or soon after, there was a written agreement entered into between Blackwell and Ryan that the latter should have the hotel if he would pay the bond given by Blackwell for the purchase money; and upon that being done, he, Blackwell, "would execute good and sufficient title to said hotel and premises unto the said Ryan." This paper is lost; but as Ryan afterwards entered into another agreement, reciting the original contract, there seems to be

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no dispute about its terms. *Under this contract, Ryan took possession. Various payments were made on the Blackwell bond to the Dobey estate, as appears by receipts, indorsed on it, but without stating from whom the money was received, down to the death of Blackwell, which occurred November 29, 1858; and immediately thereafter administration upon his estate was granted to Landon Tucker. Afterwards further payments were made on the bond, some by Ryan and others by Landon Tucker, the administrator of Blackwell, until July 7, 1863, when, there being due on the bond $2,000, this sum was paid by Landon Tucker, and the bond cancelled.

All this time Ryan and family were in possession of the hotel, and after the war, viz., on October 2, 1866, Ryan and Landon Tucker entered into a written covenant, under seal, which after reciting the sale, &c., provided as follows: "And whereas the said James Blackwell, after his said purchase, by a certain instrument in writing, agreed with B. Jabez Ryan that if he, the said Ryan, would pay the said bond given by the said Blackwell to secure the purchase money of said hotel, that he, Blackwell, would execute good and sufficient titles to said premises unto the said B. Jabez Ryan; and whereas neither the said Blackwell, in his life-time, nor the said B. Jabez Ryan, paid the bond hereinabove referred to, but the same has been satisfied and paid by Landon Tucker, who has, therefore, become entitled to be subrogated to all the rights of the said James Blackwell in the premises, the said Jabez Ryan having paid a portion of the purchase money, and having an equitable claim therefor to have the agreement between Blackwell and himself specifically performed, but being anxious to secure the said Landon Tucker the amount paid by him upon the bond aforementioned: Now know all men by these presents that it is agreed by and between the parties thereto —that is to say, the said B. Jabez Ryan of the one part and the said Landon Tucker of the other part—as follows: That the said Landon Tucker shall have the control and management of said hotel from the first day of January, A. D. 1867, until the first day of January, A. D. 1869, and shall receive the rents and profits thereof until the latter date, at which time the said hotel and premises shall be sold, the proceeds of said sale to be first chargeable with the payment of

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that portion of the pur*chase money paid by the said Landon Tucker, together with interest," &c.

It does not appear that this agreement was ever carried out; but Ryan remained in possession of the hotel until he died intestate in January, 1868. His family, consisting of his widow, Frances, and her children, Adela, wife of Frank Sandland, and defendants, Elbert Ryan and Alma Belanger, still continued to hold possession of the hotel. Letters of administration upon the estate of B. Jabez Ryan were never granted until March 2, 1882, when his said son, Elbert, became administrator. Things stood in this condition until February 27, 1882, when these proceedings were instituted by the heirs and administrator of James Blackwell against the heirs and administrator of B. Jabez Ryan, deceased, for specific performance of the contract of sale of the hotel. The defendants denied that there was anything due on the purchase money; but if so, they insisted that the plaintiffs were barred from prosecuting their action "by the statute of limitations, laches, and lapse of time."

There was no reference to ascertain how much, if anything, of the Dobey bond remained unrefunded, but Judge Fraser heard all the testimony and reached the conclusion of fact "that nothing remains unpaid except the amount paid on the bond by Landon Tucker, $500, February 7, 1860, and $2,000, July 7, 1863, in Confederate money." But he held further, as follows: "Mrs. Frances Ryan, widow of B. Jabez Ryan, and her children, have been in the possession of the rents and profits ever since the death of her husband. If this were all, I would think that the plaintiffs would have a right to have the hotel and lot sold for the payment of the money paid out by Landon Tucker. * * * Soon, however, after the death of B. Jabez Ryan, some three weeks, Mrs. Ryan says in her testimony: 'I had a conversation with Landon Tucker. He wanted me to sign an instrument of writing about this property. I told him that it was my property, and that I would not leave it unless by fire or death.' * * * I think that the plea of the statute of limitations set up by the defendants against the sale of the house and lot to pay any alleged balance due to Landon Tucker,

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either immediately or as admin*istrator of James Blackwell, deceased, must be sustained; and the complaint is dismissed," &c.

From this decree, the plaintiffs appeal to this court upon the following exceptions:

1. "Because his honor erred in decreeing that nothing remains unpaid by B. Jabez Ryan except the amount paid on the bond by Landon Tucker, the proof showing that James Blackwell, in his life-time, made numerous large payments on said bond.

2. "Because his honor erred in deciding that the statement of Mrs. Ryan to Landon Tucker, to the effect 'that the property was hers, and that she would not leave it unless by fire or death,' was such a disclaimer of title in James Blackwell as would bind the heirs of James Blackwell and give currency to the statute of limitations.

3. "Because his honor erred in deciding that the plea of the statute of limitations, set up by defendants against the sale of the house and lot to pay any alleged balance due to Landon Tucker, either individually or as administrator of James Blackwell, must be sustained.

4. "Because his honor erred in not decreeing that the defendants were tenants at will of the heirs of James Blackwell, deceased, and could not hold the possession of said house and lot adversely to said heirs without first notifying said heirs of said intention.

5. "Because his honor erred in not deciding that the agreement between Landon Tucker and B. Jabez Ryan was an equitable mortgage of said hotel, which was pledged to secure the amount paid by Landon Tucker, as administrator of James Blackwell, on said bond.

6. "Because his honor erred in deciding that a mortgage could be barred by the statute of limitations in less than twenty years," &c.

The first question is one of fact—how much, if anything, is due upon the purchase money of the hotel? In suits for the specific performance of contracts, the contract must be established by competent and satisfactory proof, clear, definite, and certain. The whole of the Dobey bond was certainly paid, but by whom is far from being clear. As to the

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first instalment paid to Com*missioner Simkins, it is not stated by whom the payments were made, but as it does appear that during the time Ryan paid money directly to Blackwell, we infer that the payments were made by Blackwell himself. Upon this supposition, it is claimed that these payments were all refunded. It does not satisfactorily appear whether they were or not; but as nothing on that account was claimed to be due in the subsequent agreement of 1866, and the onus was upon the plaintiffs to prove their claim, we agree with the Circuit judge that it was not shown with sufficient clearness that any of the first instalment remains due and owing.

The second instalment of the bond fell due after the death of Blackwell, and was all paid to Commissioner Carwile by Ryan himself, except two payments by Tucker, administrator of Blackwell, viz., the first paid as administrator, $500, February 7, 1860, and the other as an individual, $2,000, in Confederate money, July 7, 1863, making $2,500. Is the whole of this sum, and if not, what part of it, still unrefunded? It appears that on May 9th, 1859, Ryan paid to Tucker the sum of $900, which would reduce the aggregate amount paid by him to $1,600; a sum less than that paid in Confederate money. Whether that $900 paid to Tucker was needed to refund the balance of payments made by his intestate, Blackwell, or should be credited on the above amount paid by himself, does not satisfactorily appear. The recitals in the agreement of 1866 unfortunately do not state the amount due to Tucker; but they favor the view that at least the last payment of $2,000 (which it seems was paid by him as an individual, and not as administrator) had not been refunded, for it is there stated as follows: "But the same (Dobey bond) has been satisfied and paid by Landon Tucker," &c. This would seem to point specially to the last payment, which satisfied the bond. But as in another place reference is made to "the amount paid by him upon the bond," without making any discrimination between the two payments, we concur, with some hesitation, with the Circuit judge in his finding that at the time of the execution of the agreement (1866) both the sums paid by Tucker, whether as an individual or as administrator of Blackwell, remained unpaid; and as no proof was made of payments after that time, that they still remain unpaid.

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*Then as to the right of the parties now to recover this balance. This is an action for specific performance of a contract for the sale of real estate, by which the vendee agreed to pay (without naming the time) a certain amount as purchase money (the Dobey bond), and the vendor agreed to make title when said purchase money was paid. This contract embodied mutual covenants, dependent one upon the other, and was, therefore, what is known as an executory contract as to land, which conferred upon the vendor what Herman and Jones and other elementary writers denominate "a lien by contract or reservation," as distinguished from the technical "vendor's lien," in which the title is conveyed to the vendee. "Before conveyance, however, and while there is a contract of sale merely, the vendor has the legal estate in the land, and the vendee has the equitable interest—the former being a trustee of the beneficial interest in the land for the latter; the latter being the trustee of the purchase money for the former." Whilst in this state we do not recognize the technical "vendor's lien," it is well settled that the vendor has a right, by a proceeding on the equity side of the court, to have such a contract for land specifically performed. Gregorie v. Bulow, Rich. Eq. Cas., 245; Walker & Trenholm v. Kee, 16 S. C., 76. The scope of the proceeding reaches only to the unpaid purchase money, if any; and if that is not paid, to have the land sold for the payment of it, so that rents and profits are not in the case. The

defendants entered under a contract to purchase, and are entitled to the use and occupation until the time comes to get title from the vendor, or performance is decreed.

We agree with the appellant's counsel, upon the force of the authorities cited, that to such an equitable proceeding for specific performance the statute of limitations as such has no proper application. As was tersely said by Judge O'Neall, in the leading case of our State upon the subject, Gregorie v. Bulow, supra: "I concur fully with the chancellor that, either at law or equity, the statute of limitations could not be pleaded by the vendee against the vendor while the contract was executory on both parts." It seems that the authorities go so far as to hold that the nature of the contract remains unchanged even if the purchase money is put

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in the form of a note, which at law *would be barred; that either party would still have the equity to ask specific performance of the contract taken as a whole whenever he could show that he had fully performed, or was ready to perform, his part of it. "The agreement of the vendor substantially is this: when you pay the price you can have the title; till you pay, I retain it. The title is held as security for the price. The vendee cannot compel a conveyance until he pays the price; 'not even,' says the Supreme Court of Alabama, 'though the notes given for the price are barred by the statute of limitations, and no recovery at law can be had thereon.'" Herm. Mort., § 211; Driver v. Hudspeth, 16 Ala., 348; Relfe v. Relfe, 34 Id., 500; Hanna v. Wilson, 3 Grat., 232.

So far as the rights of the vendee are concerned, we do not see that it makes any difference whether the money was paid by Tucker as an individual or as administrator. We think it must be considered that he paid it as administrator out of the assets of the estate of his intestate. One of the receipts so states, but the other does not. He had, however, no connection with the matter, or right to meddle with it, except as administrator of Blackwell, whose bond was outstanding and about to be sued. But considered in either way, it comes to the same thing. If paid out of the assets of the estate, of course it was for the benefit of the heirs of Blackwell. If Tucker as an individual advanced the money for the estate of Blackwell, he thereby acquired pro tanto the original contract of Ryan to pay the purchase money, and all the rights connected with it; and thereafter the heirs of Blackwell held the legal title as trustees for him as the owner of the balance of the original obligation; or as it was well expressed in the agreement of October, 1866, Tucker was "entitled to be subrogated to all the rights of the said James Blackwell in the premises." Walker & Trenholm v. Kee, 16 S. C., 76; 1 Jones Mort., § 235. Events changed the parties who have a right to enforce it, but the contract itself remains unchanged in character, being still executory. "In no case can a sale of lands be regarded as complete until the purchaser has paid his money and the seller has conveyed the land." Herbemont v. Sharp, 2 McC., 264; Buckner v. Railroad Company, 7 S. C., 328; Burris v. Gooch, 5 Rich., 5.

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*Nor do we think that the agreement of 1866 between Ryan and Tucker created any new obligation or changed the relative condition of the parties. That was simply a recital and acknowledgment of rights previously existing with an abortive attempt to close up the matter by sale of the hotel.

Then as to the other branch of the statute, that claiming title to the hotel by adverse possession for more than ten years. It is a familiar doctrine that one who goes into possession of land under a contract to purchase it, and has not paid the whole of the purchase money, cannot acquire title against the vendor by the statute of limitations. Richards v. McKie, Harp. Eq., 190; Secrest v. McKenna, 6 Rich. Eq., 72; Milhouse v. Patrick, 6 Rich., 352; Gregorie v. Bulow, supra. Ryan entered into possession under such a contract, and in 1866, a short time before his death, admitted that the whole of the purchase money had not been paid. It is clear, therefore, that if he were living and the defendant here, he would not be heard to say that he held the hotel adversely to the heirs and representative of his vendor.

But it is urged that the case is different as to such claim on the part of his widow, who has been in possession ever since his death, and that possession was made adverse by her declaration to Tucker soon after her husband's death in 1868, that "the hotel was her property, and she would not leave it unless by fire or death." Mrs. Ryan went into possession with her husband, and must be considered to have done so on the terms and conditions upon which he received it. "When there is no new entry but the heir is in as of his ancestor's possession, the possession of the heir is that of the ancestor." Reeder & Davis v. Dargan, 15 S. C., 182, and authorities there cited.

Assuming then that Mrs. Ryan was in possession under the contract of her husband to purchase as his privy, and that all of the purchase money had not been paid, was her declaration to Tucker, the representative of the vendor, "that the property was hers, and that she would not leave it unless by fire or death," enough to change the character of her possession, so as to put the statute to running in her favor, as against the vendor or his representatives? Her declaration was certainly a very positive and unequivocal assertion of adverse right, and it is difficult

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to un*derstand how Tucker, who controverted it, could have acquiesced in it and taken no

steps to enforce his claim for more than ten years, unless upon the supposition that, originating for the most part in Confederate money, he was conscious that, in justice, it was at least doubtful.

It is undoubtedly true that ten years adverse possession gives title against all who are capable of suing and do not; but it seems to us that the legal bar of the statute cannot as such be interposed to a proceeding on the equity side of the court for the specific performance of an executory contract. See Smith v. Smith, McMull Eq., 134, where Chancellor Dunkin said: "The remedy which complainant seeks [specific performance] is purely of an equitable character. * * * How far and in what manner this court [equity] is governed by the statute of limitations, has been often discussed. It is well stated by Lord Redesdale, in Bond v. Hopkins, 1 Sch. & Lef., 428. 'The statute of limitations does not apply in terms to proceedings in courts of equity. It applies to particular actions at common law, and limits the time within which they shall be brought according to the nature of these actions, but it does not say that there shall be no recovery in any other mode of proceeding. Nothing is better established in courts of equity than that where a title exists in conscience, though there be none at law, relief should, though in a different mode, be given in equity.'" &c.

But from the fact that the legal bar of the statute as such is not applicable to an equitable proceeding for specific performance, it does not necessarily follow that a court of equity will in all cases grant the relief prayed for. Judge Story says: "The interference of courts of equity in decreeing specific performance is discretionary, and they will not interfere to decree specific performance, except in cases where it would be strictly equitable to make such a decree. There is no pretence to say that it is the doctrine of courts of equity to carry into specific execution every contract in all cases. * * * In general it may be stated, that to entitle a party to a specific performance, he must show that he has been in no default in not having performed the agreement, and that he has taken all proper steps towards the performance on his own part. If he has been

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guilty of gross laches, or if he *applies for relief after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed; for courts of equity do not, any more than courts of law, administer relief to the gross negligence of suitors. * * * It should be clear that there has been no change of circumstances affecting the character or justice of the contract, that he who asks a specific performance is in a condition to perform his own part of the contract, and that he has shown himself ready, desirous, prompt, and eager to perform the contract." 2 Story Eq. Jur., §§ 749, 771, 776.

The same doctrine is announced and the authorities collected in 6 Waits A. & D., 810. "It is the doctrine of equity that specific performance will not be decreed in favor of a complainant who has been guilty of laches, either in performing his part of the contract or in applying to a court for relief." We may add the authority of our own case of Gregorie v. Bulow, supra, in which stress is laid on the depreciation of the value of the property to the injury of the party sought to be charged, and the remark of Mr. Maddox is cited with approbation. "Where a contract has long lain dormant, thirteen years for instance, a specific performance has been refused; and laches of much less continuance is sufficient to dissolve the contract."

Now let us apply these principles to this case. The contract of Ryan to pay the Dobey bond was made about 1856. On July 7, 1863, when the last payment was made and the bond satisfied, the amount not paid by him was balance of purchase money then due, and the right of Tucker, the administrator of Blackwell, to demand specific performance was as perfect then as it is now; but we hear of no effort to enforce payment, except the abortive agreement of 1866, until February 27, 1882, when this action was commenced, a period of nearly nineteen years. It is true that the last payment on the Dobey bond was made in the midst of the war, when the courts were disorganized, but if we move up the transaction to October 2, 1866, when the agreement was executed, that was nearly sixteen years; and if we pass by the date of that acknowledgment, and count only from the time the attempted arrangement was to have been consummated, January 1, 1869, that was nearly fourteen years before action brought; and during the whole of this time Mrs. Ryan was in possession

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under the *very positive declaration that she would yield to nothing but "fire or death."

After such a long and unexplained delay, can we say that the representatives of the deceased vendor were "ready, desirous, prompt, and eager to perform the contract"? Would it be equitable now to grant specific performance of a contract made more than a quarter of a century ago by parties now dead, as to which the claim on one side, at least to the extent of four-fifths, originated in the use of Confederate money, and has been growing larger by the accumulation of interest, while on the other the property has been probably depreciating in value? The exercise of undefined power is always embarrassing, and in order to restrict it and introduce something like system, one of the rules laid down for directing the discretion of the court in such cases is to follow, as far as practicable, the analogies of the law. As remarked by Chancellor Dunkin, in Smith and Smith, supra: "In regard to equitable

titles, courts of equity are to be considered as affected only by analogy to the statute of limitations. If a party be guilty of such laches in prosecuting his equitable title as would bar him, if his title was solely at law, he shall be barred in equity."

We assume that the heirs of Blackwell, who hold the title of their ancestor as trustee for Tucker, the party beneficially interested, are ready and willing to make titles upon the payment of the balance of the purchase money to said Tucker; but under all the circumstances of the case we feel constrained to hold that the claim is stale, and that he has not shown himself entitled to the equitable relief which he asks.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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21 S. C. 126

CHALMERS v. TURNIPSEED.

(November Term, 1883.)

[1. *Courts* ⇐23.]

By order of the Circuit Court, with consent of all parties, including creditors, certain personalty was assigned to a widow as a chattel exemption, and $1,000 out of the proceeds of

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her husband's land, *as a homestead: *Held*, that these parties were estopped from afterwards claiming a return of this property from the estate of the widow, notwithstanding that the order of the Circuit Court transcended its jurisdiction, and that the exemption, both of personalty and homestead, was illegal.

[Ed. Note.—Cited in Crenshaw v. Julian, 26 S. C. 288, 2 S. E. 133, 4 Am. St. Rep. 719; Trimmier v. Winsmith, 41 S. C. 117, 19 S. E. 283; Sloan v. Hunter, 65 S. C. 237, 43 S. E. 788.

For other cases, see Courts, Cent. Dig. § 75; Dec. Dig. ⇐23.]

[2. *Exemptions* ⇐3.]

The constitution and acts of assembly relating to homesteads and chattel exemptions, create no new estate, but simply exempt certain property from levy and sale, and when such property is assigned, the head of the family holds it as other property is held, except that it is exempt from enforced sale.

[Ed. Note.—Cited in Watson v. Neal, 38 S. C. 102, 16 S. E. 833; Trimmier v. Winsmith, 41 S. C. 114, 117, 19 S. E. 283; Stewart v. Blalock, 45 S. C. 65, 22 S. E. 774.

For other cases, see Exemptions, Cent. Dig. §§ 2, 3; Dec. Dig. ⇐3.]

[3. *Homestead* ⇐1.]

The right to homestead under the constitution depends upon two conditions: 1. There must be a head of a family; 2. There must be a dwelling-house where he resides. When these two conditions do not exist there is no right under the constitution to a homestead, and when they cease to exist the homestead ceases and becomes subject to the law of distribution, sale for debts, &c.

[Ed. Note.—Cited in Ex parte Goldsmith, 68 S. C. 538, 47 S. E. 984.

For other cases, see Homestead, Cent. Dig. § 1; Dec. Dig. ⇐1.]

[4. *Homestead* ⇐142; *Mortgages* ⇐551.]

A homestead assigned to a childless widow out of her husband's realty under the act of 1872, 15 Stat., 229, returns at her death to the husband's estate, but her estate is not responsible for any diminution occasioned by the legitimate use thereof, nor for loss or destruction without fault on her part. And the same principle governs a chattel exemption to this widow under the act of 1873. 15 Stat., 372.

[Ed. Note.—Cited in Yoe v. Hanvey, 25 S. C. 96.

For other cases, see Homestead, Cent. Dig. § 274; Dec. Dig. ⇐142; Mortgages, Cent. Dig. § 1578; Dec. Dig. ⇐551.]

[5. *Executors and Administrators* ⇐402.]

Under a bill for the settlement of an intestate's estate, lands of the intestate, covered by a mortgage held by one of the defendants, was sold by the sheriff under order of the court, which directed the proceeds to be paid to the clerk, subject to the further order of the court. A part of this money the sheriff embezzled: *Held*, that the amount so embezzled should not be credited on the mortgage, as the sheriff was in no sense the agent of the mortgagee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1608; Dec. Dig. ⇐402.]

[6. *Payment* ⇐24.]

A higher security taken for an antecedent indebtedness is an extinguishment of the lower, if accepted as satisfaction; and in the absence of proof to the contrary, the law will imply such satisfaction. Gardner v. Hust, 2 Rich., 608, recognized and followed. The sealed note of two partners, *held* to be an extinguishment of a promissory note of the firm.

[Ed. Note.—Cited in Pelzer, Rodgers & Co. v. Steadman, 22 S. C. 290; Ex parte Middleton, 42 S. C. 181, 20 S. E. 34.

For other cases, see Payment, Cent. Dig. § 28; Dec. Dig. ⇐24.]

[7. *Partnership* ⇐258.]

A judgment against the survivor (since deceased) of a partnership is not entitled to priority of payment out of the partnership assets, except so far as it had acquired a lien.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 587; Dec. Dig. ⇐258.]

[8. *Homestead* ⇐142.]

[Where an estate of homestead terminates by the death of an intestate's widow without children, it becomes subject to the law of distribution of the intestate's estate.]

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 274; Dec. Dig. ⇐142.]

Before Pressley, J., Newberry, February, 1882.

All the facts of this case are stated in the opinion. The Circuit decree, so far as it is involved in this appeal, was as follows:

This case began for settlement of the es-

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tate of Robert Stewart, *and now involves, also, settlement of the partnership affairs of Stewart & Coate, of whom the latter survived, but is now dead also. The numerous points involved will be taken up separately.

1. The widow of Robert Stewart, in the early stage of this case, claimed homestead, and Judge Moses allowed her $1,000 out of the proceeds of sale of the family residence, and $477 of the personal property. There was no appeal from that decision, and she received the amounts so allowed to her. It remained unquestioned for more than six years; until after her death, and until April

30, 1880, when the administrator, de bonis non, filed his petition in this case, calling on her administrator to refund it. Assuming that Judge Moses did not have jurisdiction in the matter of homestead, and that I, therefore, am not bound by his decision, which was clearly erroneous, yet I am forced to the conclusion that money paid out in the progress of a case under decree of the court, is notice to all having an interest in it, and the statute of limitations is therefore a bar to all claim for the same against the estate of Eliza Stewart.

* * * * * *

3. James Y. Harris holds a note of Robert Stewart for $4,000, payable twelve months after date, "with interest from date at 12 per cent. per annum until paid." It was secured by mortgage, and the proceeds of the mortgaged land, except the widow's dower, and $1,239 wasted by the sheriff, was paid on said note. The questions now before me are, whether said note is to be further credited with the amount wasted by the sheriff, and whether the first year's interest, after it was due, bears interest at 12 per cent., or only at the legal rate. The principal is to bear interest from date, at 12 per cent.; but there is no provision in said note as to the rate to be borne by the interest, if not paid when due. The terms of the note cannot possibly be applied to the interest, because that would make it bear 12 per cent. from the date of the note. Such a construction could not have been intended when the note was made. The interest on the first year's interest should therefore be calculated at 7 per cent.

As to the money wasted by the sheriff, I have no proof that Mr. Harris could have prevented that by the utmost diligence. If the sheriff could then have been forced to

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pay said amount, *the motion for a rule against him should have been made at the instance of the clerk of the court, who, by order of the court, was authorized to receive said funds from the sheriff. The said mortgagee is therefore entitled to receive, out of the remainder of the estate, the balance due to him, calculating the interest as above ruled.

* * * * * *

5. Robert Stewart and John Coate were partners in trade, under the name of Stewart & Coate. The father of J. M. and R. H. Wright held in his life-time a promissory note of said firm. After his death, it came to his said sons, as distributees, and they divided it, each taking for his share a sealed note, signed Robert Stewart, John Coate.[1] The referee reports it as a partnership debt, and I agree with him. Whichever of the partners may have signed the name of Stewart & Coate to the original note is not material. Both acknowledged its validity as a partnership debt when they substituted their sealed notes for it, and their omitting the partnership name in said sealed notes is no proof that they thereby intended to remove it from being a partnership debt, and make it an individual joint and several debt. Said notes must therefore rank as partnership debts.

6. After the death of Robert Stewart, L. J. Jones, executor of Gilbal, entered judgment on a partnership debt in a suit against Coate, survivor of Stewart & Coate. He claims that it should rank as a judgment in this case. I adjudge that if any lien was acquired under said judgment, upon partnership property, the proceeds whereof are now in court for distribution, then, in that case, said proceeds must be first applied to the said judgment. But if no such lien was acquired, then my judgment is, that in marshalling partnership assets, the death of the partners does not bring said assets under the act concerning intestate estates, and so entitle judgments to be paid in preference to general debts. This ruling is also intended to cover sealed obligations.

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*From this decree all the other creditors of Robert Stewart, except James Y. Harris, and all the creditors of the firm of Stewart & Coate, except Robert H. Wright, James M. Wright, John A. Bedenbaugh, and Joseph Caldwell as executor, appealed on the following grounds:

1. Because his honor erred in holding that the estate of Eliza R. Stewart was not responsible for the $1,000 assigned to her as homestead in land, but that the claim for the same made by the administrator and creditors of the estate of Robert Stewart was barred by the statute of limitations.

2. Because his honor erred in not charging the estate of Eliza R. Stewart with interest upon the said $1,000 from the date of its receipt by her.

3. Because his honor erred in holding that the estate of Eliza R. Stewart was not responsible for the personalty assigned to her herein as homestead exemption, or its value, to wit, $477; but that the claim therefor made by the administrator and creditors of the estate of Robert Stewart was barred by the statute of limitations.

4. Because his honor erred in not charging the estate of Eliza R. Stewart with interest upon the value of said personalty, to wit, $477, from the date she received it as such exemption.

5. Because his honor erred in holding that James Y. Harris, mortgage creditor, should not lose the sum of $1,239, arising from the sale of the property covered by his mort-

[1] In the agreed statement it is said that each of the distributees took for his share a new note under the firm name for the original partnership note to Zacheus Wright, and that subsequently two of them took the sealed notes of Stewart & Coate "in the place of" the notes so held by them.—REPORTER.

gage, and embezzled by the sheriff; but that the other creditors should lose the same.

6. Because in any event his honor erred in allowing the said mortgage creditor, James Y. Harris, interest upon $1,239 of his debt from the date that said amount, as proceeds of said sale, was paid into court.

L. J. Jones, as executor of A. Gilbal, and other creditors of Stewart & Coate, also appealed on the following grounds:

1. Because his honor erred in holding that the sealed notes signed by Robert Stewart and John Coate, held by J. A. Bedenbaugh, R. H. Wright, and J. M. Wright, are partnership debts of the firm of Stewart & Coate.

2. Because his honor erred in holding that

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the judgment of *L. J. Jones, as executor of A. Gilbal, against John Coate, survivor of Stewart & Coate, was not entitled to be first paid out of the copartnership assets of Stewart & Coate.

Mr. T. S. Moorman, for plaintiff.

The assignment of homestead was a nullity. 17 S. C., 9. Especially in regard to the personalty, as there was no confirmation. 15 Stat., 229; 7 S. Ct., 146. The statute of limitations cannot protect the widow as to the homestead, for ten years had not elapsed; nor as to the chattel exemption, for she held it as administratrix. There is no estoppel against creditors. 17 S. C., 9. Besides, these orders were intermediate, and may now be reviewed. Ibid.; Code, § 11. The Harris mortgage should be credited with the amount applicable thereto lost by the sheriff. If the sheriff refused to pay the clerk, Harris could at any time have required it: but he seems to have done nothing. It was his negligence, not that of the creditors, that permitted the embezzlement, and the loss should not be thrown upon the latter. 2 S. C., 14. At least he should lose the interest, which is damages for money detained; but here the estate did not detain it, but it was paid into the hands of the officer of the court under its order.

Mr. Geo. S. Mower, same side.

Mr. L. J. Jones, for Gilbal's estate and other creditors of Stewart & Coate.

The facts show that the Wright notes were taken as payment. They were so intended, and being a higher security, so operate. Riley Eq., 181; Story Part., § 369; 2 McMull., 348; 2 Rich., 608; 15 S. C., 36; Big. Estop., 578; 2 Speer, 438; 4 Rich., 59; 16 S. C., 198. The judgment against Coate, survivor, was a judgment against Stewart & Coate and against Coate, and should rank as such against both firm and individual assets.

Mr. Y. J. Pope, same side.

Messrs. Suber & Caldwell, contra.

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*The claim against Mrs. Stewart cannot be sustained, for her right to the property has been adjudicated. If creditors acquiesced through ignorance of law, they cannot be relieved. 2 Bail., 623; 2 McCord Ch., 455. Nor can they be relieved against mistake of law. 2 East., 469; 1 Stew. (Ala.), 81; 10 Pet., 137; 12 Id., 32; 64 Pa. St., 383; 51 Me., 140; 7 Hill (N. Y.), 159. In Landsdowne v. Landsdowne, 2 Jac. & W., it is significant that Powell, the attorney, was made a party, suggesting that there may have been misrepresentations in that case. See, too, 15 Am. Rep., 323; 2 DeSaus., 592; Bail. Eq., 492. Her estate is also protected by the statute of limitations. She did not hold this personal property for life only. There is no such limit in the constitution, nor in any of the statutes. Nor did she hold it as administratrix, for she took it as her own, and the statute began then to run in her favor. Ang. Lim., § 174; Speer Eq., 375; 1 McCord Ch., 176; 7 Johns. Ch., 90; 7 Rich. Eq., 34; 4 Id., 60, 92; 14 Id., 176; 15 S. C., 241; and consult Bail. Eq., 324. As to the homestead, she certainly is not liable for interest on the $1,000. Nor did she hold the corpus for life only. The constitution does not limit a homestead to the life-time. Some of the statutes undertook to do so, but they did not do so effectually. 2 S. C., 216. But if so, the order gave this money to Mrs. Stewart absolutely. And from the time that she took this money she held it adversely, and is now protected by the statute of limitations. As to the Harris mortgage, there can be no blame attached to Harris, for the money was to be paid into court, subject to its further order, and Harris could not disregard this order. The Wrights are creditors of the firm of Stewart & Coate. The new sealed notes of the partners was not a payment of the partnership notes. 75 N. Y., 535; 1 Quincy, 179; 12 Johns., 409; 11 R. I., 609; 11 S. C., 527; 15 Id., 72. There is no law to sustain the claim asserted by Gilbel's estate.

April 14th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Robert Stewart, late of Newberry county, died intestate in August, 1869. He left a personal estate, which proved to be insolvent, not paying

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his specialty *debts, most of which were contracted before the adoption of the constitution of 1868. His real estate consisted of two lots in Newberry village, one the homestead and the other known as "Stewart's corner." His widow, Mrs. E. R. Stewart, administered, and in July, 1870, commenced the action below to marshal the assets. The heirs at law, a creditor, one James Y. Harris, who held a mortgage on the lot known as Stewart's corner, and John Coate, the survivor of Stewart & Coate, were made parties, and the creditors, both of Stewart individually and of the firm of Stewart & Coate, were called in. During the progress of the

action. Coate died, and his administrator, C. H. Suber, was made a party.

Mrs. Stewart claimed dower in the two lots and homestead in the home place, and in the personalty also. Dower was allowed in both the lots, and by order of the court, December 10, 1872, she was adjudged to be entitled to homestead in the home place, which was ordered to be sold, and out of the proceeds $1,000 to be paid her as a homestead, and on April 9th, 1873, commissioners were appointed to appraise and set off to her a homestead in the personalty. Accordingly, personalty to the value of $477 was appraised and assigned to her. The return of the appraisers was filed with the clerk, but it does not seem to have been confirmed. The above orders adjudging the homestead, &c., seem to have been passed by the consent of all the attorneys in the cause representing the various parties.

Harris established his mortgage as the first lien on the corner lot, to the extent of $4,000, by note dated January 7th, 1869, due at twelve months, with interest at 12 per cent. from date, the interest to be paid annually till paid; and by order of the court, March, 1871, this lot was sold by the sheriff at the price of $9,000, one-third cash, the balance in one and two years, the sheriff being directed to pay out of the cash proceeds $1,500 to the widow for her dower, and the remainder, after his costs and expenses, &c., to be applied to the Harris mortgage. This remainder amounted to $1,239.15. Before this application was made, by a second order, March 31, 1871, the court directed the application to be suspended until the next term of the court, and the sheriff was directed to turn over all proceeds of the sale

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to *the clerk of the court. Before the next term of the court, the sheriff embezzled these cash funds, and they were lost. The notes for the credit portion of the sale, however, were turned over to the clerk, out of the collection of which he paid the widow her dower, $1,500. The status of the Harris mortgage having been referred to a referee, it was urged before him that Harris should lose the amount embezzled by the sheriff, or at least the interest after it was paid into the hands of the sheriff. The referee reported otherwise, and upon exceptions, the Circuit judge sustained the referee, and ordered the application of the proceeds in the hands of the clerk to the mortgage. Under this order, the clerk applied the balance in his hands. There is still a balance due on this mortgage. No proceedings seem to have been taken against the sheriff or his sureties.

Certain creditors by the name of Wright, who at one time held promissory notes on the firm of Stewart & Coate, as partners and in their firm name, afterwards gave up their notes and took sealed notes for the same amount, signed by Stewart and Coate in their individual names. Upon the call for creditors, these parties appeared and presented these last notes against the assets of the firm of Stewart & Coate. The referee and the Circuit judge sustained these claims. The estate of one Gilbal, after the death of Stewart, obtained a judgment against Coate, as survivor of Stewart & Coate, in 1869, and this judgment was presented before the referee, claiming priority over all creditors of the firm because in judgment. This claim as a prior claim was overruled, except as to such property, if any, over which the judgment had lien.

In 1879, Mrs. Stewart died testate, appointing Mrs. Turnipseed her executrix. The plaintiff, Chalmers, was then appointed administrator de bonis non of Robert Stewart, and was substituted as plaintiff in this action. Chalmers, after thus becoming a party plaintiff, with the view to bring the question before the court as to the liability of the estate of Mrs. Stewart for the homestead received by her, filed a petition in re, alleging that the orders by which Mrs. Stewart obtained the homestead were nullities and void, and demanded that the estate of Mrs. Stewart should be held responsible for both the personal property and the $1,000 in place of real estate which she had received under

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these *orders. Mrs. Turnipseed, executrix of Mrs. Stewart, was made a party defendant, and she pleaded orally (by agreement) res adjudicata and the statute of limitations.

Under this state of facts, and upon a report of the referee, the case was heard by Judge Pressley. 1. As to the homestead, Judge Pressley held that although the orders under which Mrs. Stewart obtained said homestead were manifestly erroneous, yet it having been allowed by the court, and paid out in the progress of the case, from which there was no appeal, and having remained unquestioned for more than six years, and until the death of Mrs. Stewart, that the claim was barred by the statute of limitations. 2. That the Harris mortgage should not lose the money, $1,239.15, embezzled by the sheriff; that his note should bear interest at 12 per cent., the interest on the first year's interest to be at 7 per cent. 3. That the claims of the Wrights should be established as against the firm of Stewart & Coate as partnership debts, and that the Gilbal judgment did not have priority over the other creditors of Stewart & Coate, except so far as to any lien it may have acquired over any other property of the firm subject to lien. In other words, that the dissolution of the partnership by the death of one of the parties did not bind the assets under the act relating to intestate estates, entitling judgments to be paid in preference to general debts. The appeal involves the correctness of Judge Pressley's ruling on all of these different points.

First, as to the accountability of the estate of Mrs. Stewart for the personalty valued at $477, assigned to her as a homestead out of personalty, and for the $1,000 paid her out of the proceeds of the home place as a homestead therein. It is very clear that Judge Moses, in ordering the homestead, transcended his jurisdiction, both as to the personalty and the realty, and its allowance to Mrs. Stewart was illegal on several other grounds, yet these orders appear to have been passed by the consent of all parties interested in the matters then before the court, creditors and all. They were passed under a mistake of law, perhaps, that Mrs. Stewart was entitled to a homestead, and no doubt, too, under a belief that the Circuit Court had jurisdiction in such matters. But be that as it may, they were pass-

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ed by consent, *and they were intended and accepted by all parties, including Mrs. Stewart, as setting apart to her a homestead, such as the law allowed to parties entitled thereto. The property was turned over to her with that understanding, and was so accepted and enjoyed during her life, all parties acquiescing.

Under these circumstances, we think it is too late to change front, and for the creditors, either through themselves or by their representative, the administrator de bonis non, or for any other party to the proceeding, now to claim that the whole thing was a nullity and therefore void from the beginning, and on that account to require the estate of Mrs. Stewart to restore the original status. On the contrary, we must regard the proceeding as legal, so far as it applies to this case, and that it accomplished what all parties desired and intended to accomplish; that it gave Mrs. Stewart a homestead, such as the law provided for widows and children, and the parties on all sides must be estopped from taking any other position. Hand v. Savannah and Charleston R. R. Co., 12 S. C., 314.

Having reached this conclusion, the next question is, the homestead having terminated by the death of Mrs. Stewart, and there being no children, what has become of it? Does it return to the estate of Stewart and become liable to his creditors, or does it descend to his heirs free from the claims of creditors? This is a very important question, and it is one which has never been presented squarely to this court before, nor have we been able to find any authority on the subject elsewhere upon which we can rely. We must, therefore, adjudge the point as our own construction of the constitutional provision on the subject of homesteads and the acts of assembly in reference thereto may demand.

It has been held in several cases recently decided by the court that neither the constitution nor the acts on the subject of homesteads create any new estate different from that already vested in the head of the family; on the contrary, as we have held, their only effect is to exempt certain property from levy and sale without affecting or changing in any way the character of the estate therein. In other words, a certain portion of the property of the head of the family, as it already exists, so far as the estate therein is concerned, is set aside and

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walled in, so to speak, as a *homestead against invasion by process from any court. This is certainly the extent of the constitutional provision on the subject. See Constitution of 1868, Article II., § 32. No new estate then being created, nor any change being made in the title, interest, or tenure of the head of the family in the exempted property, it would follow that he would hold it, so far as the provision of the constitution is involved, precisely as he would any other of his property, except that this being a homestead it is exempt from enforced sale by court process or order.

But how long is this exemption to continue, supposing the acts of assembly to be as silent on the subject as is the constitution? Upon examination it will be seen that the constitution, it is true, does not in express terms fix a limit to the exemption as to time. The language is, "That the family homestead of the head of any family, &c., shall be exempt, such homestead to consist of the dwelling house, &c." Now although no duration is expressly fixed in this section, yet is it not necessarily limited to the existence of the thing exempted? The exemption depends upon certain conditions and surroundings, to wit, first there must be a head of a family, and, second, there must be a homestead, a dwelling house, a place where the head of a family resides. When these two conditions are present, the constitutional exception as to realty attaches, and as long as they exist the constitution is a perfect shield. But when these conditions, on account of which the exemption has been evolved, cease to exist, does not the exemption cease also? And is not a limit thus necessarily implied in the very nature of the surroundings or conditions which produce the exemption? The exemption is not a privilege or right which every citizen can claim, but it only extends to the heads of families, and it embraces only certain species of property, the homestead or dwelling place. Suppose that these essentials, one or both, are absent, either when the homestead is first claimed or afterwards, can the shield be then interposed? We think not, because the property attempted to be shielded does not occupy the position which the section demands. The section protects a dwelling house of the head of a family, and by the supposition which we have made, the property sought to be protected is not the dwelling house of the head of a

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family. It may *have been once, and when it was, then the protection could have been invoked, but it is not now, and therefore the protection cannnot be claimed.

This must be so, otherwise there would be discrimination between classes of citizens as to the right of property, while there would be no difference in the relations which they sustained to said property. Why should one, after he ceases to be the head of a family, be entitled to any greater protection than one who has not become the head of a family? What reason is there for the homestead of the one to be exempt from his debts, and not that of the other? There can be none. It would seem to follow from this reasoning that when the constitutional provision is alone considered, the inhibition from enforced sale would terminate when either of the conditions constituting the property a homestead ceased; and the title or estate therein of the party not having been in any way changed or affected, it would be governed by the law of descent, devise, distribution, dower, and sale for payment of debts, as are applicable to any other of his property.

Now, what has been the effect of the acts of assembly on this subject? The constitution provides that the general assembly at their first session shall enforce the provisions of this section by suitable legislation; and in pursuance of this authority and direction, the general assembly did, at its first session, and at various sessions since, enact laws on the subject, and these acts have gone somewhat further than the terms of the constitution. For instance, there is nothing in the constitution which extends the homestead in terms to the widow and children of the former head of the family. No doubt its spirit and true intent embraced them, however. The general assembly has so interpreted the constitution, and all of the acts have made provision for the widow and children to claim. The first act, the act of 1868, continued the homestead of the head of the family to his widow and minor children, expressly declaring, however, that it was to be held and enjoyed by them until the youngest child became twenty-one years of age, and until the marriage or death of the widow, and that it should be limited to that period. Under this act, a limit being fixed, of course when the event determining that limit happened, the homestead ceased, and the prop-

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erty being freed from this *incumbrance, it fell back to the party to whom it originally belonged, or to the estate, and again became subject to all the laws which governed his other property.

The second act on the subject, "An act to reduce all acts and parts of acts as to homesteads into one act," was approved March 13, 1872. 15 Stat., 229. This act provided in section 4 that the homestead, when assigned as therein directed, should "vest in the heads of the family in fee simple and be freed and discharged from all debts and liabilities whatever so long as he or she shall remain resident of the state, and no longer." It is difficult to say what was intended by this section, but it is not necessary to do this now, because whatever may have been its intent, it applied to the head of the family, and not to his widow and children, and therefore is not involved here. That act, after providing for the head of the family as above, in section 8 further directed that the widow and minor children of any deceased father shall be entitled to the right of the homestead, to be set apart by the Probate Court, but there is nothing said as to the limit, or as to the estate therein of these parties. It was while this act was of force that the order of the Circuit Court was passed allowing Mrs. Stewart, as widow, the homestead in the realty of her husband, and under which the $1,000 was paid her December 10, 1872.

The third act was approved February 22, 1873. This act, after providing for setting apart the homestead to the head of the family, without specifying any limit, or attempting to create or define the estate therein, as was attempted in the act of 1872, further provided, "that if the husband be dead, the widow and children, &c., should be entitled to the exemption in like manner as if the husband or parents were living, the exemption to be subject to partition among all the children of the head of the family in like manner as if no debts existed." It was while this act was of force that the homestead in the personalty was allowed under an order passed April 9, 1873. There has been a subsequent act, the act of 1880, the one now of force, but it has no application here, and need not be considered.

Section 8 of the act of 1872 is the section which applies to the widow and children under that act, as we have already observed. This section does not attempt to create a new

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estate, *nor in terms to perpetuate or limit the homestead. It simply declares that the widow and children of the deceased father and husband shall be entitled to the right of the homestead, and it provides for setting it off by the Probate Judge. The same principle then by which we have determined that the homestead described in the constitution would cease, after its conditions ceased, and would then fall back to the original estate, subject to the general law governing and controlling the property of the citizen, would apply here, and would hold that the $1,000 (as corpus) should belong to the estate of Robert Stewart on the death of his widow, disencumbered of the homestead, there being no children surviving. Having been set apart, however, to her as a homestead, by the consent of all parties, she had the right to en-

joy it as such, and therefore the annual interest or income was hers. Nor should her estate be held responsible for any diminution in the corpus occasioned by the legitimate use thereof or any loss or destruction not the result of fault on her part.

The personal property, valued at $477.15, was set apart to her in kind under the act of 1873, and under that act was subject to partition among the children, but in this case there are no surviving children. Had there been, another difficult question would have been presented. Section 2 of this act does provide that when the homestead is set off, as the act directs, to the head of the family, it shall be forever discharged from all debts of said debtor then existing, or thereafter to be contracted. This provision is also found in the act of 1880, but it is not in the act of 1872. What effect this section will have on homesteads set off under the act now of force has not been considered here. There is nothing in this act which gave the widow any greater right than simply to enjoy the homestead, and she had this right to the fullest extent during her life, and at her death the property in kind fell back as she left it, impaired or consumed, if consumed, in its lawful use, as it might be.

Next, should the Harris mortgage be credited with the $1,239.15, lost by the sheriff? This mortgage covered the entire corner lot, and was entitled to be paid out of the proceeds of said lot, prior to any other claim except dower. But there could be no payment, either in whole or in part, until said

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proceeds *reached the hands of the mortgagee, either in person or by his agent. It is very certain that this mortgage was never paid to Harris himself. Was the sheriff his agent in such sense as that his receipt, under the circumstances, was the receipt of Harris? In Sims et al., creditors of Rochelle, v. Campbell and Chambers, 1 McCord Eq., 53 [16 Am. Dec. 595], it was held that the sheriff was the agent of the plaintiff in an execution for certain purposes, but he is also the agent of the law, and the plaintiff is no further bound by his acts than as they come within the scope of his authority. In O'Neall v. Lusk, 1 Bail, 220, the sheriff received a sum of money from a defendant in execution, taking his receipt, to be applied to the executions in his office. The plaintiff's execution was the oldest, and the amount received was more than sufficient to satisfy it, but the sheriff failed to apply the money, and went out of office leaving plaintiff's execution open. Upon the question whether the defendant was entitled to a credit, the court said upon the facts there could be no doubt about it; that the sheriff having plaintiff's execution in his hands, he was clearly entitled to receive the money, and having done so the defendant was discharged, and the plaintiff should look to the sheriff and his sureties.

Now, if the sheriff in the case below had been acting under an execution of Harris, lodged by him, to make the money, then in receiving it by virtue of such execution he would have been the agent of Harris, and of Harris alone; and this act being within the pale of the authority delegated by Harris, would have been in substance the act of Harris. In such case the two cases, supra, would have applied. But the proceeding under which the property here was sold, was in the nature of a creditor's bill. It was sold for the benefit of all claimants, according to their respective rights. The proceeds were in the hands of the court awaiting an order of distribution. While in this condition the sum in question was lost by act of an officer of court, and before the court had determined finally as to the application. Under such a state of facts it cannot be said that the sheriff was the agent of Harris. Nor can Harris be held responsible on account of negligence, as there is no testimony in that direction.

As to the claim of the Wrights. The two

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latest cases on this *subject are Adger & Co. v. Pringle, 11 S. C., 527, and Johnson v. Clarke, 15 S. C., 72. In these cases the doctrine applied was that where a creditor takes an obligation of an inferior or equal rank with the old debt, whether it shall be regarded as payment or renewal, is a question of fact depending upon the intention of the parties, the burden of proof being upon the debtor. In the case, however, of Gardner v. Hust, 2 Rich., 608, it was held, "that in general the taking of a higher security is an extinguishment of the lower, provided the higher security is accepted as satisfaction, and if not so accepted, then it is merely additional or cumulative security for the same debt," referring to 1 Mason, 505. And in the absence of proof to the contrary, the authorities seem to favor the notion that the law will imply the higher security was in satisfaction of the inferior.

The difference between the two classes seems to be that the taking of an equal or inferior security raises a question of fact, with the burden of proof on the debtor; while, when a higher security is taken, in the absence of testimony to the contrary, the law will imply a payment. In the case below a higher security was taken, to wit, sealed notes signed by Stewart and Coate in their individual names, in the place of promissory notes in the name of the firm, which last notes were given up; and there was an absence of all testimony as to a different intent. Under the case of Gardner v. Hust, supra, the law implies a payment, and the Circuit judge having held otherwise, we think his ruling was error.

The appeal of the administrator of Gilbal

cannot be sustained. One creditor has no priority over another in the assets of their debtor, except in cases of intestacy, or where he has secured a lien. The debt of Gilbal did not occupy either of these positions as to the assets of the firm of Stewart & Coate. Although both of the partners were dead as individuals, and intestate, yet it cannot be said that the copartnership was intestate. It is by special act that debts of an intestate are paid in a certain order; but this does not apply to the distribution of the assets of a dissolved or extinct copartnership. The Circuit judge ruled that the judgment of Gilbal should only have preference in such property as it covered with a lien. This, we think, was correct.

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*It is the judgment of this court that the judgment below be modified as herein, and that the case be remanded to be enforced in accordance with the principles herein announced.

21 S. C. 143

HAGOOD v. RILEY.

(November Term, 1883.)

[*Action* ⇐70.]

Complaint was filed and answer made, and nothing more was done in the cause by either party for ten years, when plaintiff gave defendant notice that he would press for trial at the ensuing term; whereupon defendant gave notice of a motion to strike the case from the calendar, on the ground that the action had abated by reason of plaintiff's laches. The Circuit judge ruled that the plaintiff was out of court, and gave judgment of dismissal. *Held*, that this ruling was erroneous.

[Ed. Note.—Cited in Pudigon v. Goblet, 24 S. C. 477, 479.

For other cases, see Action, Cent. Dig. § 754; Dec. Dig. ⇐70.]

Before Pressley, J., Barnwell, April, 1883.

The opinion states the case.

Mr. Robert Aldrich, for appellant.

Mr. John R. Bellinger, contra.

April 14th, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Proceedings were instituted in April, 1873, in the name of the plaintiff, late commissioner in equity for Barnwell county, to foreclose a mortgage on real estate situate in said county. The mortgage was executed in 1853, and the defendant, Lancaster, being in possession, as a purchaser from an intermediate purchaser, was made a party, by service upon him of the summons and complaint. Lancaster answered on April 25th, 1873.

The case remained in this condition without further proceeding until in 1883, when Mr. Robert Aldrich, as attorney for plaintiff (Mr. Hay, the attorney who instituted the proceeding, having in the meantime died), gave notice to Mr. Bellinger, the attorney of Lancaster, that the case would be pressed

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for trial at the ensuing *April term of the court, i. e., April, 1883. Up to this time no attorney had been regularly substituted in the place of Mr. Hay, nor had the case been placed on any calendar. In response to the notice, Mr. Bellinger gave notice that he would move at the same term to strike the case from the calendar, on the ground that the action had abated by reason of the laches of the plaintiff, and could only be revived by supplemental complaint, by leave of the court first had, &c., with notice also of other motions, should this fail.

The questions raised by these notices were heard by Judge Pressley, who passed the following order: "It is adjudged that the plaintiff is out of court, and it is therefore ordered that the cause be stricken from the docket, with ten dollars' costs of motion." From this order the plaintiff has appealed.

In support of the appeal, the appellant relies upon section 276 of the code; and in opposition, the respondent relies upon subdivision 4 of section 296. It devolves upon us to determine the application of these sections and their effect upon the case. Section 276 provides that, "in all issues to be tried by the court or a jury, the plaintiff shall, at least fourteen days before the court, file in the clerk's office the summons and complaint in the cause, endorsing thereon the nature of the issue and the number of the docket upon which the same shall be placed; and if the plaintiff fail so to do, the defendant, seven days before the court, may file copies of said papers with a like endorsement, and the clerk shall thereupon place said cause upon its appropriate docket, and it shall stand for trial without any further notice of trial or notice of issue." Subdivision 4 of section 296 provides that "the court may dismiss the complaint with costs in favor of one or more defendants in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant, or defendants, served."

Neither of these sections fixes the time within which after action commenced the case shall be placed upon some calendar of the court. The first simply provides that to have case placed on a calendar by the plaintiff, he must, at least fourteen days before the court, file in the clerk's office the summons and complaint, endorsing thereon the nature of the action and the number of the

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*calendar upon which it is to be docketed; and if the plaintiff fails to do this, the defendant may do it seven days before the court. But there is no limit prescribed as to the time within which this must be done, with forfeiture of the right if not done. The second authorizes the court to dismiss the

complaint for unreasonable delay in proceeding with the case.

There is nothing in either of these sections which is conclusive of the question raised here. The Circuit judge, in his order appealed from, dismissed the complaint because, in his judgment, the plaintiff was out of court, on account of the delay in having the cause docketed. There is nothing in section 276 which declares that failure to docket within a prescribed time after action begun puts a party out of court; on the contrary, that section provides a mode by which delay, if objected to by either party, may be prevented. Either party may have the cause docketed and the trial had by pursuing the directions given in this section. Nor does failure by plaintiff to proceed after docketing his cause, or after service of summons on the defendant, of necessity have this effect of putting the plaintiff out of court, under section 296. That section only provides that the court may dismiss the complaint in case of unreasonable neglect to have the summons served on all of the parties, or to proceed against those served. The Circuit judge seems to have based his order dismissing the complaint upon the legal conclusion that the plaintiff was out of court. Neither of the sections which we have considered sustains this conclusion.

Is there any other principle connected with the practice, either old or new, which may be invoked in support of such a conclusion? The cases of Bennett v. Calhoun Association, 9 Rich. Eq., 166, and Jeannerett v. Radford, Rich. Eq. Cas., 470, are referred to by counsel on both sides. At the time these cases were heard, certain acts were of force intended to dispatch business in the Court of Chancery, viz., the acts of 1784, 1789, and 1810. The first act provided that suits in that court should be finally decided within one year after action brought, unless upon cause shown the time should be extended. The second extended this time to three years; and by the last the court was authorized to continue causes for a longer period

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than three years, *by consent of parties, or without their consent upon good cause shown.

In the first of these cases the court said that they were "well satisfied with the observations of Chancellor Harper [in the second case, Jeannerett v. Radford], 'that according to uniform practice of the court the cause is not regarded as ipso facto out of court, although the directions [in the acts above] may not have been strictly observed.' It is not declared by the act that if the cause be not decided within that time, it shall be ipso facto at an end and out of court. The law of 1784 directs the cause to be finally decided within one year, unless for satisfactory cause shown. Under that act, a party defendant might have had the bill dismissed for want of prosecution, unless for satisfactory cause shown to the contrary: or it would have been in the power of the court, of its own motion, and after the cause was docketed, if the parties delayed their proceeding, to strike off the cause, or make such order as would be a final decision; or it might refuse to proceed further against the defendant; or might set aside a decree improvidently entered against him. But these directions of the act should be, and have been always, construed to subserve the purposes of justice, and not to take advantage of inadvertence or misapprehension. As is remarked by Chancellor Harper, if such motion be not made by the party defendant, being in court, this may be held evidence of consent on his part; and it may be added that if no order be entered by the court, it may be inferred that the court thought that the delay was reasonable."

These remarks are applicable to this case. Under section 276, supra, if the defendant had desired to bring the case to trial and have it ended, he might have done so at any time after issue joined by giving the seven days' notice as therein provided. Or before the case was placed on the calendar by the plaintiff, or after, he might have proceeded under section 296, and moved to dismiss the complaint for unreasonable delay. He failed to adopt either of these modes; in fact, took no action until he was notified fourteen days before the court by the plaintiff that the case would be pressed for trial at the ensuing term. He thereupon gave notice that he, at the same term, would move to dismiss for unreasonable delay. The Circuit judge did

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not pass upon the *question of unreasonable delay as a ground for dismissal; but seems to have held that the plaintiff was out of court as matter of law. In this we think there was error; and for that reason the case must be remanded.

Whether the facts, when presented, will make out a case of unreasonable, or, on the other hand, of excusable delay, is a matter for the Circuit judge, which, under section 296, supra, he is empowered to consider. All that we decide is, that we do not regard that the plaintiff was ipso facto out of court upon the facts as they appear in the "Case" submitted to us.

It is the judgment of this court that the order of the Circuit Court be reversed and the case be remanded.

21 S. C. 147

HUGGINS v. OLIVER.

(November Term, 1883.)

[1. *Judgment* ⇐688.]

In action by a purchaser of an intestate's lands under judgment obtained against the administrator, such judgment is conclusive upon the heirs at law, of their intestate's indebtedness, and of all issues involved in that adjudication.

[Ed. Note.—Cited in Bell v. Bell, 25 S. C. 154.

For other cases, see Judgment, Cent. Dig. § 1211; Dec. Dig. ⇐688.]

[2. *Judgment* ⇐303.]

Under a judgment against an administrator, which technically was not in proper form, the lands of the intestate were sold, and the purchaser brought action against the heirs for a recovery of such land. A few days before the trial, the plaintiff, on ex parte application to the Circuit judge at chambers, with consent of the administrator, obtained order amending the judgment according to the right of the case. *Held*, that the amendment was properly allowed and related back to the sale of the land.

[Ed. Note.—Cited in Gowan v. Gentry, 32 S. C. 377, 378, 11 S. E. 82.

For other cases, see Judgment, Cent. Dig. § 594; Dec. Dig. ⇐303.]

[3. *Descent and Distribution* ⇐130.]

Lands of an intestate may be sold under a judgment recovered against his administrator upon a debt of the intestate, but if the lands have passed into the actual and exclusive possession of the heirs before the judgment was recovered, they cannot be sold under such judgment. Cases reviewed.

[Ed. Note.—Cited in Roberts v. Smith, 21 S. C. 464; Carolina Nat. Bank v. Senn, 25 S. C. 578; Ex parte Worley, 49 S. C. 59, 26 S. E. 949; Hendrix v. Holden, 58 S. C. 530, 36 S. E. 1010; Brock v. Kirkpatrick, 60 S. C. 340, 348, 350, 38 S. E. 779, 85 Am. St. Rep. 847.

For other cases, see Descent and Distribution, Cent. Dig. § 480; Dec. Dig. ⇐130.]

[4. *Descent and Distribution* ⇐130.]

Partition is conclusive evidence of actual possession under a claim of exclusive right asserted by the heirs, but it is not the only evidence. Such claim may be shown by other facts and circumstances.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 472, 478–487; Dec. Dig. ⇐130.]

[5. *Judgment* ⇐707.]

A purchaser of the lands of an intestate under judgment against the administrator, brought action against the widow of intestate, and the vendee of such purchaser recovered the possession. Action was then brought by the

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widow and other heirs of intestate against *such vendee for the recovery of this land. *Held*, that the widow was estopped by the judgment had in the action against her, but that the others were not, they not being parties or privies.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. ⇐707.]

[This case is also cited in Brock v. Kirkpatrick, 60 S. C. 342, 38 S. E. 779, 85 Am. St. Rep. 847, without specific application.]

Before Pressley, J., Marion, October, 1883.

This was an action by Mary A. Huggins and others, heirs at law of Neal C. Huggins, against William A. Oliver, commenced September 20, 1881, for the recovery of a tract of land.

The facts are all stated in the opinion. The Circuit judge charged the jury that notwithstanding the errors in the Elvington judgment and execution against the administrator, Rogers, the levy and sale under them of the lands of the intestate, Neal C. Huggins, were effectual to convey title to the purchaser against his heirs at law, the plaintiffs, and that the said judgment and execution had been properly amended; that the lands in possession of the plaintiffs as heirs at law, although claimed and used by them as their own, were subject to levy and sale under a judgment and execution against the administrator of the estate of their ancestor obtained in an action to which said heirs were not made parties, and of which they had no notice; that the plaintiffs, as heirs at law, were estopped from setting up title against the purchaser at such sale, and that no length of possession by them would enable them to hold or claim title to the said land by reason of the statute of limitations against the defendant in this case; that heirs at law can never hold adversly against creditors of ancestor until partition, and that the separate possession of a part of the land by one of the plaintiffs, N. C. Huggins, as his share of same, amounted to nothing, because the defendant was not in possession of that part of the land.

The jury under this charge found a verdict for the defendant, and the plaintiffs appealed.

Messrs. Blue & Walsh, for appellants.

The judgment in Elvington v. Rogers, administrator, was against Rogers individually and did not authorize an execution against the property of the intestate. 2 Strob., 3; 8 Rich., 345; 16 S. C., 64. The execution was

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directed against Rogers indi*vidually, and could not be levied on property of intestate. Freem. Exec., § 43, and authorities supra. The defects in this judgment were more than mere irregularities, and the order of the Circuit judge amending the same not having been made upon the motion of a party to the proceedings in which it was recovered, within a reasonable time and before it was satisfied, was without authority of law and too late to affect the title of the plaintiffs. 16 S. C., 64; 1 Mill Con. R., 133; 1 Hill, 167, 209. Heirs in possession of descended real estate for the statutory period may claim title by virtue of the statute of limitations against a purchaser at sheriff's sale under a judgment and execution against an executor or administrator. 2 Bay, 156, 339; Rice Eq., 373; Speer Eq., 250. The statute applies to an action against heirs and devisees to subject real estate in their possession to a debt of their ancestor or devisor. Bail. Eq., 437; Rice Eq. 387; 9 S. C., 430; and

also to actions against legatees to subject personalty in their hands to the payment of debts. 2 Hill, 522; 2 Hill Ch., 496; Bail. Eq., 437; 9 S. C., 430. Heirs in possession are not bound by a judgment against an administrator. 2 Hill Ch., 257; Speer Eq., 250; 9 S. C., 430; 19 Id., 160. Lands in the actual and exclusive possession of heirs are not subject to levy and sale under a judgment and execution against an administrator. 2 Hill, 579; Speer Eq., 250.

Messrs. W. W. Harllee and C. A. Woods, contra.

It matters not to whom the dower was released, and the widow of N. C. Huggins has never claimed it, and there was no bar to a recovery on the note for the purchase money. The judgment was simply an adjudication of the issues and was against Rogers as administrator, as in 1 Brev., 289, which was a case like this. There was no defence to the action. See 6 S. C., 356. The fifth exception raises a point that has been settled for eighty years. 6 S. C., 356. In the cases cited contra, the actions were against the heirs, or there were other circumstances varying the case. See cases cited in 6 S. C., 356. There was no partition here to show exclusive possession. 4 McCord, 128. There was not ten years from Rogers' purchase until the plaintiffs were ousted.

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*April 14th, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The tract of land, which is the subject matter of controversy in this action, formerly belonged to Giles Elvington, who, on September 1, 1860, sold and conveyed the same to Neal C. Huggins, who immediately went into possession and held the same until August, 1864, when he died intestate, leaving as his heirs at law his widow and children, who are the plaintiffs in this action. Subsequently to Huggins' death said Elvington recovered a judgment against Robert R. Rogers, as administrator, on a note of Neal C. Huggins, payable on January 1, 1862, to said Elvington for $586, "when Ann Eliza Elvington assigns her dower, and not until then," the declaration alleging "that Ann Eliza Elvington, wife of Giles Elvington, did renounce her dower as required by the terms of said note." The judgment was signed and the execution lodged on December 10, 1869. The informalities in this judgment and execution are set out in the "Case," but need not be stated here.

Under this execution the land in dispute was levied on by the sheriff and sold in September, 1870, at which sale one Barfield Rogers became the purchaser, and after receiving titles he brought an action against the widow alone, one of the plaintiffs in this action, to recover possession, in which he recovered judgment against her and issued his writ of habere facias possessionem, but he does not seem to have taken any steps towards enforcing the same. Subsequently the land was sold by the sheriff under an execution against said Barfield Rogers and bought by one Clawson T. Page, who received titles from the sheriff and an assignment from said Barfield Rogers of the said writ of habere facias possessionem, under which the plaintiffs, who had been in possession ever since the death of Neal C. Huggins, were ejected by the sheriff on December 30, 1879. The said Page afterwards conveyed a portion of the said tract of land to the defendant, of which he is now in possession.

It also appeared in evidence on the trial that one of the plaintiffs, H. J. Huggins, "with the consent of all the others, went into possession of a portion of the land, and held and cultivated the same for more than ten years before they were all ejected by the sheriff, and that said portion of said land

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so held by H. J. *Huggins was regarded by them at the time as his fair share of the whole;" but the land so held by H. J. Huggins was not embraced in that portion of the tract of which the defendant is in possession. It also appeared that H. J. Huggins had, on December 24, 1879, signed a written lease, acknowledging tenancy to Clawson T. Page, and agreeing to surrender possession to said Page on or before March 20, 1880, about which time he did surrender possession to Page.

The defendant at the trial introduced an order made at chambers a few days before the trial amending the judgment in the case of Elvington v. Rogers, as administrator of Neal C. Huggins, which order was made without notice to the plaintiffs herein, but with the consent of the administrator, Rogers.

The plaintiffs proposed to offer testimony showing that the note upon which the judgment in favor of Elvington v. Rogers, administrator of Neal C. Huggins, was based, was given for the balance due on the purchase money of the land; that it was not payable until the dower was renounced, which had never been done, and that the note had in fact been paid by Neal C. Huggins. The Circuit judge rejected the proposed testimony, "holding that the Elvington judgment against the administrator of Huggins could not be thus impeached; that the sale under it was effectual to convey title to the purchaser under whom defendant claims, and that plaintiffs were estopped from setting up title in themselves against him."

Various propositions were presented by the plaintiffs as embodying the law applicable to the case, but as they were not all made the basis of exceptions to the rulings of the Circuit judge, it is not necessary to set them out here; but it will be sufficient to state the exceptions which present the only questions which are before us for decision. The exceptions are as follows:

1. "Because his honor erred in ruling that notwithstanding the fact the note on which the judgment against the administrator was obtained, was, on its face, payable only after the wife of payee should relinquish her dower, and the relinquishment was in fact made to widow of intestate, drawer of said note, the purchaser had a good title against the heirs of intestate.

2 "Because his honor erred in ruling that

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the judgment hav*ing been entered against the administrator as such, and not against the property of intestate, a sale under it was effectual to convey title to the purchaser, and plaintiffs were estopped thereby from setting up title in themselves.

3. "Because his honor erred in holding that the judgment was properly amended at the trial term of this action by consent of administrator, and without notice to the plaintiffs.

4. "Because his honor erred in ruling out testimony offered by plaintiffs, tending to show that the note on which the judgment was obtained had, in fact, been paid before action brought upon the same.

5. "Because his honor erred in charging the jury that lands in possession of heirs at law, claimed and used by them as their own, could legally be levied upon and sold under a judgment and execution against an administrator, they, the heirs, not being parties to nor having notice of the proceedings instituted to obtain such judgment.

6. "Because his honor erred in charging the jury that no length of possession by heirs at law would enable them to hold or claim title to lands by reason of the statute of limitations against a purchaser at sheriff's sale under a judgment and execution against an administrator, on a debt due by the ancestor and intestate."

The questions made by these exceptions may be stated as follows: 1. Was there error in excluding the testimony proposed by plaintiffs for the purpose of showing that Elvington was not entitled to recover in the action against Rogers as administrator of Neal C. Huggins, by reason of the fact that the dower of his wife had not been properly renounced, or by reason of the fact that the note had been paid by N. C. Huggins in his life-time? 2. As to the effect of the informality in the judgment and execution under which the land was sold, and the subsequent amendment thereof? 3. Was there error in the charge of the judge respecting the rights of a purchaser at sheriff's sale, under an execution against an administrator of an intestate, of lands in the possession of the heirs of such intestate as against said heirs?

We do not think that there was any error in excluding the testimony proposed to be offered by the plaintiffs for the purpose of

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*showing that Elvington was not entitled to recover in his action against the administrator of the intestate, Neal C. Huggins. The issues proposed to be raised by such testimony were concluded by the judgment in that action. If there was any valid defence to the note sued upon, it was the duty of the administrator to interpose such defence, and if he culpably neglected such duty, he may be liable to the parties interested, but the plaintiff in that action cannot thereby be deprived of any rights which he acquired by such judgment, one of which was the right to sell under such judgment the lands of his intestate debtor, unless they had been partitioned amongst his heirs, or had otherwise gone into their exclusive possession. To that action the heirs were neither necessary nor proper parties, and the administrator being the only necessary and proper party, all the issues which arose, or could have been presented in that action, are concluded by the judgment therein. Fraser & Dill v. City Council of Charleston, 19 S. C., 384.

It will be observed that the question presented here is not like that in Wilson v. Kelly, 19 S. C., 160, where a creditor under a proceeding to marshal assets is called in to prove his demand, and presents it in the form of a judgment recovered in an action to foreclose a mortgage of real estate, to which the heirs were not, but could have been, made parties; nor is it a case in which a creditor is seeking to subject lands in the hands of the heirs to the payment of the debts of the ancestor, as in Gillilland & Howell v. Caldwell, 1 S. C., 194, in both of which cases the heirs would have the right to contest the validity of the debt upon which the judgment was recovered against the administrator. Here the question is as to the validity of a sale of the land of an intestate under a judgment recovered against his administrator in an action to which the heirs were neither necessary nor proper parties, and in such a case, following, as we are bound to do, the long line of authorities from D'Urphey v. Nelson, 1 Brev., 289, decided in 1803, down to Rogers v. Huggins, 6 S. C., 356, decided in 1874, we must hold that such a judgment is conclusive of all issues which were or might have been raised in the action in which it was recovered; and as the issues proposed to be raised by the testimony which was excluded were of that

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class *manifestly, it is quite clear that there was no error in excluding the proposed testimony.

Our next inquiry is as to the effect of the irregularities in the judgment and execution and of the subsequent amendment thereof. It appears from a certified copy of the judgment introduced at the argument here, by consent, that the judgment was in favor of Giles Elvington and against "R. R. Rogers, administrator of all and singular the goods and chattels, rights and credits, which were of Neal C. Huggins, deceased, the defend-

ant," and the ideo consideratum est is, "that the said plaintiff do recover, against the said defendant the damages so found as aforesaid, and also seventy-five dollars for his costs, &c., which said damages, costs, and charges in the whole amount to seven hundred and eighty-five dollars and twenty-two cents, to be levied of the goods and chattels, lands, tenements, hereditaments and other real estate which were of Neal C. Huggins, deceased, in the hands, possession, and control of the defendant, R. R. Rogers, the administrator, or otherwise." And the order to amend was that the following words be inserted in the judgment, viz.: "To be levied of the goods, chattels, lands, tenements, and real estate which were of Neal C. Huggins, deceased, in the hands, possession, and control of the defendant, R. R. Rogers, his administrator, or otherwise," which words, substantially, seem already to have been embraced in the judgment.

It also appears from a certified copy of the execution, which was likewise presented by consent at the argument here, that the sheriff was therein commanded, "that of the goods, chattels, houses, and lands, and other hereditaments and real estates of Robert R. Rogers, administrator of all and singular the goods and chattels, rights and credits which were of Neal C. Huggins, the defendant, you cause to be levied the sum of seven hundred and eighty-five dollars and twenty-two cents, * * * if he have so much of the goods and chattels, houses, lands, and other hereditaments and real estates of the said Neal C. Huggins, in his hands to be administered, or if he have not, then you cause the said debt, damages, costs, and charges to be levied of the proper goods and chattels, houses, lands, and other hereditaments of the said Robert R. Rogers."

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*The plaintiffs contend that the defects in the judgment and execution amounted to more than mere irregularities and made them void, or at least that they furnished no sufficient authority for the sale of the land of the intestate; and that the order of the Circuit judge granting leave to amend, not having been made upon the motion of a party to the action in which the judgment was recovered, within a reasonable time, was without authority of law, and too late to affect the title to the land sold under such judgment. We think the following authorities show that these positions cannot be maintained: D'Urphey v. Nelson, 1 Brev., 289; Hubbell v. Fogartie, 1 Hill, 167 [26 Am. Dec. 163]; Giles v. Pratt, 1 Hill, 239 [26 Am. Dec. 170] recognized as late as 1866 in Ashmore v. Charles, 14 Rich., 65. In D'Urphey v. Nelson, an amendment similar to the one made in this case was suggested by the court itself in the opinion granting a new trial. And in Giles v. Pratt a similar amendment was allowed at the trial term of the action brought by the purchaser at sheriff's sale to recover the land twelve years after the judgment was recovered, and upwards of eleven years after the sheriff's sale, the judgment having been recovered in October, 1820, the sheriff's deed being dated April 14, 1821, and the trial having taken place at fall term, 1832. As is said in Hubbell v. Fogartie: "It is every day's practice to permit judgments and executions to be amended according to the right of the case, even after a sale under execution;" and these remarks are substantially repeated in Giles v. Pratt.

The authorities relied on by the plaintiffs do not sustain their position. Tobin v. Addison, 2 Strob., 3, was an action of trespass for seizing a bale of cotton belonging to the plaintiff under an execution issued by a magistrate to enforce a judgment rendered by him in favor of one Sauls against "Jabez G. Brown, guardian of Miss Owens," the execution commanding the levy of the goods and chattels of Miss Owens. The court held that the execution was void and altogether unauthorized by the judgment; that Miss Owens could not be made liable without the service of summons upon her, and her appearance by guardian, neither of which was done; and that the debt, though contracted for blacksmith work done on the planation, was not her debt, but the debt of her guardian, with whom the contract had been

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*made. It is manifest that this case, in which the court had never acquired jurisdiction of the person of the party against whom the execution was issued, differs very materially from the case under consideration.

In Beazley v. Dunn, 8 Rich., 345, the action was trover to recover damages for the conversion of a mule, the property of the plaintiff. It seems that the plaintiff, as administrator of Youngblood, had been sued before a magistrate in two cases, on debts contracted by his intestate, and judgments were recovered against him. Upon these judgments the magistrate issued executions, in which the plaintiff was styled "administrator," and under these executions the defendant, a constable, sold the mule in controversy. The court said that the only question in the case was whether the executions had been issued in conformity with the judgments; and as they were not, the court held that the executions furnished no authority for making the levy or sale. In that case no question as to the right to amend was raised, and nothing was said about it.

So, too, in Small v. Small, 16 S. C., 64, no question as to the right to amend was raised, and in that case stress was laid upon the fact that it did not appear from the proceedings that Mary Small, under whose judgment the land in question had been sold, had sought to obtain a judgment which would bind the estate of her deceased hus-

band. In that case the language of the court is as follows: "Her complaint was against the conduct of the executors. The character of her cause of action would seem to indicate that her purpose was to obtain precisely such a judgment as was rendered against Uriah Small and John S. Small as individuals; but be that as it may, she cannot claim want of notice as an innocent purchaser. She was the plaintiff in execution, and is fairly chargeable with knowledge of the terms of her own process."

The case of Mooney v. Welsh, 1 Mill Con. R., 133, does not decide that five years would be a bar to a motion to amend. Judge Cheves, in delivering the opinion of the court, simply suggests that period, in analogy to the period then fixed by law as a statutory bar to an action to recover real estate, but expressly says that nothing is intended to be

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decided as to that point. *There is a case—Surtell ads. Brailsford, 2 Bay., 333—which holds that a motion to set aside a judgment, after the lapse of twelve years from its entry, will not be entertained. But setting aside a judgment is a very different thing from amending it so as to conform to the real facts as presented in the record and to effect substantial justice; and, as we have seen, in the case of Giles v. Pratt, supra, the court did grant an order to amend a judgment twelve years after it had been entered, under almost the identical circumstances presented by this case.

The only remaining inquiry is, assuming that the judgment and execution were in proper form, and that the sale was in other respects legal, did it divest the title of the heirs at law of Neal C. Huggins, who were in possession at the time the sale took place? There can be no doubt that ever since the case of D'Urphey v. Nelson, 1 Brev., 289, it has been uniformly held in this state that the lands of an intestate may be sold under a judgment recovered against the administrator, upon a debt of the intestate, although the heirs, to whom the title of the land had descended, were not parties to the action in which such judgment was recovered. In that case, however, nothing but the general proposition above stated was decided, and the facts of the case did not call for the statement of any qualification or exception to the general rule. In that case it did not appear that the heir had ever been in possession of the land, and the presumption is that he certainly was not in possession at the time of the sale under the judgment; because the action was brought by the heir to recover possession from the purchaser at the sheriff's sale, and if he had been in possession at the time of such sale, and desired to contest the right of such purchaser, the action would have been brought against, instead of being brought by, the heir. So, too, in the case of Martin v. Latta, 4 McCord, 128, it did not appear that the heirs had ever been in possession, and in fact the court, while recognizing the decision in D'Urphey v. Nelson, seemed to consider that the only question in the case was whether the fact that there was sufficient personal property to pay the debts would take the case out of the general rule.

In Jones v. Wightman, 2 Hill, 579, the court was for the first time called upon to consider whether there were any qualifica-

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tions *or exceptions to the general rule laid down in D'Urphey v. Nelson, and it was there held that after the lands had been partitioned, and those of the heirs to whom they had been allotted had sold them to a third person, such lands could not be sold under a judgment recovered against the executors, after such partition was made. In Bird v. Houze, Speers Eq., 250, the court went a step further, and held that where the heirs had been in the exclusive possession of the lands of an intestate, and had exercised acts of ownership over them, the same are not liable to levy and sale under an execution against the administrator, notwithstanding the fact that no regular partition had been made.

The facts of this case are important in the consideration of the question decided by it, and will therefore be briefly stated. The intestate died in 1828, and his administrator leased the land for two years, receiving the rent. In 1830 the heirs took possession, and held the same until the winter, or spring, of 1842, sometimes occupying it themselves, and at other times renting it out. In January, 1842, the widow of intestate applied to the ordinary to have partition made, and when the parties met at the ordinary's office for the purpose, the defendant, who was a joint owner of the land in question with the intestate, claimed the whole of it under the terms of some contract with intestate. This seems to have broken up the attempt then made for partition, and in April, 1842, the interest of the intestate was levied on and sold, under a judgment recovered by the defendant, on December 17, 1832, in an action against the administrator on a note of intestate, which was barred by the statute of limitations before the action was commenced. There was, however, another judgment against the intestate in favor of one Dobbin, recovered in 1828, upon which, however, there does not seem to have been any execution having active energy. At the sheriff's sale the defendant became the purchaser, and took a deed from the sheriff in April, 1842. The bill was then filed for partition, which was resisted by the defendant upon the ground that the title of complainants as heirs at law of the intestate was divested by the sheriff's sale, and that under that sale he had an absolute estate in the entire prem-

ises. Chancellor Dunkin, on Circuit, held that the exclusive possession by the heirs

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for such a length of time, even though *there had been no actual partition, was sufficient to defeat the right of a creditor to sell the land under the judgment against the administrator, and he therefore ordered the sheriff's sale set aside and a writ of partition to issue. On appeal, the same Chancellor delivered the opinion of the court, and after saying that the court concurred in the Circuit decree, added that the cause of action upon which the judgment was recovered being barred by the statute of limitations, it was the duty of the administrator to have pleaded the statute, and it constituted no claim against the heirs.

The last case is Rogers v. Huggins, 6 S. C., 356, in which it was held that the mere fact that the heirs of an intestate were in possession of the land would not defeat the right of a creditor to have the same sold under a judgment obtained against the administrator upon a debt of the intestate.

It seems to us that the rule to be deduced from the foregoing cases is this: that while, as a general proposition, it is true that lands of an intestate may be sold under a judgment recovered against the administrator upon a debt of the intestate, yet, if the lands have passed into the actual and exclusive possession of the heirs before the judgment has been recovered, and before any lien has thus been fixed upon them, they can no longer be sold under such judgment, and can only be reached by the usual proceeding to subject real estate in the hands of the heir to the payment of the debts of the ancestor, to which proceeding the heir would, of course, be a necessary party. Without this qualification of the general rule stated in D'Urphey v. Nelson, it would be impossible to reconcile the various decisions to which we have referred, but with it the cases may all be harmonized. Certainly, after partition, lands of the intestate cannot be sold under a judgment against the administrator, as seems to be conceded in Rogers v. Huggins, which has gone further than any other case.

But it is manifest from the reasoning of O'Neall, J., in Jones v. Wightman, and Dunkin, Ch., in Bird v. Houze, that there is no inherent virtue or efficacy in the fact of partition, but that fact simply affords conclusive evidence of the further fact that the heirs have taken and asserted their right to the exclusive possession of the lands, without regard to the claims of creditors or any

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*supposed rights of the administrator to subject the lands to the payment of debts. If it were otherwise, then the case of a single heir, where partition is impossible, would be indeed an unfortunate one; but as Chancellor Dunkin well says: "Partition can give no right to several heirs which a single heir would not have without partition." The language of Judge O'Neall, that if the lands "are not in the exclusive, actual possession of the heir entitled to them, they would also be liable to execution on a judgment recovered against the executors or administrators," shows that he did not regard the fact of partition as necessary.

The real inquiry is one of fact. Does the evidence show that, before the judgment was recovered and the lien fixed upon the land, the heirs had taken actual possession under a claim of exclusive right? This may be shown not only by proof of actual partition, but also by other facts and circumstances. For example, in this very case, if the jury believed that, before the judgment was recovered, the heirs had undertaken to make a partial partition by setting off to one of them, H. J. Huggins, such a portion as was regarded his full share of the whole, this would constitute strong evidence that they then asserted an exclusive right to the land, without regard to the claims of creditors or any right of the administrator to subject it to the payment of debts. The fact that the defendant is not in possession of the particular portion allotted to H. J. Huggins, could not affect the question as to whether such partial partition furnished sufficient evidence that the heirs then asserted their exclusive right to the lands of their ancestor. We think, therefore, that the fifth ground of appeal is well taken. But if the judgment was recovered and a lien thereby fixed upon the lands, before they passed into the actual and exclusive possession of the heirs, such lien would follow the lands when they so passed into the hands of the heirs, and could be enforced against them, unless the heirs have had possession for a sufficient length of time to protect them, under the decisions in McRaa v. Smith, 2 Bay., 339; Lamar v. Raysor, 7 Rich., 509.

The plaintiffs not having made the refusal of the Circuit judge to charge the second proposition submitted by them the basis of any of their exceptions or grounds of ap-

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peal, the question pre*sented by that proposition is not, strictly speaking, properly before us. But as the rule is that the judgment below must be affirmed if there is any ground upon which it can be sustained, and as the judgment in this case could be sustained if the Circuit judge was right in refusing to charge that proposition, it becomes necessary for us to consider it. The question presented by that proposition is whether the judgment recovered by Barfield Rogers against Mary A. Huggins (6 S. C., 356,) can affect the rights of the plaintiffs herein other than the said Mary A. Huggins. They were not parties to that case, and they are not privies of any party thereto. And hence it is perfect-

ly clear that the judgment in that case is not binding upon them, although it is equally clear that Mary A. Huggins is bound thereby and is estopped from setting up any claim against the defendant herein, who claims under Barfield Rogers, the plaintiff in that action.

The only effect that judgment can have, so far as the other plaintiffs are concerned, is as authority for the legal proposition which it decided, and that was, as we have seen, that the mere fact that the heirs were in possession would not be sufficient to defeat the right of the judgment creditor to sell the land under the execution obtained against the administrator. But it does not decide, and could not have decided, the question raised in this case as to whether the evidence adduced by the plaintiffs in this case was sufficient to show that, before judgment was recovered against the administrator, the heirs had taken such actual and exclusive possession of the land as would exempt it from liability to levy and sale under the judgment against the administrator. In the former case no evidence whatever was adduced by the defendant, and the question came up on a motion for nonsuit, which was granted by the Circuit judge solely on the ground that, "as the heirs were in possession, the judgment and execution did not authorize the sheriff to make the levy and sale and convey the estate to the plaintiff;" and all that the Supreme Court adjudged was that the Circuit judge in that case erred in granting the non-suit. While, therefore, the judgment in the former case is conclusive against Mary A. Huggins, one of the plaintiffs herein, upon the principle of res adjudicata, it

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can have *no such effect so far as the other plaintiffs herein are concerned, and the jury should have been so instructed.

The sixth ground of appeal is taken under a misapprehension of the charge of the Circuit judge. He did not charge that no length of possession by the heirs would enable them to claim title under the statute of limitations against a purchaser at sheriff's sale under a judgment against the administrator; but his charge was that the heirs can never hold adversely against the creditors of their ancestor until partition. The question, therefore, intended to be raised by this ground of appeal is not properly before us; though from what we have said it follows necessarily that actual partition would not be necessary, but would only serve as conclusive evidence of the essential fact that the heirs had taken actual and exclusive possession, which, however, might be established by other evidence.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

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HAND v. SAVANNAH AND CHARLESTON R. R. COMPANY.

(November Term, 1883.)

[1. *Costs* ⟸103.]

Where compensation is allowed out of a common fund belonging to others, for expenses incurred and services rendered in behalf of the common interest, it is upon the principle of representation or agency; e. g., to the plaintiff in a creditor's bill, or to a defendant made a party as a representative of a class too numerous to be served.

[Ed. Note.—Cited in Hall v. South Carolina R. Co., 25 S. C. 567.

For other cases, see Costs, Cent. Dig. § 398; Dec. Dig. ⟸103.]

[2. *Work and Labor* ⟸4.]

No one can legally claim compensation for voluntary services to a party, however beneficial they may be, nor for incidental benefits and advantages flowing to a party as a result of services rendered under the employment of another party.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 3–7; Dec. Dig. ⟸4.]

[3. *Corporations* ⟸566; *Costs* ⟸103.]

A bill against a railroad company to require the payment of certain unfunded coupons of their six per cent. bonds was filed by a holder of such coupons in behalf of himself and all others holding like coupons. Afterwards, certain holders of seven per cent. bonds of this company intervened by petition and made one S., a holder of six per cent. bonds, a party defendant in behalf of himself and all other holders of such bonds. S. employed counsel, and all creditors of the company were called in and

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made parties by advertisement. *The contest then arose between the sixes and sevens as to priority of lien, which was decided in favor of the sixes, and the railroad was sold for an amount insufficient to satisfy the prior lien. *Held*, that counsel fees out of the common fund should be allowed only to the attorney employed by S., although other counsel for other holders of sixes rendered valuable services to that class of bonds; but S. was made the representative of the successful class, and was therefore the only party authorized to charge the common fund with expenses.

[Ed. Note.—Cited in Westmoreland v. Martin, 24 S. C. 240; Ex parte Lynch, 25 S. C. 193, 200, 201; Hubbard v. Camperdown Mills, 25 S. C. 501, 1 S. E. 5; Wilson v. Kelly, 30 S. C. 489, 9 S. E. 523; Walker v. Killian, 62 S. C. 488, 40 S. E. 887; Park v. Laurens, 68 S. C. 218, 46 S. E. 1012.

For other cases, see Corporations, Cent. Dig. § 2284; Dec. Dig. ⟸566; Costs, Cent. Dig. § 398; Dec. Dig. ⟸103.]

[4. *Receivers* ⟸154.]

And upon the same principle, counsel for plaintiff should be allowed a fee out of so much of the common fund as was payable to the holders of unfunded coupons of the six per cent. bonds.

[Ed. Note.—Cited in Buist v. Williams, 81 S. C. 499, 62 S. E. 859.

For other cases, see Receivers, Cent. Dig. §§ 279–282; Dec. Dig. ⟸154.]

[5. *Action* ⟸2.]

Courts have no power to subject the property of citizens to claims, unless founded upon established legal or equitable principles making such property liable and constituting a cause of

action. Courts have no power to adjust claims upon grounds of abstract moral equity.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 10–16; Dec. Dig. ⟸2.]

[6. *Corporations* ⟸566.]

An attorney for a stockholder successfully resisted the liability of the railroad to taxation, and by direction of the receiver resisted the claim of other parties to certain lands of the company; and another attorney appeared by direction of trustees of the seven per cent. bonds and rendered services in behalf of the property. *Held*, that neither was entitled to be paid out of the fund going to the successful sixes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2284; Dec. Dig. ⟸566.]

[7. *Attorney and Client* ⟸149; *Receivers* ⟸200.]

An attorney was employed by the receiver of the company to sue for a tract of land held adversely, and such attorney, by special contract, was to receive half of the recovery for his services. The land was recovered and was sold with all the other property of the company. *Held*, that this attorney was entitled to compensation out of the fund realized from the sale.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 357; Dec. Dig. ⟸149; Receivers, Cent. Dig. § 397; Dec. Dig. ⟸200.]

[8. *Costs* ⟸32.]

Costs should be taxed in favor of the successful parties.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 108; Dec. Dig. ⟸32.]

Before Cothran, J., Charleston, April, 1883.

The opinion substantially states this case, but an elaborate statement of all the litigation in this cause may be found in 17 S. C., 219, and in the other appeals to this court there referred to. The Circuit decree here appealed from was as follows:

The several matters which remain to be determined in this complicated litigation, which has been protracted for more than thirteen years, came on to be heard by me on Monday, April 2, 1883, and from day to day, for nine days. It would be tedious and unprofitable to relate the history of the case as it has wound its slow length along through many of the volumes of the Appeal Court Reports from the 5th S. C. to the 17th inclusive.

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Those *who are most interested, as well as a majority of the Circuit judges, and all of the members of the Supreme Court, are familiar with its details, and I shall therefore, after much consideration, and with no small amount of embarrassment, growing out of the importance and very peculiar nature of the issues, proceed as briefly as I can to state my conclusions.

The matters submitted were the following:

1. The amount of compensation due to the referee (Mr. Pringle), and of the taxed costs of attorneys engaged in the cause, and of the officers of court, including the present and former clerks and masters.

2. A proper allowance to Charles T. Mitchell, the receiver, for the Bee's Ferry extension.

3. The claim of the eight per cent. bondholders, who insisted that neither the statutory lien nor any mortgage prior to theirs included the franchise, and that they were entitled to whatever of value this indispensable element had given to the corporation.

4. Which of the many attorneys engaged in the cause were entitled to fees and costs out of the common fund.

5. The amount of such fees and costs.

The question of attorneys' costs, embraced in the first proposition, was eliminated from it, and is set down in proposition five as properly to be determined after settling the question of the right of the attorneys to costs. The matter of compensation to the referee and the costs of the several officers of court were determined at the hearing, and an order made touching these matters; so also as to the allowance to the receiver for the Bee's Ferry extension, and the question involving the franchise.

In the orderly progress of the inquiry this brings us to the fourth proposition: Who are entitled to fees and costs out of the common fund? The Supreme Court say, at page 278 of 17 S. C.: "It is always embarrassing for this court to attempt to adjust costs and counsel fees, which more appropriately belongs to the Circuit Court. It seems to us, however, that in this case there should be some system upon the subject, and that the costs and fees of all the attorneys properly chargeable for successful service should be paid out of the common fund, so as to make the successful litigants pay their proper proportion."

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*It was suggested at the hearing that this expression of the court is obiter dictum, but it will hardly be denied that as a legal proposition it is indisputably true. Indeed, the practice in this state, as settled by numerous decisions, and in strict conformity with the rule laid down by the elementary writers, is to allow counsel fees out of a fund to those who have recovered, or assisted in recovering, the same. Some of the writers use the term created. In the familiar case of a creditor's bill, where a fund is preserved or realized for the benefit of a class by the efforts of one or more of such class, the counsel representing those who have acted in behalf of the whole class are allowed their proper fees out of the fund. So where a trustee, as such, is involved in litigation, he is entitled to be reimbursed for counsel fees out of the fund; but the fund must be, or it must have been during the progress of the litigation, within his fiduciary control. In all other cases, each party must bear his own charges out of his own funds.

It is needless to cite authority in support of these propositions. The difficulty, however, arises in applying these familiar rules to the case in hand; and I find, moreover, in the condition of the seven per cent. bondhold-

ers, a manifest and very great hardship in the legislative delusion by which they have been victimized. The court, however, can furnish no remedy for this. At the close of the late war the Charleston and Savannah Railroad, from its exposed position and early capture by the Federal armies, was practically destroyed, and its stockholders and bondholders, as such, were financially in like condition. The sevens, relying upon the validity of the act of assembly in 1869, postponing the statutory lien held by the state as an indemnity for its guaranty, furnished the necessary money to rebuild the road. This has proved to be a delusion and a snare, and their money, advanced in good faith, by means of which the road was rebuilt, and increased value given to the sixes, has gone beyond the reach at least of the judicial department of the government.

On April 12, 1870, the plaintiff, Hand, holding a large amount of past due detached coupons of the sixes, filed his complaint in "behalf of himself and all other creditors of the Charleston and Savannah Railroad Company, standing in the same right, plight, and condition as himself," &c. This proceeding soon

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involved *the sixes and sevens in a contention for priority of lien, the value of the road being supposed to be inadequate for the satisfaction of both classes of creditors. It was a hard and uncompromising fight; the stakes were large, and very conspicuous ability has marked the progress of the cause from the beginning to the close.

The road was finally sold, and the sum of $300,000 realized, which is the fund now in the custody of the court for distribution. This has been decided by the Supreme Court to belong to certain of the sixes, who are not estopped, as are others of the same class, from claiming a pro rata thereof. All other claimants are denied the right to participate in the distribution of this fund. It is contended, however, by the attorneys of many of these defeated claimants, that they ought to have their costs and counsel fees out of what they call "the common fund."

At different times during the progress of the struggle between the sixes and the sevens there appeared upon the field other formidable contestants than those who were originally and mainly engaged: 1. The attorney general, in favor of the state, for taxes amounting to about $120,000. 2. The comptroller general, demanding the possession of the road itself, as forfeited to the state under act of 1869 for non-payment of interest on the bonds guaranteed by the state. 3. Material men (so called) and others, claiming damages for injury to persons and property. All of these were regarded by the main contestants as the common enemies of both, and upon their appearance the bugles rang loud; and contingents were detailed from the ranks of each, whose common efforts were directed against their common enemies. When these were discomfited, or driven off, the main fight was renewed, and the sixes were finally victorious.

It cannot be denied that valuable services were rendered by the contingents, but in my judgment such were only incidental and inspired by the hope that in the defeat of a common enemy the fund in controversy would be preserved, not as a common fund for distribution with their foes, but exclusively for themselves. It seems to me that the true character of the fund in controversy settles the question conclusively. The term "common fund" is relative in its true and proper

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sense. The *sixes having succeeded in establishing their right to it under the decision of the court of last resort, it is as to them and for them a common fund—itself insufficient for the satisfaction of their claims, and as none of the sevens can participate in its distribution, it follows, ex necessitate rei, that their attorneys, who can claim only through them, are in like manner excluded. The stream cannot rise above its source.

Having thus disposed of the claims of those representing the sevens, the material men, and all other claimants, excepting the sucessful sixes, it remains to determine which of these are entitled to have their fees and costs out of the common fund. The term successful sixes is used because the judgment of the Supreme Court clearly excludes certain of the sixes who had funded their coupons upon the principle of estoppel, amounting in all to about $60,000; and these being thus in no better condition than the sevens, their counsel are not entitled to have fees and costs, or either, out of the common fund.

It is worthy of observation that none of the counsel for the sevens make any objection to the allowance of fees and costs to the counsel of the sixes. Their clients having no interest in the common fund, these have simply claimed compensation for themselves for valuable services rendered in the course of the litigation, and are indifferent to the manner of distributing the residue.

It may be further observed that after the order for the sale of the road was made by Judge Aldrich, the priority of liens having been determined, a majority of the sixes combined together, forming a syndicate (or pool, in modern parlance), for the purpose of purchasing the road.

Some of the sixes declined to enter into this combination, and it is from these that the objection to the allowance of fees and costs comes. Mr. A. D. Cohen is the champion of this class, and with admirable temper has delivered an ingenious and forcible argument, insisting that each of the representatives of the successful sixes should be required to look to his own clients for compensation. The learned counsel, however, was too generous to be satisfied with his own conclusions, when he remembered that Mr. Hanckel, who, according to the famous judgment of

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the wise *Athenian, displayed in selecting the candidate best qualified for office, was the most deserving (perhaps) of the counsel of the sixes, and represented, at the close, only two or three bonds out of which, upon the principle contended for, he could be paid.

It appears that when Cutting's executors, holding a large amount of the sevens, intervened, and the lists were being set, it was necessary to select some one to represent the sixes. Mr. William B. Smith, holding the greatest number of these, was selected, and Mr. Hanckel filed an answer for him. During the progress of the litigation Mr. Smith sold out his bonds, but there is no evidence that the purchasers repudiate the engagement with the counsel already employed or at any time ordered him to desist. If it were necessary to do so, I would hold, in this regard, that these bonds, having been purchased when the litigation was flagrant, that the purchasers of such were affected with knowledge of the fact, and by not repudiating the engagement, assented to and are bound by it.

The fruits of this engagement with Mr. Hanckel, with efficient aid rendered at different stages of the controversy by Messrs. Buist, Brawley, and Lord (and others to be referred to hereafter), together with the valuable aid of the contingents, which must go without further requital than that already received by them, are as follows:

First and foremost, the establishment of the priority of the lien of the sixes.	
Second. The defeat of the claim for taxes	$120,000
Third. The defeat of the material men	25,000
Fourth. The defeat of receiver's certificates	75,380
Fifth. Bee's Ferry Extension, reduced from $59,474 to $17,000	42,474
Sixth. The estoppel of six per cents. and claim by an equivalent of seven per cents. to substitution	60,000
	$322,854

to say nothing of the Trenholm & Potter claims greatly reduced and a host of other floating debts under the administration of the receiver awaiting anxiously the result of

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the suits *already brought. These great advantages have been gained for the sixes by deeds not done in a corner, but by strong and skilful contention over and over again in this forum, and in a higher one, upon both of which beats the fierce light of public observation.

Nor did these results fall out by chance, and whilst I do not feel authorized in entering upon the inquiry whether the contingents, whose aid was so potent, have been sufficiently compensated by the large sums already paid to them from time to time from the earnings of the road, it would seem to me to be an act of injustice, and in conflict with the principles announced in Nimmons v. Stewart, 13 S. C., 445, and Brooks v. Brooks, 16 Id., 621, to permit the supine sixes, who stood aloof and watched the progress of the fight, to come in now and share the fruits of victory without rendering a money equivalent for services which they lacked either faith or courage to contribute. I have no hesitation in saying that Messrs. Hanckel, Buist, Brawley, and Lord are entitled to be paid the amount of the claim presented by them jointly, say ten thousand dollars, to be apportioned amongst themselves, as they may think proper, and also their costs, to be taxed as hereinafter provided.

There are other counsel engaged in the case, who also represent successful sixes. I find myself unable, without the aid of additional testimony, to pass upon their claims. No specified sums are claimed, and the nature of the services rendered are not in all of these very clearly made out. I would prefer, therefore, lest an act of injustice might be done to some deserving of compensation, that all others representing successful sixes, and who have in any wise contributed to the results attained, file, forthwith, in the office of Master Sass, who, as the successor of Master Porter, has custody of the fund, specific statements of their claims for services rendered in the cause, with leave to offer proof to support the same. I regret the delay caused by this course in settling these minor issues, but it is better to go slow than to go wrong, even in a cause that has already been more than a decade in court.

The master (Clancy) has made report upon the claim of James W. Moore, Esq., for pro-

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fessional services to the road in recover*ing from a purchaser a large tract of land belonging to the railroad company, which had been sold for taxes in Beaufort county. The testimony taken by the master and sent up by him sustains fully his report, and the same is in all respects hereby affirmed.

Wherefore, it is ordered, adjudged, and decreed as follows:

1. That all claims for counsel fees and costs exhibited against the funds in question on the part of those representing the seven per cent. bondholders and the other claimants, excepting the counsel representing the successful sixes, be, and the same are hereby, denied.

2. That the master, in whose hands the funds in question are, do pay over to Messrs. Hanckel, Buist, Brawley, and Lord, upon their joint receipt, the sum of ten thousand dollars ($10,000), as a fee for professional services rendered by them in the above entitled causes; and that he do also pay over to James W. Moore, Esq., the sum of six hundred dollars ($600) together with the proper costs to the parties entitled to the same in the proceedings by which said last mentioned fee was established.

3. That the several counsel representing

others of the successful sixes have leave to file their claims in the office of G. Herbert Sass, Esq., master, &c., if they choose to do so, stating specifically the sums claimed by them for professional services rendered in this behalf, exhibiting before the said master such proof as they may deem proper to sustain the same.

4. It is further ordered, that the clerk of this court do tax the costs due to the counsel above named, to whom fees are allowed by this decree.

Messrs. Asher D. Cohen and Mitchell & Smith, for bondholders.

Messrs. B. H. Rutledge and H. A. M. Smith, for H. E. Young.

Messrs. B. J. Whaley and A. G. Magrath, for J. B. Campbell.

Mr. Joseph W. Barnwell, for Buist & Buist, T. M. Hanckel, Samuel Lord, and W. H. Brawley.

Mr. James Simons, for J. W. Moore.

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*April 14, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The case of Hand v. Savannah and Charleston R. R. Co. et al. has been before the courts for a number of years. The road has been sold, the proceeds of sale collected, and the rights of the parties determined. In fact, all of the questions involved, as between the litigants, have been adjudged. The only matter remaining is as to the fees of counsel, which is now before us under this appeal.

In the consideration of this matter, it will not be necessary to review the whole case, or to state fully its entire history. Only so much is needed as may be required to make the questions involved intelligible, and therefore only so much will be given. The case in its progress has been most earnestly and ably fought, and numerous counsel have been engaged. It has appeared in different forms, and every inch of ground has been vigorously contested. Its history may be divided into three stages: First. The institution of the original action by Daniel Hand; second, the intervention of the comptroller and the attorney general of the state; and, third, the proceedings in re the executors of Cutting. It will be necessary to state some of the facts connected with these three different stages, and to consider the case somewhat from the standpoint of each.

In 1853 the Charleston and Savannah Railroad Company was incorporated. In 1856 the state by act agreed to indorse, upon certain conditions, and guarantee six per cent. bonds of this company, not to exceed $5,000 per mile, with statutory lien on the road. Coupon bonds to the amount of $505,000, payable in 1877, were issued by the company under this act, and were indorsed by the State. This amount did not prove sufficient to complete the road, and in 1858, with the view to raise an additional sum, the company conveyed the road to certain trustees, and issued additional bonds to the amount of $1,000,000, which completed the road. After the war, the road was found greatly damaged, in fact in ruins; and for the purpose of rebuilding, the trustees above referred to proceeded to foreclose their mortgage, and in December, 1866, the road was sold, subject to the lien of the state under the act of 1856 above. At this sale Geo. W. Williams and others purchased at the

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price of $30,000. These parties pro*ceeded to organize a new company by virtue of an act passed to that end in 1866, the style of this company being the "Savannah and Charleston Railroad Company."

This company being without means to rebuild, and not being able to issue marketable bonds with mortgage on the road so long as the lien of the state under the act of 1856 stood in the way, made application to the legislature to stand aside its lien. This was assented to by the legislature, and accordingly in 1869 an act was passed, authorizing the company to issue seven per cent. bonds to the amount of $500,000, for the purpose of reconstruction; upon which issue, it was enacted, the lien of the state should be postponed and become a second lien. These bonds were then issued, and the road was thereby rebuilt and put into operation. By the third section of the act of 1869 the company was authorized and requested to fund and redeem the coupons for interest of the six per cent. bonds issued by the Charleston and Savannah Railroad Company then past due, or that might fall due, by the first of September, 1869, by issuing an equal amount of their bonds with coupons attached at the rate of seven per cent., payable semi-annually; these bonds to be guaranteed by the state.

Under these circumstances, in 1870 there were outstanding as claims against the company the six per cent. bonds issued under the act of 1856, and unfunded coupons upon these bonds; bonds substituted for the funded six per cent. coupons under the act of 1869; the seven per cent. bonds issued under the act of 1869; and certain eight per cent. bonds. In 1870 Daniel Hand, holding unfunded coupons of the six per cent. bonds, to the amount of $27,705, besides interest thereon, instituted his action, in his own behalf "and in behalf of all other creditors of the Charleston and Savannah Railroad Company, standing in the same right, plight, and condition as himself, who shall in due time come in and contribute to the expenses of the action," demanding judgment: that an account be taken of the amount due to him upon the bonds and coupons held by him, and secured by the statutory mortgage to the state; that the same might be paid with the interest thereon by a certain day; and in de-

fault that the road be sold in satisfaction of his claim and of the claims of all standing

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*in the same right, plight, and condition with himself; that said creditors be called in; that injunction, restraining the Savannah and Charleston Railroad Company from appropriating and wasting the funds of the company, be granted; and that a receiver be appointed to take charge of the road until said claims were satisfied or the road sold, &c., &c. This action was commenced by Messrs. Buist & Buist, as plaintiff's attorneys. To this action the Savannah and Charleston Railroad Company and certain parties, trustees or mortgagees to secure the $500,000 seven per cent. bonds, were summoned as defendants, and also the state, through the attorney general, appeared as defendant. The company and the trustees appeared by Messrs. Campbell & Seabrook, attorneys.

This case being heard upon the Circuit in October, 1873, the Circuit judge decreed that the plaintiff and other holders of coupons of the six per cent. bonds issued under the act of 1856, were entitled to be paid, with the interest thereon, and he ordered that the case be referred to a referee, with instructions to call by advertisement upon all persons holding past due coupons of said bonds to present and prove their claims on or before a certain day, and to the end that such further order as might be necessary should be passed, that the referee file his report immediately after the day fixed for the proof of claims. From this decree, the defendant, the Savannah and Charleston Railroad Company, appealed through James B. Campbell, attorney. This appeal was dismissed for irregularity without prejudice.

On the return of the case to the Circuit Court, a consent order was passed, by which the road was put into the hands of a receiver, with an advisory board of nine, to be operated, with quarterly reports to the court; the net profits to be applied quarterly to the six per cent. "coupons reported by the referee as proved under the previous order. 2. To all outstanding, unpaid, or unsatisfied coupons for interest then due and payable, or to fall due, in the order of their rank and right of payment, the right of payment or priority of lien to be referred to and determined by the court whenever they may arise after full hearing." 3. If any surplus of net profits should remain, the same to be applied to any other liens, if any, and then ratably to the unsecured debts of said company, the costs and disbursements of the

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cause to be *taxed and paid by the receiver, also proper counsel fees to both plaintiff and defendants, to be ascertained by a referee as thereafter to be ordered.

Charles T. Mitchell was appointed receiver under this order, with salary to be fixed by the advisory board, and to hold his office until the maturity of the six per cent. bonds, unless sooner removed upon the recommendation of the advisory board, and not otherwise, with leave to the Savannah and Charleston Railroad Company, at any time pending the case, upon showing that all interest coupons in arrear were paid, and all other unsecured debts arranged, to have the said railroad and property restored to them, with leave also to the receiver to hold the said road open to private sale upon terms to be reported to the court, at the same time enjoining all creditors who failed to come in under this proceeding from interfering in any way, by suit or otherwise, with said management. While this action was in progress, the comptroller general undertook to take possession of the road under the act of 1869, § 5, 14 Stat., 202, and afterwards the attorney general instituted proceedings to foreclose the statutory lien to the state.

In 1875, the executors of Cutting, holding seven per cent. bonds issued under the act of 1869, supra, filed a petition, in re Daniel Hand, claiming that they were secured by the first and prior mortgage on the road, and prayed a foreclosure thereof. To this petition the Savannah and Charleston Railroad Company, Andrew Simonds, H. H. De Leon, and Edwin Bates, trustees under the second mortgage to secure eight per cent. bondholders, Henry Gourdin, trustee, and Robert Adger, holders of said bonds, William B. Smith and James Conner, holders of the six per cent. bonds, and other creditors of the said company, were made parties defendant. Messrs. Memminger & Jervey filed this proceeding as attorneys for the executors of Cutting. Mr. Campbell answered for the receiver, Hon. A. G. Magrath for Simonds and other trustees, and Mr. Thomas M. Hanckel for William B. Smith. No other answers were filed. In this petition, after stating that the petitioner was the holder of a large amount of the seven per cent. bonds issued under the act of 1869, and secured by mortgage to William Aiken and others,

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*and also other indebtedness in New York, further stated, in paragraph 4, that besides these bonds and mortgages there is also the issue of $505,000 in bonds on the Charleston and Savannah Railroad Company, at an interest of six per cent., which is secured by the statutory lien of the act of 1856, as amended by the act of March 2, 1869, and of which the bonds and coupons held by Daniel Hand, are part and parcel, and that certain other bonds are in the hands of W. B. Smith and James Conner, and of certain other persons too numerous to be made parties, &c., &c., and the petitioner prayed that process might issue against all parties having interests in the premises who have not already become parties to the suit, to wit, certain persons naming them, among them W. B. Smith and James Conner, styled

holders of some of the six per cent. bonds. As has been stated, Mr. Hanckel appeared and answered for W. B. Smith.

The case remained in this condition for a year or more, with negotiations for sale and compromise pending, but without any decisive action; when in 1877 an order referring the matter to Hon. W. Alston Pringle was made with instructions to call in all creditors both of the Savannah and Charleston Railroad Company and the Charleston and Savannah Railroad Company having claims secured by mortgage or other liens upon the property belonging to the Savannah and Charleston Railroad Company to prove their claims, &c. The reference under this order was extended several times, and after all claimants had presented and proved their different demands, the real contest began between the sixes and sevens as to the effect of the act of 1869 postponing in favor of the sevens the statutory lien created by the act of 1856, which had secured the sixes. In this conflict, it is conceded on all hands that Mr. Hanckel was at least the leader on the question presented in behalf of the sixes, with a most formidable array against him on the other side. He was the first in the field, by virtue of the fact that his client, W. B. Smith, was the only one of the sixes summoned who answered; James Conner, for satisfactory reasons to himself, finding that he could not ally himself with the sixes, and the other sixes, on account of their number, not having been specially

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summoned. They *were, however, called in, and were represented by their respective attorneys afterwards.

The referee finally reported in favor of the sixes. This report, after a most serious, earnest, and able contest, both in the Circuit and Supreme Court, was sustained, and the fruits thereof were awarded to the sixes by the court of last resort. Mr. Hanckel's appearance in the case was by authority of Mr. Smith, who had been selected by the petitioners, executors of Cutting, as a defendant representing the class of sixes to which he belonged; and having thus become a leader in the beginning, he so continued to the end, and his voice was the first and the last heard in behalf of the common right of the sixes. It is stated that he was greatly aided by Messrs. Buist & Buist, Mr. Brawley, and Mr. Lord, and by the respective attorneys of the different holders of the sixes, other than W. B. Smith, after their bonds had been proved; or at least that all of these attorneys rendered valuable services in support of the position taken by the sixes, that the act of 1869 postponing the statutory lien was unconstitutional. But Mr. Hanckel's client was the only one of the sixes who had been made a representative defendant, or, to use the language of the counsel, a "head creditor." He had been especially summoned by process; the others had been called in by advertisement, and made themselves parties by responding to the call, except Daniel Hand and those already in court in his action, upon which the executors of Cutting had engrafted their proceeding which precipitated the conflict between the sixes and sevens, and out of which this appeal now comes.

In the meantime, while the case of Daniel Hand was pending, and before the executors of Cutting intervened, and in fact before the appointment of the receiver above, a question arose as to the liability of the road for taxes, and a proceeding was instituted in the United States Court by Mr. H. E. Young, attorney, at the instance of Mr. Miller, "a large stockholder," it is said, to restrain the collection of these taxes, the amount involved being very large. An injunction was obtained on the Circuit; but after reaching the Supreme Court of the United States, the case was abandoned. The question again arose in the state courts, but finally the road was declared exempt. Several mat-

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ters of litiga*tion growing out of claims of certain parties, Potter & Trenholm, and others, to land affecting the road-bed and right of way, also came up, in which it seems that Mr. Young represented the company, or the receiver. For services in these respects up to October, 1874, it seems that Mr. Young was allowed and paid out of the income of the road the sum of $3,850, under an order of Judge Reed dated April 16, 1875, directing the receiver to pay the same, and other expenses and counsel fees embraced in a report made by Wilmot G. DeSaussure on these matters. This amount, in the claim now made by Young, has been credited on his account for services rendered on the question of taxes, and his present claim consists in additional services as to that question and the other matter above referred to.

Some time in 1876, one Richardson, having purchased at a tax sale a large tract of land, consisting of some 2,000 acres, located in Beaufort county, belonging to the Savannah and Charleston Railroad Company, and this fact being reported by the superintendent to Mr. H. E. Young, as one of the solicitors of the road, Mr. J. W. Moore, attorney at Hampton, was employed by Mr. Young, representing the company, to bring action for the recovery of this land, the terms being that the receiver would pay actual outlay and one-half of the recovery, land and damages. This land was ultimately recovered, and has been sold as a portion of the property of the company, the proceeds being incorporated in the general fund held for distribution among the sixes. Mr. Moore has presented a claim of fee of $600, which upon the testimony has been allowed in the decree of Judge Cothran.

The above presents the facts of the case

now before us, upon which the questions of law as to the fees of the different attorneys arise. Judge Cothran ordered the master "to pay out of the common fund in his hands to Messrs. Hanckel, Buist, Brawley, and Lord, upon their joint receipt, the sum of $10,000 as a fee for professional services rendered by them in the above entitled cause," and to Mr. Moore the sum of $600, "and that the several counsel representing other successful sixes have leave to file their claims in the office of the master, stating specifically, &c., the sums claimed by them for their services, and exhibiting such proof as they may deem

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proper to sustain them." He also *ordered "costs to be taxed for the counsel above named, to whom fees are allowed by the decree."

Messrs. Simonton & Barker, Hayne & Ficken, and Asher D. Cohen, representing successful sixes, appealed upon exceptions. These exceptions raise three questions: 1. That the common fund in court ought only to be charged with the payment of the fees of such counsel as had authority to represent the successful sixes as a class. 2. That the judgment of the Supreme Court, April 12, 1879 (12 S. C., 314), severed the rights of the several sixes, and that the only issue thereafter was an individual contest, and that the "common fund was not thereafter chargeable with fees for services rendered by the counsel of the individual bond holders;" and 3. That his honor erred in decreeing that costs should be taxed in favor of Messrs. Hanckel, Buist, Brawley, and Lord, instead of to the counsel representing the successful sixes.

Mr. Asher D. Cohen, in addition to the above, filed other exceptions as attorney for the executor of Townsend. These exceptions, however, are in substance the same as the above, and embracing an exception to the fee of Mr. Moore out of the common fund. Messrs. Mitchell & Smith excepted upon several grounds, all turning, however, upon the point that the common fund should not have been charged with the fees allowed, as these attorneys were not authorized representatives of the sixes; and Messrs. Whaley and Magrath excepted for William Aiken et al., trustees, and for James B. Campbell, on the ground mainly, that their clients being trustees in possession, and necessary parties, it was their duty to resist the efforts of the comptroller general to seize the property in dispute, which successful resistance enured to the benefit of the sixes, and the expenses, counsel fees, &c., should be chargeable on the common fund, decreed to the sixes.

The underlying principle in all these cases, where one has been allowed compensation out of a common fund belonging to others, for expenses incurred and services rendered in behalf of the common interest, is the principle of representation or agency. Where such compensation has been allowed, the party claiming has been in some way the recognized and authoritative representative

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of the *whole and therefore authorized to contract for the whole. Thus, executors, administrators, and other trustees, being the legal representative of the parties interested in the trust fund or property, have been usually allowed credit for all necessary and reasonable charges incurred by them in the proper management and protection of the trust fund.

So, too, where the parties having a common interest, or are very numerous, and one of the class institutes proceedings for himself and all others belonging to that class, these latter afterwards coming in and claiming to share in the successful result, the law, regarding the first party as the representative of the latter, has recognized his right to charge to the common fund or property such reasonable and proper expenses, including counsel fees, as he may incur for the common and general interest.

This principle has been frequently enforced in behalf of a plaintiff in creditors' bills, and it also applies where the common interest belongs to the defendants, who being so numerous that one is selected and brought in by regular process as a representative of the class, while the others are called in by advertisement, who may come in or not as they choose; but if they do come in, must do so under the principle that the common fund shall be taxed with the reasonable expenses incurred by the representative. Thus it will be seen that such charges are allowed not simply and alone because services have been rendered which have been beneficial to the common interest, but upon the ground that they were rendered by the authority of those having the common interest exercised by the representative, the compensation for which was to be chargeable to the fund protected or recovered.

No one can legally claim compensation for voluntary services to another, however beneficial they may be, nor for incidental benefits and advantages to one, flowing to him on account of services rendered to another, by whom he may have been employed. Before legal charge can be sustained, there must be a contract of employment either expressly made or superinduced by the law upon the facts. And thus it is, as we have said above, that in the case of executors, administrators, and other trustees, and in creditors' bills, and suits of that nature, where

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the representative of a class *is the principal and first actor, either as plaintiff or defendant, the class being so numerous as not to be conveniently made parties individually, the law superinduces a contract on the part of all having a common interest, that the common property shall be chargeable with

the reasonable contracts as to fees, expenses, &c., of the representative. Section 140 of the code provides, that "when the question is one of a common or general interest of many persons, or when the parties are numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." See Mr. Pomeroy's discussion of this section, and the former equity practice. Pom. Rem., § 389 et seq. This is the principle, as we understand it, upon which the questions involved here must be determined.

The class which has been successful at the end of this protracted and vigorously conducted contest, is the class known throughout the case under the name and style of the sixes. They had a common interest in the struggle, and the property has been sold and the proceeds adjudicated to them. They were not all summoned into the court by individual process; on the contrary, the most of them came in under the call by advertisement—all except Daniel Hand and those who stood with him, having unfunded coupons of the six per cents., they being already in court, and W. B. Smith and James Conner, the two last being especially summoned as holders of sixes.

Now, who of these parties was the representative of the sixes? No one but Smith, James Conner having declined to appear for them. Daniel Hand and those who stood with him in possession of unfunded coupons of the sixes, it is true, were interested in the question upon which the case ultimately turned, but Daniel Hand's proceeding was expressly for himself and "those who stood in the same right and plight with himself." He did not in any way claim to act for the benefit of the sixes generally, nor did he ask that they should be made parties either by process or by call, and but for the interposition of the executors of Cutting, Daniel Hand's case might have terminated without the sixes appearing. We do not see in the "Case" that the sixes as a class had any standing in court until the sevens raised the main question involved between themselves

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and the sixes and summoned *W. B. Smith as one of the holders of the sixes, omitting to serve the others because too numerous. Under these circumstances we must regard Smith as the representative of the sixes, and their only representative as a class, and consequently the only party authorized to charge the common fund with expenses.

Mr. Hanckel seems to have been the attorney employed by Smith. He answered for Smith, and it appears from several indorsements on the papers connected with the different references that he signed his name as the attorney of the sixes. Upon these facts we think that Mr. Hanckel is entitled to a proper fee out of the common fund in court other than that portion going to Daniel Hand and those who stood with him with unfunded coupons of the six per cent. bonds. No doubt it is true, that after the conflict commenced between the sixes and sevens, that Messrs. Buist & Buist and Brawley, who were representing unfunded coupons of the sixes, and Mr. Lord, did valuable and able services on the question of the unconstitutionality of the act of 1869, postponing the statutory lien of the state in favor of the sevens, but at whose instance, and by whose authority was this done? Was it done by the authority of the sixes or their representative, W. B. Smith? Can these parties come in under the principle we have laid down above? Do not they rather occupy the position of rendering an incidental service, to parties not represented by them, but derived to them because their rights were involved in the same question, as to which they had been engaged for others?

It may be that, inasmuch as Daniel Hand's suit was in the nature of a creditor's bill for those holding unfunded coupons, his attorneys, Messrs. Buist & Buist and Brawley (if the latter was engaged by Daniel Hand), would be entitled, under the above principle, to proper fees out of so much of the common fund as the holders of such coupons may be entitled to. Mr. Lord, it appears, represented those of the sixes who at one time had been represented by Mr. Brawley, and who had been turned over to Mr. Lord by Mr. Brawley, when he came to the conclusion that they were in conflict with the unfunded coupons standing with Daniel Hand.

Mr. Lord, it is admitted, rendered most ef-

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fective and valuable *assistance in the interest of the sixes, but the question again recurs, upon whose authority? Was it by contract, either express or implied, made by one who could bind the common fund of the sixes? We do not find any allegation or statement of that kind in the case, and we do not see, therefore, how the claim, however meritorious in other respects, can be sustained against the protests of the sixes. This court has no power to subject the property of citizens to claims, except such as may be founded upon legal or established equitable principles making such property liable. It has no power to adjust claims upon grounds of abstract moral equity. On the contrary, a claim to be sustained by the courts must amount to a cause of action under some settled legal or equitable principle. Where are the facts in this case which would constitute a cause of action by these attorneys against the sixes?

The same principle which excludes Messrs. Buist & Buist, Brawley, and Lord will also exclude Mr. Young. His services in protecting the road from taxation and other claims may have enured to the ultimate advantage of the sixes. Yet it was one of those incidental advantages sometimes following acts

which go beyond the object of the immediate employment and redound to the benefit of others besides the party authorizing it and for whom the act was performed. The same may be said as to the claim of William Aiken and Geo. W. Williams, and their attorney, Mr. Campbell. For such benefits the law has given no pecuniary compensation.

The claim of Mr. Moore, we think, occupies a different position from those we have been discussing. He was employed by the receiver or the solicitors of the company to sue for a tract of land, claimed by the company, then in the possession of another. He undertook the service under a special contract, to wit, one-half of the recovery, land and damages. He succeeded in recovering the land, which has been incorporated into the general property, his half as well as the other. The land has been sold and the proceeds are now in the common fund. After the recovery of the land, his special contract was subject to specific performance, and he might no doubt have claimed a partition. This was not done, however. On the

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contrary, as we have said, the *land has been sold and the proceeds are in court. We think he may pursue these proceeds and establish his claim against the fund instead of the land, which has been done substantially; and therefore there was no error in allowing his claim.

Such costs as the statute prescribes should be taxed in favor of the successful parties.

We repeat that it is not hereby intended to intimate that any of the gentlemen engaged in this case did not render valuable services for which as between attorney and client they should be paid, but simply to announce who are entitled by law to have a judgment of the court for fees out of the common fund.

It is the judgment of this court that the decree of the Circuit Court be modified as herein stated, and that the case be remanded to be carried out in accordance herewith.

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KERNGOOD v. DAVIS.

(November Term, 1883.)

[1. *Judgment* ⊂⊃778.]

A testator, C., left property in trust for his daughter for life, with remainder to the heirs of her body, share and share alike. H., a son of this daughter, received from his father and mother, after his marriage, a large estate in lands and negroes (the latter being part of the C. estate), for the value of which he promised to account on the death of his parents, or either of them, if necessary, for purposes of equalization with his brothers and sisters. H. died, and then his mother, and judgments were obtained against the executrix of H. By a consent decree in a cause to which H.'s widow and children, his brothers and sisters, and these judgment creditors were parties, a plantation of H. was vested in his children, in satisfaction of their interest in the C. estate, and discharged from the lien of the judgments, and the said brothers and sisters were ordered to pay these judgments, which were thereupon marked satisfied as against H.'s estate. But this decree was not enrolled, nor was execution sent to the county in which was a plantation of the C. estate until many years afterwards, and meantime these brothers and sisters had mortgaged their interest in such plantation. *Held*, that this decree did not create a lien upon the interests of the brothers and sisters in the C. lands, until lodged in the county where the lands were, and this lien was therefore postponed to the lien of the intermediate mortgages.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1339; Dec. Dig. ⊂⊃778.]

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[2. *Judgment* ⊂⊃772.]

* But the evident scheme of the decree being an arrangement by which these parties took the interest of their brother's children in the C. lands and were to pay the judgments, the judgments not being paid were entitled to hold a lien upon such children's interest in said lands from the date of the decree.

[Ed. Note.—Cited in Clark v. Wright, 24 S. C. 535.

For other cases, see Judgment, Cent. Dig. §§ 1329–1332, 1335, 1337; Dec. Dig. ⊂⊃772.]

[3. *Mortgages* ⊂⊃169.]

The mortgagees were chargeable with notice that the interest of these infant co-tenants was not expressly transferred to the others, and that these others, the mortgagors, were directed to pay said judgments.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 386–388; Dec. Dig. ⊂⊃169.]

[4. *Judgment* ⊂⊃651.]

These children were entitled to share per capita with their uncles and aunts in the C. lands, but their interest having been treated in the consent decree as a share per stirpes, all parties are now bound to so accept it.

[Ed. Note.—Cited in Dukes v. Faulk, 37 S. C. 266, 16 S. E. 122, 34 Am. St. Rep. 745; Parrott v. Barrett, 70 S. C. 205, 49 S. E. 563; Rembert v. Vetoe, 89 S. C. 213, 71 S. E. 959.

For other cases, see Judgment, Cent. Dig. § 1163; Dec. Dig. ⊂⊃651.]

[5. *Covenants* ⊂⊃47.]

An informal covenant of warranty in a mortgage *held* to have been intended as a general warranty, and to operate as such.

[Ed. Note.—Cited in Bleckeley v. Branyan, 26 S. C. 430, 2 S. E. 319; Butler v. Butler, 67 S. C. 216, 45 S. E. 184.

For other cases, see Covenants, Cent. Dig. § 47; Dec. Dig. ⊂⊃47.]

[6. *Mortgages* ⊂⊃459.]

A complaint for foreclosure alleged that a judgment of record had been paid. *Held*, that the court, under such allegation and the facts proved, and in order to settle the priorities of lien, might raise an estoppel against the assertion of such judgment.

[Ed. Note.—Cited in Colton v. Galbraith, 35 S. C. 536, 14 S. E. 957.

For other cases, see Mortgages, Cent. Dig. §§ 1343–1347; Dec. Dig. ⊂⊃459.]

[7. *Estoppel* ⊂⊃23.]

A party holding a judgment lien on the interest of a co-tenant in a tract of land, joined with all the co-tenants in mortgaging this land, with covenants of general warranty. *Held*, that he was estopped from asserting his judgment lien as against this mortgage, but not as against intermediate mortgages.

[Ed. Note.—Cited in Pee Dee Naval Stores Co. v. Hamer, 92 S. C. 426, 75 S. E. 695.

For other cases, see Estoppel, Cent. Dig. § 58; Dec. Dig. ⊂⊃23.]

Before Cothran, J., Sumter, October, 1883.

The facts of this case are stated in the opinion of this court. The Circuit decree was as follows:

This cause was noted in the calendar as heard at the October term of the Court of Common Pleas for Sumter county, and by agreement the argument was heard afterwards in Columbia, on November 14, 1883. The land described in the pleadings is under order of sale by a previous decree in the cause, and is advertised to be sold by the master of Sumter county on sales-day in December next, now nearly at hand. It was deemed expedient by the parties in interest to settle the conflicting claims for priority of liens with a view to promote a more favorable sale of the premises, and to facilitate this purpose the extraordinary hearing was had.

The case has been argued upon all sides with great zeal and ability, but the time is so

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short and the necessity of a speedy *decree is so much greater than for an elaborate one, that I shall undertake to do little more than give a brief history of the case and state the conclusions obtained, leaving it, in case the cause should go further, to the counsel in whose favor I have decreed to sustain my conclusions by the very able argument delivered at the hearing. The facts of the case extending over a period of seventy years (the testator R. L. Champion, under whose will the controversy arises, having died in 1813), would of themselves make a volume. It is enough barely to mention a few of the complications: litigation for nearly one-third of that time, death of parties, substitution of others, debtors insolvent, contention among creditors, a family settlement, a sale of the premises as forfeited to the state for taxes unpaid—all go to show the difficulty of unravelling, and perhaps the necessity of cutting, this Gordian knot.

The first question in the case involved the validity of a patent issued by the executive of the state to Mrs. Sarah E. DeSaussure for the land in controversy, known as the Champion place, in Sumter county, containing some 2,400 acres, and said to be very valuable. The land was first exposed to sale December 31, 1877, for taxes due for the year 1876, and for the want of a bid for the same, was not sold. There was no redemption of the premises, and finally, on the first Monday of September, 1879, the said land was offered for sale as land forfeited to the state and was bought for Mrs. Sarah E. DeSaussure by her attorney, the arrearages of taxes amounting to $545.18 paid, and a patent issued her by the governor of the state for the whole tract.

It was urged in behalf of the patentee that the exhibitions of the patent was proof of good and sufficient title, but unsuccessfully, and the patent was fiercely assailed by all the other parties in interest as the common enemy of all. After much contention it was suggested that if the holder of the patent would consent to assume the position of a trustee for the lien creditors, in the purchase made, and not insist upon the validity of her title, but agree to cancel the same, that the amount of money paid by her for the land at the tax sale, with interest, would be refunded to her. To this all parties agreed, and this matter is happily eliminated from the case.

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*The next question is, as to the priority of liens. The following is a list of those:

1. The Ellen Stewart claim. This was a sealed note of Eliza C. DeSaussure, A. B. DeSaussure, and J. M. Davis, for $500, dated July 13, 1874, payable January 1, thereafter, with interest from date, and after maturity at the rate of one per cent. per month. Mrs. Eliza C. DeSaussure gave to the payee a mortgage of her interest in the land in controversy, to secure payment of said note.

2. The Clyburn claim. A bond of M. L. Davis, S. A. Davis, John M. DeSaussure, jr., E. C. DeSaussure, and L. C. DeSaussure, to W. D. McDowell, receiver of the estate of Workman, dated January 28, 1875, conditioned for the payment of $3,500 on January 1, 1876, with interest from date at the rate of twelve per cent. per annum, payable annually until the whole be paid; indorsed (in the handwriting of J. M. Davis, and admitted by Mr. Hay to be correct) "$600 of this bond bears interest from the date of the bond, the balance $2,900 having been only paid over today, will bear interest from this date, March 16, 1875." A mortgage of the interest of all the obligors in the land in question was executed and delivered on the same day to secure the payment of said bond.

3. The Simonds claim. A bond of J. M. Davis, L. D. Davis, L. C. DeSaussure, Eliza C. DeSaussure, and A. B. DeSaussure, to Louis D. DeSaussure, dated April 25, 1876, conditioned for the payment of $2,086.24, with interest at the rate of twelve per cent. per annum, from January 1, 1875, payable annually until the whole amount of principal and interest is paid—the principal to be paid in two equal successive annual instalments, the first whereof is to be paid on or before January 1, 1877. Eliza C. Davis, Louisa D. Davis, and Lloyd C. DeSaussure at the same time executed and delivered to Louis D. DeSaussure a mortgage of all their interest in the said lands to secure the payment of said bond. This bond has been duly assigned and transferred to Andrew Simonds.

4. The Kerngood claim. A bond of John M. DeSaussure, sr., Louisa D. Davis, John M. DeSaussure, jr., Sallie D. Davis, Eliza C. DeSaussure, and Lloyd C. DeSaussure, dated

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May 27, *1877, conditioned for the payment to George Alden, on or before January 1, 1878, of the sum of $1,516.65, with interest

from January 1, 1877, at seven per cent. per annum. All the obligors at the same time executed and delivered to the obligee a mortgage of their interest in the land in question to secure the payment of said bond. This bond was afterwards duly assigned and transferred to the plaintiff, Tobias Kerngood.

5. The claims of Witte Bros. These consist of sundry judgments obtained by James D. Matheson, James D. Kirkpatrick, administrator, Priscilla B. Perkins, executrix, and Mary E. Shaw, administratrix, against the estate of Henry W. DeSaussure, deceased. These by assignment all became the property of one Sanders, who in turn pledged them as security to Witte Bros., who present them here. As the main contention in the matter of priorities arises in regard to these claims, it is proper to define just here their true nature. Henry W. DeSaussure was the eldest son of the late John M. DeSaussure, who had intermarried many years ago with Eliza Hester Champion, daughter of Richard L. Champion, the devisor of the lands here in question. Henry W. DeSaussure was killed in one of the battles around Richmond, in June, 1862; at his death he left a widow and four children surviving.

After the close of the war, amid the wrecks of a large fortune, an effort was made to adjust his affairs. To this end, his widow and executrix, in behalf of herself and her infant children, filed a bill in equity on December 21, 1869, entitled for "injunction, dower, partition, to marshal assets, and for relief." Most of the parties to the proceedings now before the court were made defendants in that bill; amongst others the assignors, then the holders and owners, of the claims presented here by Witte Bros. The injunction sought by that proceeding was to stay the hands of these assignors then holding judgment against the executrix of the will of the said Henry W. DeSaussure. It was an omnibus bill, as its title imports, but in the latitude which is allowed in the matter of family settlements (for this was obviously such), no plea for multifariousness was interposed, and on November 14, 1870, Hon. S. W. Melton, then the presiding judge of the fifth

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*Circuit, made a decree in the cause, which was assented to by all parties to the suit.

By the fourth clause of the will of Richard L. Champion, who departed this life in the year 1813, he devised the land in question here to his daughter Eliza Hester, afterwards the wife of John M. DeSaussure, sr. (the mother of the said Henry W.) for life, with remainder to the heirs of her body living at the time of her death. She died in 1864, being predeceased by her son, Henry W. It was conceded in the consent decree of Judge Melton that the children of Henry W. were entitled to a share of the Champion land at the falling in of the life estate of their grandmother. The estate of Henry W. being insolvent, James M. Davis was appointed receiver of the same.

Besides the interest which Henry W.'s children had in the Champion lands as tenants in common with their uncles and aunts, their father was seized at the time of his death of other valuable lands in Kershaw county and of a house and lot in the town of Camden. It was manifestly the purpose of the family settlement already referred to, to save a home and farm for the widow and children of Henry W. DeSaussure. This appears from the terms of the decree of Judge Melton, and without encumbering this decree with the contents of that, I shall only cite the sixth paragraph:

"It is further ordered that the said James M. Davis, receiver as aforesaid, after applying the assets remaining in his hands necessary to make the payments of the said Mary R. DeSaussure, hereinbefore directed, to pay therefrom the costs of this suit (the same to be apportioned and charged to the parties liable therefor, as ascertained by the further orders of this court), and to apply the balance of said assets, when collected, to the payment of the demands of the other creditors of the estate of said Henry W. DeSaussure, deceased, pro rata, to wit, the said James D. Matheson, James D. Kirkpatrick, Priscilla B. Perkins, and Mary E. Shaw, and that the judgments at law upon the said claims be satisfied before the judgment creditors thereof receive any benefit from this decree. It is further ordered that the defendants, Mary Louisa Davis, Eliza C. DeSaussure, John M. DeSaussure, jr., Sarah Amelia

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Davis, and Lloyd C. DeSaus*sure, do pay the said creditors, respectively, whatever may remain due to them on their said claims after the application thereto of the proceeds of the said assets in the hands of the said James M. Davis, receiver aforesaid, as hereinbefore directed."

Paragraph 7 in terms authorizes the remaindermen under the will of Richard L. Champion, who are adults, and John M. DeSaussure, sr., the father of the infant, Lloyd C., whenever they may deem it advisable, to sell the land and personalty to pass under the said will, &c. These claimants, or their assignees, were parties to that proceeding, and assented to it. The right to sell absolutely certainly includes the right to make a conditional sale; the greater including the less.

The decree filed in November, 1870, was never enrolled. It is worthy of remark also that it was made after the adoption of the code of procedure, and if it had been enrolled, would not ipso facto have become a lien upon land. In the meantime, the several mortgages exhibited here were executed by the defendants of their interests in the Champion lands, all of which were upon record before any steps were taken by the judg-

ment creditors herein to file transcripts of their judgments in Sumter county, where the land in controversy lies. It cannot, therefore, be contended that the Witte claims, as judgments, can have priority to the recorded mortgages.

It is argued, however, with great ingenuity and force, by the counsel for Witte Bros., that by virtue of the operation of the act of 1791, then of force, a statutory lien was acquired by these creditors of Henry W. DeSaussure, the balance of whose claims, after applying whatever was available in the hands of the receiver, J. M. Davis, were to be paid by these tenants in common, defendants here, under the terms of Judge Melton's decree, and out of their interest in the Champion lands in Sumter county. There is no doubt but that in cases of partition by means of sale, as perhaps where contribution in money to make equality was decreed, that this insidious security prevailed, and without attempting to follow or to answer the learned argument of Mr. Haynsworth, it is enough perhaps to say that it has not convinced me. I cannot admit the premises upon which the

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argu*ment was based, to wit: that this was ever a case of partition at all. There was no land sought to be made the subject of partition in Kershaw county. There was a scheme for the exchange of the interest of Henry W.'s children in the Sumter lands for what was thought to be a shelter and a farm for them in Kershaw, and this upon certain conditions, it is true in part not complied with, but to which the creditors assented.

Besides, I think the search would not be rewarded with success, however diligently made, for a case where proceedings could be instituted and sustained in one county for partition of lands in another, unless there should at the same time be partitionable lands in the county where the proceedings were instituted, by laying hold of which the court alone could acquire jurisdiction of the lands in another county. This disposes of the main question in the case, to wit, that of the priority of the several claimants, and in the order in which they have been stated herein.

There are, however, some minor questions which have been brought to my attention, and which I will now attempt to dispose of. The first of these is as to the effect of John M. DeSaussure, sr., joining in the Kerngood mortgage. It appears that he was the assignee of the Villipigue judgment by reason of having paid off the same. It further appears that that judgment is the oldest lien upon the property of John M. DeSaussure, jr. Should the land in question sell for its real value, it is hardly possible that this question can be of any practical application in the case, for the plaintiff's debt will probably, in any event, be paid, having priority of the claims of Witte Bros. But in case it becomes important in distributing the proceeds of sale, I hold that John M. DeSaussure, by giving the mortgage to Kerngood, with a covenant of warranty, is estopped from claiming any right to have his judgment against John M., jr., paid to the prejudice of the plaintiff, Kerngood, his mortgagee.

The next question arising is as to the manner of computing the interest upon the Clyburn and Simonds bonds. The terms of the bonds severally relating to the matter of interest are almost identical, and involves the consideration of the distinction between the computation of annual interest and compound interest. The difference, except where

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the amount is large and the length of *time great, is hardly appreciable; still there is a difference, and the parties raising the question are entitled to have it considered and settled. There is nothing in the terms used to justify or allow the compounding of interest upon either of these bonds—that is to say, there are no stated times up to the time of making the final calculations when interest is to be added to principal, and the sum so found made a new principal. Hence it follows that the computation should be made upon the rule of annual, and not of compound, interest. The terms "until the whole be paid" in the Clyburn bond, and those of like import in the Simonds bond, clearly support the right to the rate of interest stipulated in the bonds respectively until they are paid and satisfied.

There were some other questions raised in argument at the hearing, but not appearing in the pleadings, nor in the shape of exceptions, and I do not know that I apprehend them very clearly. One as to contribution to John M. DeSaussure, sr., by his co-obligors on the Kerngood bond, in the event that he is estopped from claiming upon the Villipigue judgment as against Kerngood's mortgage. The other as to the rights of the several cotenants (so-called) to homestead exemptions. As to the latter, it is difficult to see under the decisions how as mortgagors they can set up their claims to homestead as against their mortgagees. If such exists, as against the judgments of Witte Brothers, as to whom alone they would be available, their rights must be asserted in the manner prescribed by the act of assembly. They cannot be considered here. "Sufficient unto the day is the evil thereof."

Wherefore it is ordered, adjudged, and decreed as follows:

1. That from the proceeds of sale of the land described in the complaint the master do pay, as heretofore ordered, the taxed cost of this case, and also state and county taxes if any be due, and a fee of one hundred dollars to the referee, W. D. Trantham, esq.

2. That he pay to Mrs. Sarah C. DeSaussure, or her attorney, the sum paid by her as trustee for the lien creditors herein at the forfeiture sale of the said lands, together

with lawful interest thereon to the day of payment to her, and that she deliver up her patent to be cancelled by the clerk of this court.

3. That from the balance of purchase mon-

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ey in his hands he *pay to the several lien creditors, in the order set down herein, the several debts due to them, with interest calculated thereon in the manner herein determined, having due regard in such payments to the interests and liabilities of the several obligors.

4. That the surplus (if any be), after paying the claims of Witte Brothers, be held subject to the further order of the court.

5. That in the matter of contribution to the defendant, John M. DeSaussure, sr. (if he have any such right), as well as touching the adjustment of the rights of the co-tenants (so-called) inter sese, the parties being all before the court, leave is hereby given to them to apply at the foot of this decree for such orders as they may be advised are necessary and proper.

Witte Bros. appealed upon grounds which were substantially as follows:

1. That his honor erred in not holding that Witte Bros., as assignees of the judgments, were entitled to the payment of their claims to the extent of 4–10 parts, and also 4–28 of one other tenth part of the net proceeds of the sale of the lands ordered to be sold in this case, after the payment of the costs and taxes and referee's fee, and of the amount decreed to be paid to Mrs. S. C. DeSaussure.

2. That his honor erred in not holding that by the decree of Judge Melton the said shares of the said children of H. W. DeSaussure in the said lands were to be transferred to and vest in the other tenants in common, or remaindermen, under the will of Champion only upon the payment by them to the said judgments of the balances which should remain due, after the application thereto of the proceeds of the assets directed in said decree of Judge Melton, to be applied thereto, until which payment they were to have only an inchoate right therein, not to become complete and perfect until the payment by them of the said balances; and that said balances not having been paid, the legal estates and interests of the said children have never been transferred to, or vested in, the other tenants in common, or any of them, and that they derived or acquired under said decree only the equitable right to have title to the said shares of the said children of Henry, upon the payment of the said bal-

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ances and interest thereon; that *the payment of the said balances was to be the consideration of the transfer or vesting of said shares; and that by the provisions of said decree the right to receive payment of the said consideration was assigned and transferred to the said judgment creditors. And that these appellants, as assignees of the said balances, are entitled to the application to their said claims of the said 4–10 parts and 4–28 of one other tenth part of the net proceeds of the sale of the said lands.

3. That his honor erred in matter of fact in this, that he states that there were no lands in Kershaw county to which the children of Henry W. DeSaussure and the other co-tenants under the will of Champion were entitled, which were sought to be made the subject of partition in the proceedings in the Court of Common Pleas for Kershaw county, referred to in the decree; which statement was erroneous.

4. That his honor erred in not holding that the Court of Common Pleas for Kershaw county had jurisdiction for the partition of the said lands, and that the proceedings in the said cause in Kershaw county were, among other things, for the partition of the said lands among the parties entitled thereto both as remaindermen under the will of Champion and as distributees of Caroline DeSaussure, deceased. And that under the provisions of the act of 1791, the shares of the said children of Henry in the said lands were to vest in the other tenants in common, upon the payment by them of the said balances, which they were ordered in and by the said decree to pay.

5. That his honor erred in his construction of paragraph 7 of Judge Melton's decree, and erred in not holding that said paragraph 7 authorized the execution of a deed of conveyance only of the interest of the then minor, Lloyd C. DeSaussure, in the said lands and personal property and the receipt by his father of such portion of the purchase money as may belong to the said Lloyd; and did not determine or adjudge the interest of the said minor to be one-fifth of the whole of said lands and personalty, nor authorize the sale or conveyance of the shares therein of the children of Henry W. DeSaussure, nor adjudge that those shares had vested in and then belonged to the other co-tenants, but that it only authorized the sale of the inter-

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est of the said minor, Lloyd, and that *that interest, as to the shares of said children of Henry, was the right to have title made to them when they should be paid for; and that said paragraph 7 was only a provision for advancing the interests of the minor, Lloyd, without in any way having any reference to or affecting the rights of the children of Henry, or of the said judgment creditors.

W. D. Trantham, administrator, appealed on the following grounds:

1. That his honor erred in decreeing upon the pleadings and evidence "that John M. DeSaussure, by giving the mortgage to Kerngood with a covenant of warranty, is estopped from claiming any right to have his judgment against John M. DeSaussure, jr., paid to the prejudice of the plaintiff, Kerngood, his mortgagee," because no such ques-

tion was made either in the pleadings or by the evidence, or by way of exception.

2. That his honor erred as matter of law in so decreeing.

3. That his honor erred in not decreeing that Wm. D. Trantham, administrator of J. M. DeSaussure, sr., was entitled to contribution by his co-obligors on the Kerngood bond in the event that he is estopped from claiming upon the Villipigue judgment as against Kerngood's mortgage.

4. That his honor erred in adjudging and decreeing that the master, after paying costs, taxes, &c., "pay to the several lien creditors in the order set down therein the several debts due to them," while no decree is made for the payment of the Villipigue judgment, or any part thereof.

5. That Wm. D. Trantham, administrator, was not, by reason of anything contained in the mortgage of J. M. DeSaussure, sr., and others, to George Alden, estopped from claiming the right to have the judgment of Villipigue against J. M. DeSaussure, jr., paid out of the share of the latter in the lands in preference to all other claimants thereon.

Messrs. Haynsworth & Cooper, for Witte Bros.

Messrs. Moise & Lee, for Kerngood.

Messrs. DeSaussure & Son, for Louis D. DeSaussure.

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*Messrs. Blanding & Blanding, for Trantham, administrator.

Mr. J. T. Hay, for Clyburn, receiver.

April 14, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. On May 27, 1877, John M. DeSaussure, sr., Louisa D. Davis, John M. DeSaussure, jr., Sallie D. Davis, Eliza C. DeSaussure, and Lloyd C. DeSaussure, in order to secure their bond for $1,516.65, besides interest, executed and delivered to one George Alden a mortgage of lands thus described: "All that piece or parcel of land situate in the county of Sumter, in said state, containing 2,351 acres, be the same more or less, bounded northwest and north by lands of James M. Davis, northeast and east by the public highway to Stateburg, south by lands of James M. Davis, west by the Wateree River, being lands devised by will of Richard L. Champion to his grandchildren, parties of the first part, and part purchased by the executors for the use of his will," &c. The bond and mortgage were assigned to Tobias Kerngood, who instituted these proceedings to foreclose the mortgage on the premises aforesaid.

It was discovered that there were other creditors of the mortgagors, devisees under the will aforesaid, who claimed to have older and superior liens upon the said lands, and such claimants were made parties defendant, as follows:

First, William D. Trantham, as administrator of John M. DeSaussure, sr., claimed a judgment, M. B. Villipigue v. John M. DeSaussure, jr., entered in Kershaw county, October 10, 1867, for $1,180, besides interest and costs, and in Sumter county, November 30, 1867, and levy made by the sheriff of Sumter on the interest of the defendant in the said premises; which judgment was assigned to John M. DeSaussure, sr., February 22, 1868.

Second, the claim of Ellen Stuart. Eliza C. DeSaussure, A. B. DeSaussure, and J. M. Davis, executed a bond to Ellen Stuart for $500, due January 1, 1875, secured by mortgage July 13, 1874, executed by Eliza C. DeSaussure, of all her interest (said to be one-fifth) in the said Champion lands.

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*Third, the Clyburn claim. M. L. Davis, S. A. Davis, John M. DeSaussure, jr., E. C. DeSaussure, and L. C. DeSaussure gave bond to M. D. McDowell, receiver of the Workman estate, June 1, 1876, for $3,500, secured by mortgage of same date, on the aforesaid premises, being the same devised to them by the will of their grandfather, Richard L. Champion.

Fourth, the Simonds claim. J. M. Davis, L. D. Davis, L. C. DeSaussure, Eliza C. DeSaussure, and A. B. DeSaussure gave bond to Louis D. DeSaussure April 25, 1876, for $2.086.24, with interest, &c., secured by mortgage of same date, executed by Eliza C. DeSaussure, Louisa D. Davis, and Lloyd C. DeSaussure, of all their interest in the said premises. This bond has been assigned to Andrew Simonds.

Fifth, the claim of Mrs. Sarah E. DeSaussure, under letters patent conveying to her as lands forfeited to the state for nonpayment of taxes, the Champion lands in Sumter county. As appears by the decree, this claim was adjusted at the hearing below, the claim being abandoned, and the amount of purchase money paid by Mrs. DeSaussure and the interest thereon to be refunded to her out of the proceeds of sale.

Sixth, the Kerngood claim. This is the claim for $1,516.65 secured by mortgage of the same premises first stated, upon which claim these proceedings were instituted. The mortgage bears date May 27, 1877, includes a warranty of the premises mortgaged, and was signed also by John M. DeSaussure, sr.

Seventh, the claim of Witte Brothers. This consists of the aggregate balances of sundry judgments originally obtained by James D. Matheson, James D. Kirkpatrick, administrator, Priscilla B. Perkins, executrix, and Mary E. Shaw, administratrix, against the executrix of Henry W. DeSaussure, deceased, who was one of the grandchildren of R. L. Champion aforesaid; which balances by assignments have become the property of Witte Bros. By a family arrangement in regard to the aforesaid Champion lands, among the devisees thereof

(which will be more particularly referred to hereafter), these judgments were cancelled as against the estate of Henry W. DeSaussure, deceased, and the payment of any balances thereon, was assumed by the five living grandchildren of the said Champion, the

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*obligors in the Kerngood mortgage, Louisa D. Davis, Sallie D. Davis, John M. DeSaussure, jr., Eliza C. DeSaussure, and Lloyd C. DeSaussure. This undertaking was embodied in a consent decree in Kershaw county of date November 12, 1870, but said decree for said balances could not be enrolled at the time, but lately the said balances still unpaid were ascertained and judgments rendered thereon in Kershaw county, February 15, 1882, and transcripts of said judgments entered in the office of the clerk for Sumter county, March 6, 1883; which would give Witte Bros. the last lien upon the said Champion lands.

But they claim that the original arrangement embodied in the consent decree of November 12, 1870, gave them a lien from that date on said Champion lands, at least to the extent of the interest of the children of H. W. DeSaussure, deceased, including both the share proper of their father, Henry, and their interest in the portion of their deceased aunt, Caroline DeSaussure. There is no doubt that the interest of the said devisees in the Champion lands and all other property they may have, is liable for the Witte claim as a debt assumed by them; but it is earnestly denied that they gave any lien for its payment, or that any was involved in the aforesaid transaction, even as to the share of the children of H. W. DeSaussure, which they thereby acquired, so far as the lands now in controversy are concerned.

The issue simply as to priority is the principal question in the case, and we will now proceed to consider it. The facts are somewhat complicated, and in order to make them intelligible, we will go back a little. Richard Lloyd Champion, late of Kershaw county, departed this life November 13, 1813, seized and possessed of a large estate, and leaving a will, of which Benjamin Bineham was the sole qualified executor. By the fourth clause, the testator devised and bequeathed as follows: "I will and bequeath unto my said friends, Duncan McRae, Alexander Matheson, Abraham Blanding, and Benjamin Bineham, all the rest and residue of my estate both real and personal, to them, their heirs, executors, administrators, and assigns forever; in trust and confidence, and subject to the uses, limitations, and restrictions hereinafter mentioned and expressed; that is to say (after the payment of my debts), that they shall stand

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seized and *possessed of the same to and for the sole use, benefit, and behoof of my beloved daughter, Eliza Hester Champion, for and during the term of her natural life, and no longer, without being subject to the debts, contracts, or disposal of any person with whom she may at any time intermarry; and from and immediately after the death of my said daughter, Eliza Hester Champion, that then they, the said executors, &c., shall stand seized and possessed of the same in trust to and for the sole use, benefit, and behoof of the heirs of the body of my said daughter, who may be living at the time of her death, share and share alike," with some ulterior limitations, &c.

The lands referred to in this case as the "Champion lands in Sumter county," passed under and were devised by the said fourth clause of this will. The said Eliza Hester survived her father, married John M. DeSaussure, Esq., and died March 11, 1864, leaving her surviving, her said husband, and six children, viz., Mary Louisa (who married James M. Davis), John M. DeSaussure, jr., Eliza C. DeSaussure, Sarah Amelia (who married Junius Davis), Lloyd C. DeSaussure, and Caroline E. DeSaussure (who departed this life August 12, 1864, intestate and unmarried), and four grandchildren, viz., George R. DeSaussure, John M. DeSaussure, Douglass B. DeSaussure, and Champion DeSaussure, children of Henry W. DeSaussure, then deceased. The Champion lands have never been divided among the devisees, except as to the interest therein of the children of the aforesaid predeceased son, Henry W. DeSaussure, in respect to which this contention has arisen.

Henry W. DeSaussure was the eldest child of the said Eliza Hester, and having married in her life-time, he was settled off partly by his father, John M. DeSaussure, out of his own means, but for the most part out of the property of the Champion estate. The plantation hereinafter known as the "upper plantation," near Camden, in Kershaw county, was purchased and conveyed to him directly by the vendor, and was stocked by negro slaves. At the time he was thus provided for, December 30, 1856, the property which went into his possession, lands and slaves, were described and valued, and he covenanted as follows: "I agree with my father and mother and as representing my brothers

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and *sisters, that if it be necessary to bring the said lands and negroes into common valuation and calculation on the death of my father or mother, or either of them, in order to equalize the shares of my brothers and sisters and myself in all or either of the estates of my father or mother, or in the estates devised by my grandfather, Richard L. Champion, to the children of my mother in remainder, I will bring the value of said lands and negroes into such common valuation and calculation, and will hold the said lands and negroes as my own and will account for their value," &c.

Henry W. DeSaussure afterwards went

into the Confederate army, and fell at Frazier's farm, near Malvern Hill, in Virginia, on June 30, 1862, leaving a widow, Mary R. DeSaussure, and the four children above named. He left a will, of which his widow was sole executrix, but its provisions are unimportant in this case. The said Henry W. DeSaussure left debts, and the creditors, James D. Matheson, James D. Kirkpatrick, administrator, Priscilla B. Perkins, executrix, and Mary E. Shaw, administratrix, having sued the executrix, Mary R., recovered judgments respectively, and levied the "upper plantation" and all the other property of the testator; and James P. Boswell, the sheriff of Kershaw county, was about to sell the same, when, in December, 1869, the executrix, Mary R., for herself and her aforesaid children, filed a bill in Kershaw county, entitled "Mary R. DeSaussure et al., v. James P. Boswell et al.," making the sheriff and creditors parties, as also the devisees under Champion's will, and praying for injunction, to marshal the assets of the estate, for dower, and "for partition of the estate derived by the children of the said Eliza Hester DeSaussure, under the will of the said R. L. Champion, with the accumulations thereof." &c.

In this proceeding Judge Melton, on November 12, 1870, made a consent decree, the construction and legal effect of which are involved in this case. We cannot encumber this statement, already too long, by reciting it at length. It will be enough to say that it ordered certain property of the testator to be sold, appointed a receiver, gave the widow dower, and as to the "upper plantation," provided as follows: "1. It is ordered, adjudged, and decreed, that the 'upper plantation' of the late Henry W. DeSaussure, situate * * be assigned in severalty in

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fee simple to *the complainants, George R. DeSaussure, Douglass B. DeSaussure, John M. DeSaussure, and R. Champion DeSaussure, as tenants in common, to them and their heirs and assigns for ever, charged, nevertheless, with the payment to the defendant, Louis D. DeSaussure, of the amount of his claim (contracted by the executrix after the death of H. W. DeSaussure) * * * and the said 'upper plantation' above described shall be taken and deemed to be in full discharge and satisfaction of the portions, shares, and interests of the said children, heirs and devisees of the said H. W. DeSaussure, deceased, in the estate of their said father, and in the estate of their grandmother, Eliza Hester DeSaussure, deceased, and in the trust estate devised to them by the will of Richard L. Champion, or conveyed in trust to Benjamin Bineham, his executor, &c. * * *

"6. It is further ordered, that the said James M. Davis, receiver, as aforesaid, after applying the assets remaining in his hands, necessary to make the payments to the said Mary R. DeSaussure, here before directed, do pay therefrom the costs of this suit, &c., and apply the balance of said assets, when collected, to the payment of the demands of the other creditors of the estate of the said Henry W. DeSaussure pro rata, to wit: the said James D. Matheson, James D. Kirkpatrick, Priscilla B. Perkins, and Mary E. Shaw, and that the judgments at law upon the said claims be satisfied before the judgment creditors thereof receive any benefit from this decree. It is further ordered, that the defendants, Mary Louisa Davis, Eliza C. DeSaussure, John M. DeSaussure, jr., Sarah Amelia Davis, and Lloyd C. DeSaussure, do pay to the said creditors respectively, whatever may remain due to them on their said claims after the application thereto of the proceeds of the said assets in the hands of the said James M. Davis, receiver as aforesaid, as hereinbefore directed, &c.

"7. It is further ordered that whenever the said Mary Louisa Davis, Eliza C. DeSaussure, Sarah Amelia Davis, and John M. DeSaussure, jr., the adult children of Eliza Hester DeSaussure, and remaindermen with Lloyd C. DeSaussure, under the will of their grandfather, the said R. L. Champion, may deem it advisable to sell the lands and personalty passing under said will, and also the

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lands conveyed in trust to Benjamin *Bineham, executor of the said R. L. Champion, as described in the bill, and shall enter into a contract for the sale of the same or any part thereof, that the said John M. DeSaussure, the father and guardian ad litem of the said minor defendant, Lloyd C. DeSaussure, be authorized and required to execute to the purchaser or purchasers thereof a deed of conveyance of the interest of the said Lloyd C. DeSaussure in the said lands and personal property, and that he receive and receipt for such portion of the purchase money as may belong to the said Lloyd C. DeSaussure, to wit: one-fifth portion thereof, and hold the same subject to the further orders of this court or until a general guardian for the said Lloyd C. DeSaussure shall be duly appointed," &c.

As before stated, the balances of the judgments have lately been ascertained and confirmed by the court, and the question now is, whether Witte Bros., owners of these balances, having given up their liens upon the "upper plantation" and the other property of Henry's estate and in lieu thereof taken the decree for the amount against the aforesaid living children of Eliza Hester, must be regarded as holding them as simple debtors without security, or as having a lien from the date of the decree upon their property, at least to the extent of the share of Henry's children, assigned to them by the same decree which required them to pay the debt. The Circuit judge held that the effect of the

Circuit decree was to make them responsible simply as debtors for the balances which, after applying the assets of the estate, should finally be due upon the judgments; but gave no lien on the property of those adjudged to pay, not even on the share of Henry's children, assigned to them by the decree. He also held that W. D. Trantham, as administrator of the estate of John M. DeSaussure, sr., who was one of those who executed the Kerngood mortgage containing a covenant of warranty of the premises embraced, was estopped from claiming any right to have the Villipigue judgment against John M. DeSaussure, jr., paid to the prejudice of the plaintiff, Kerngood, his mortgagee; and after providing for costs, fee of the referee, and the reimbursement of Mrs. Sarah C. DeSaussure for money paid at the forfeiture sale of the lands for taxes, fixed, in effect, the priorities of the parties as follows: 1. The claim of Ellen Stuart; 2, the claim of

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Clyburn, receiver; *3, the Simonds claim; 4, the Kerngood claim; 5, the Trantham claim on the Villipigue judgment; and 6, the claim of Witte Bros.

From this decree, Witte Bros. and W. D. Trantham, administrator, appeal to this court. The exceptions are long, and need not be stated here, as they are in the brief.

First, as to the claim of Witte Bros. The judgments afterwards assigned to them had liens on all the property of Henry W., which the consent decree cancelled, and adjudged that the living brothers and sisters of Henry W. should pay "whatever may remain due to them (the creditors) on their claims after the application thereto of the proceeds of the assets in the hands of the receiver," &c. Although this was a consent decree, it was a present judgment. It was not less a judgment of the court because it was in conformity to the wishes of the parties. The aggregate amount of the judgments was not stated in terms, but that was known when the judgments were marked satisfied, and it is not entirely clear that the decree could not have been enrolled at that time, subject to be credited as successive payments were made by the receiver. If that had been done and execution issued and levied as required by the code, that would have given a lien upon all the interests in the Champion lands in Sumter or elsewhere.

We incline to think that such was the intention of the parties and of Judge Melton's decree. The creditors had a lien upon the property of Henry W., which in all probability, without regard to the claim of the cotenants for advancements and a money equalization, would have produced payment, as the legal title to the "upper plantation" had been made to Henry W. in his life-time. In order, however, to facilitate a judicious family arrangement, they yielded their lien, and in lieu thereof consented to take the judgment aforesaid against the substituted parties, and it is hardly to be supposed they would have done so without taking a new lien upon the new parties. But be that as it may, there was the difficulty that the aggregate amount was not stated in the decree, and it could not be then foreseen what the exact balance would be; and on that account, probably, the judgment was not enrolled or execution issued in Sumter county until March, 1883. So that, although there

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was a decree against *the substituted parties, it gave no lien upon their own proper shares in the lands until that time (March, 1883). In the meantime, the co-tenants aforesaid who were adjudged to pay the judgments had encumbered their own interests in the lands by the mortgages before mentioned, and the question now is whether the provisions of the consent decree vested in them such absolute title to the interest of Henry's children as to pass it also under these intermediate incumbrances, although they had not paid the aforesaid balances, which at the time of the relinquishment of that interest they were ordered to pay.

Witte Bros. insist that the bill in the case of Mary R. DeSaussure et al. v. Boswell, Sheriff, et al., in Kershaw county, was, among other things, for partition among the tenants in common of the Champion estate; and that the interest of Henry's children in the lands, being relinquished to the other cotenants upon their paying the judgments aforesaid as the consideration of that relinquishment, the act of 1791 gave the creditors a lien on said interest so relinquished to secure said balances. To this it is objected that the bill was not for partition of intestate property, and that it was filed in Kershaw county, where there was really no property of any value belonging to the tenants in common; but it all lay in Sumter county, and that for these reasons this is not a case for the application of the act of 1791. It is true that the same decree which made the relinquishment of the interest of Henry's children also ordered those to whom the relinquishment was made to pay the judgments, in order to disencumber the "upper plantation" so as to allow it to be taken by Henry's children in exchange for their interest in the other lands, and to that extent the proceeding was substantially a partition of the Champion property; at least to the extent of eliminating therefrom the interest of Henry's children. It is also true that the act of 1791 gave a lien for the purchase money of an intestate's land sold for partition, and by fair construction also upon lands assigned for sums of money necessary to produce equality of partition. See McQueen v. Fletcher, 4 Rich. Eq., 158; Burris v. Gooch, 5 Rich., 1. But we do not consider it necessary to decide whether the bill was for the partition of such property as was contemplated by the

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act, or whether lands in *Sumter county could be legally partitioned by this proceeding in Kershaw county, or whether the technical statutory lien under the act arose out of the proceedings, in favor of the creditors thereby adjudged to be paid.

A consent decree is in effect the agreement of the parties concerned, and we think the rights of the parties must be determined, not by reference to the statute of 1791, but by the construction of Judge Melton's decree. What was the object and intention of that decree? Taking all of its parts together and considering it as a whole, we cannot resist the conclusion that it was intended to embody and carry into effect a tripartite agreement as follows: First, the children of Henry were willing to take the "upper plantation" in full of their share of the Champion estate, if it could be disencumbered. Second, the other cotenants, in order to accomplish this to the relief of the other lands, agreed to disencumber it by paying the judgments. And third, the creditors consented to lift their liens from the "upper plantation" upon the other co-tenants agreeing to pay the balance of their judgments.

The children of Eliza Hester had no connection with the proceedings to settle the affairs of Henry's estate, except in so far as they touched the Champion property. The title to the "upper plantation" had been made to Henry W. and his heirs, and therefore, as property, it was no part of the Champion estate, although the estate of Henry might be liable to account for its value; and it seems to us that the logical and inevitable conclusion must be that the undertaking to disencumber the "upper plantation" (by paying the judgments) was really the consideration of the relinquishment by Henry's children of their share in the Sumter lands. Lifting the judgments was in fact the basis of the whole arrangement, without which nothing could have been done, as appears from the fact that the creditors could derive no benefit from the decree until their judgments were marked satisfied. The agreement to pay the judgments was the very thing that enabled the children of Henry to take the "upper plantation" in exchange for their interest in the Sumter lands.

It is true that the decree does not expressly declare that one was the consideration of

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the other, but the transaction shows it. *If the payment of the judgments was not expressly stated to be a condition precedent to the vesting absolutely of the interest of Henry's children, both were connected with the same subject-matter, were counterparts of the same scheme, declared by the same consent decree or mutual covenant, and, in our judgment, must be considered as mutual and dependent provisions. Therefore only an equity to the interest of Henry's children passed to the other co-tenants, which they could only mortgage subject to the payment of the judgments to the creditors, who had relieved the "upper plantation" for Henry's children, and thereby become entitled to all their rights.

It is well settled that a vendor of lands, or his assignee, where he has not executed title to the purchaser, but the contract is still executory, has a lien upon the lands sold for the purchase money and may have specific performance of the contract, and the land sold in discharge of it, precisely as if he had executed titles and taken back a purchase money mortgage. Gregorie v. Bulow, Rich. Eq. Cas., 244; Buckner v. Railroad Company, 7 S. C., 328; Walker & Trenholm, v. Kee, 14 Id., 142; Herbemont v. Sharp, 2 McC., 264. In the last case cited, it is said that "in no sense can a sale of lands be regarded as complete until the purchaser has paid his money and the seller has conveyed the land."

We do not think there is anything in the last paragraph of the consent decree which conflicts with this view. One of the cotenants, Lloyd C. DeSaussure, was a minor, and in order to enable the parties to meet promptly any advantageous offer that might be made to purchase the Champion property, John M. DeSaussure, sr., the father of the said minor, was authorized to act for him and to receive his part of the purchase money, until he had a regular guardian appointed. This was in no way inconsistent with the general scheme of the decree by which the co-tenants were to pay the judgments. That was a present obligation, and any rights conferred upon the said minor must be assumed to have been given subject to that obligation, and not in such way as to defeat the whole scheme before arranged. Besides, it is clear that the privilege conferred upon the said minor had no special reference to the interest of Henry's children, but reached to the minor's interest in the whole of the Champion lands.

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*Nor do we think that this secret lien, as it is styled, could work a hardship upon others without notice. No one dealing with one tenant in common had the right to suppose that he could encumber the share of another tenant in common; and if he desired information on the subject, he could find it nowhere but in the decree, which would have disclosed the fact that the "upper plantation" had been assigned to the children of Henry in full discharge and satisfaction of their shares in the trust estate devised to them, but at the same time it would have disclosed the other facts, that the living cotenants were directed to pay certain balances of judgments, and that there was no change of title expressly made as to the interest of Henry's children in the Sumter lands. We are constrained to hold that there

is a lien upon the share of Henry's children in the Sumter lands, to secure the balance of the judgments aforesaid, commencing November 12, 1870, and upon the interest proper of all the other tenants in common from March, 1883, when the judgments were renewed and lodged in Sumter county.

What, then, is the amount of that share, so far as the creditors are concerned? If this were an original question, there could be little doubt about it. The lands were a part of the estate of Champion, and fell under the fourth clause of his will, which devised them to trustees for the sole and separate use of his daughter, Eliza Hester, during her life, and "from and immediately after her death, that then the said trustees shall stand seized and possessed of the same in trust to and for the sole use, benefit, and behoof of the heirs of the body of my said daughter who may be living at the time of her death, share and share alike." Eliza Hester died March 11, 1864, leaving alive six children, viz.: Mrs. Mary L. Davis, John M. DeSaussure, jr., Eliza C. DeSaussure, Mrs. Sarah A. Davis, Lloyd C. DeSaussure, and Caroline DeSaussure (who afterwards died August 12, 1864, unmarried and intestate), and four grandchildren, viz.: George R., Douglass, Blanding, and Champion DeSaussure, children of a predeceased son, Henry W. DeSaussure.

Assuming that the grandchildren as well as the children were "heirs of her body then living," the question is made whether they took per stirpes through their father who

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was not living at *the time of the death of the life tenant, or per capita "share and share alike" with the children, making ten instead of seven original shares. Although described as "heirs," the remaindermen did not take as "heirs" by descent, but as purchasers under the will. In such cases, after much discussion and some difference of opinion, it seems to have been settled as a rule of construction, that "wherever, by the terms of description, in a devise or grant, resort must be had to the statute of distributions for the purpose of ascertaining the objects of the gift, resort must also be had to the statute to ascertain the proportions in which the donees shall take, unless the instrument making the gift indicates the intention of the donor that a different rule of distribution shall be pursued," &c. Campbell v. Wiggins, Rice Ch., 10; Lemacks v. Glover, 1 Rich. Eq., 141; Rochell v. Tompkins, 1 Strob. Eq., 114; Collier v. Collier, 3 Rich. Eq., 555 [55 Am. Dec. 653].

The terms of the devise here being "to heirs of the body," imposed the necessity of referring to the statute to ascertain who were such "heirs," and if the devise had stopped there, the children of Henry W. would undoubtedly have taken in the manner prescribed by the statute. That is to say, they would have represented their father and taken together per stirpes his share —one-seventh part of the estate, besides their distributive portion of the share of their deceased aunt, Caroline. But the superadded words, "share and share alike," imply equality of division, and we think made the exceptional case "when the instrument creating the gift indicates the intention of the donor." Templeton v. Walker, 3 Rich. Eq., 543 [55 Am. Dec. 646]; Allen v. Allen, 13 S. C., 531 [36 Am. Rep. 716]. This latter case well expresses it: "Thus where, as in Freeman v. Knight, 2 Ired. Eq., 72, the testator directed that certain personal property 'should be sold and the proceeds equally divided between my legal heirs,' it was held that though a resort to the statute was necessary, in order to ascertain who were the persons embraced in the class to whom the bequest was made, there was no such necessity to refer to the statute to ascertain the mode of distribution because the testator had himself determined that, by directing an equal division, and hence the proceeds of sale should be distributed amongst the widow and

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children and the children of pre*deceased children per capita and not per stirpes." We think that the same must be said here of the words "share and share alike."

But it is urged that the question as between these parties is res adjudicata; that it was adjudged in the Kershaw case of Mary R. DeSaussure and her children against Boswell, sheriff, and others, before referred to, that the children of Henry W. represented their father and took among them only one-seventh part of the estate, and their distributive part of their aunt Caroline's share; and that those creditors who were parties to that proceeding and agreed to take that interest, cannot go back to the will, and under a strict construction thereof now claim more. It seems to us that there is force in this view. It is true that the precise point was not formally decided by the consent decree; but at that time such was manifestly the understanding of all the parties, including the counsel engaged as well as the judge who pronounced the decree. The bill filed in behalf of the children of Henry W. in setting out the parties entitled to the Champion property, stated their claims as follows: "Your infant orators who are entitled to take among them the one-sixth part of said estate, and the other parties in interest each one-sixth."

This statement did not discriminate nicely as to their interest in the estate of their deceased aunt, Caroline; but regarding her separate share as simply absorbed in the general estate, did distinctly claim per stirpes through their deceased father. And the consent decree itself, which only put in force the covenants of the parties, recognized the same construction. In assigning the "upper

plantation" to the children of Henry, "to be taken and deemed to be in full discharge and satisfaction of the portion, share, and interest of the said children in the Champion estate," the decree incidentally refers to what was the share of one of the remaindermen, viz., the minor, Lloyd C. DeSaussure, after the interest of Henry's children had been eliminated, and declares it to be "one-fifth portion thereof."

In considering the rights of the creditors, we have construed that consent decree according to what we conceived to be its object and intent taken as a whole; and we are of opinion that in reference to the rights of the remaindermen it should be construed in the same manner, and that the creditors,

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who were par*ties and consented to the arrangement on that basis, should be held to stand by it, even if there was an honest mistake of law involved in it. Keitt v. Andrews, 4 Rich. Eq., 354; Reese v. Holmes, 5 Rich. Eq., 531; Cuningham v. Cuningham, 20 S. C., 317. "One who accepts the terms of a contract must accept the contract as a whole. He cannot accept part and reject the rest." Big. Est., 511. Thus, considering the creditors estopped from changing the elements of the arrangement as understood and acted on by all parties at the time, the aggregate share of Henry's children must be taken to be as follows: as remaindermen under the will representing their father, and taking one-seventh of the whole estate; and as distributees of their aunt Caroline (counting her father as distributee), one-seventh of another original seventh.

This brings us to the question of estoppel as to the Villipigue judgment, which is not free from difficulty. John M. DeSaussure, sr., became the owner by assignment of the Villipigue judgment against John M. DeSaussure, jr., which, as appeared before, is the oldest lien on the undivided interest of the said John M., jr. Afterwards, John M., the father, joined in the bond and mortgage to Alden, assigned to Kerngood. This mortgage was also executed by John M., jr., along with his brothers and sisters. That mortgage contained a warranty in these words: "And the parties do hereby bind themselves, their heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said George Alden, heirs, and assigns, for and against his heirs, executors, administrators, and assigns, lawfully claiming, or to claim, the same or any part thereof." And it is now claimed that it was error on the part of the Circuit judge to hold that W. D. Trantham, as administrator of John M. DeSaussure, sr., is estopped from setting up the judgment to the prejudice of the rights of Kerngood.

Several preliminary objections are made to the alleged warranty in the Kerngood mortgage. It is said that the words used did not clearly express a general warranty of the premises. There seems to have been some transposition of its different parts, as if a mistake had been made in filling blanks; but there can be no serious doubt that the

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parties intended to execute a *general warranty in the usual form. It is also suggested that the question of estoppel was not made "either in the pleadings or by the evidence or by way of exception." The complaint did allege that the judgment had been "paid," and the peculiar defence of estoppel was one of law, and arose out of the facts proved. In settling the priorities, it was necessary to decide it.

Then what was the effect of the warranty in the Kerngood mortgage? If it had been an absolute conveyance of the premises to Alden, with a general warranty, which has been held to include several covenants, and among them one of quiet enjoyment, and that of free from all encumbrances, it is plain the warranty would have been broken by the existence of an outstanding judgment having a lien upon the premises, and the covenantee might have recovered against his covenantors, or their respective representatives, the amount of damages caused to him by said encumbrance. Jeter v. Glenn, 9 Rich., 380, and authorities. We do not see why the same consequence should not follow from a warranty in the mortgage, when it is proposed to foreclose it and claim the land to pay the debt for which it was a security. This consequence results simply from the existence of the encumbrance, without regard to who may be the owner of it.

In such case if the incumbrance is owned and enforced by a stranger the only remedy for the mortgagee would be an action at law for damages upon the broken covenant of warranty. But when it happens that such incumbrance is owned by the warrantor himself or his representative a court of equity seizes hold of that coincidence, and, in order to prevent circuity of action declares an estoppel. "Covenants for quiet enjoyment in themselves are said to be as effectual by way of estoppel as words of conveyance. The doctrine seems to rest upon the same grounds as that concerning the estoppel of a grantor in fee with warranty to set up an outstanding title against his grantee, namely, that of prevention of circuity of actions. Should the grantor, having acquired a paramount title, attempt to disturb and regain the possession of his grantee, the latter would be entitled to set up the covenant for quiet possession by way of rebutter; and this, it would seem, would as effectually operate against the grantor as if he had made a direct convey-

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ance of the land." Big. Est., 304. *A mortgagor by a mortgage containing the usual covenants of seizin and warranty is

estopped to deny the title of the mortgagee. Jones Mort., § 662.

We do not think it was error to hold that Trantham, the administrator of John M. DeSaussure, sr., is estopped from claiming any right to have the Villipigue judgment paid to the prejudice of the plaintiff Kerngood, his mortgagee. But it seems to us that it was error to remove that judgment from its place in the line of priorities and place it behind Kerngood, thus pushing up into its place the next succeeding liens in their order. We cannot see that the estoppel as to Kerngood should be made to enure to the benefit of the intermediate mortgagees, who took their liens subject to that of the judgment and prior mortgages duly recorded, and cannot in any way be injured by the covenant of warranty executed subsequently. In order that the intermediate mortgagees may simply hold their places unaffected by the warranty in the Kerngood mortgage, it seems to us that the Villipigue judgment should keep its place at the head of the line of priorities; but that the estoppel should be affected by regarding as assigned to Kerngood so much of the Villipigue judgment as may be necessary to reimburse him for the damage he may sustain by the enforcement of the judgment. If Kerngood should be paid by the sale of the property, then he has suffered no damage, and the administrator, Trantham, will be entitled to the proceeds of the judgment. If he is not paid, Kerngood will be entitled to the proceeds of the judgment, or so much thereof as may be necessary to indemnify him for damage caused thereby.

We conclude, that after paying the expenses and Mrs. Sarah E. DeSaussure, as provided by the Circuit decree, the priorities in respect to date will stand as follows: I. The Villipigue judgment, with the rights of Kerngood in regard thereto, as herein stated. II. The claim of Witte Bros., as to the share of Henry's children in the Sumter lands, as herein explained and limited. III. The Ellen Stuart claim, as set down in the decree. IV. The Clyburn claim as stated. V. The Simonds claim as stated. VI. The Kerngood claim, with rights in the Villipigue judgment, as herein stated. VII. The remainder of the claim of Witte Bros.

The judgment of this court is, that the
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judgment of the Circuit *Court be modified in conformity with the conclusions herein announced, and in all other respects be affirmed.

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HERRING & CO. v. CANNON.

(November Term, 1883.)

[1. *Chattel Mortgages* ⇐6, 85, 194.]

A merchant purchased and received possession of an iron safe with his name painted thereon by the vendor, and for the purchase money gave to the vendor two notes, to each of which was added the stipulation that "in accordance with the terms of an agreement for the purchase of the safe, said vendors do not part with any title thereto until the purchase money has been fully paid." *Held*, that this was "an instrument of writing in the nature of a mortgage," which, under the second section of the act of 1843, required recording to be valid against subsequent creditors or purchasers for valuable consideration without notice. Cases reviewed and Talmadge v. Oliver, 14 S. C., 522, explained.

[Ed. Note.—Cited in Perkins v. Loan & Exchange Bank, 43 S. C. 44, 20 S. E. 759.

For other cases, see Chattel Mortgages, Cent. Dig. §§ 33, 153, 426; Dec. Dig. ⇐6, 85, 194.]

[2. *Sales* ⇐473.]

The act of 1843 was intended to embrace such conditional sales, and to render all secret liens, whether verbal or written, invalid as against the rights of subsequent creditors or purchasers for valuable consideration without notice.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1377–1390; Dec. Dig. ⇐473.]

[3. *Chattel Mortgages* ⇐153; *Judicial Sales* ⇐50.]

Such safe having been attached and sold as the property of the vendee, at the suit of subsequent creditors without notice, the purchaser at such sale has good title to the safe, although having notice of the vendor's claim. McKnight v. Gordon, 13 Rich. Eq., 223 [94 Am. Dec. 164], recognized and followed.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 257; Dec. Dig. ⇐153; Judicial Sales, Cent. Dig. § 92; Dec. Dig. ⇐50.]

[This case is also cited in King v. Fraser, 23 S. C. 564, without specific application, and in Ludden & Bates Southern Music House v. Dusenbury, 27 S. C. 464, 470, 4 S. E. 60; Arthur v. Screven, 39 S. C. 82, 17 S. E. 640; Armour & Co. v. Ross, 78 S. C. 294, 58 S. E. 941, 1135, and distinguished therefrom.]

Before Wallace, J., Orangeburg, May, 1883.

The opinion states the case.

Messrs. James F. Izlar and S. Dibble, for appellants.

Messrs. DeTreville & Glover, contra, cited 1 Chit. Cont., 538 (11th Am. edit.); 1 Pars. Cont., 537; Benj. Sales, § 320; 14 S. C., 522; 1 Bay, 312; 4 Mass., 269; 4 Wash. C. C., 79, 588; 20 S. C., 17.

April 26, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an ac-
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tion for the recovery *of possession, and for damages for the detention, of one patent Champion Iron Safe, claimed by the plaintiffs, valued at $105.69, and alleged to be illegally detained by the defendant, Peter G. Cannon. It appeared that in August, 1880, the plaintiffs sold the safe to one E. S. Griffin for $105.63, payable January 1 and April 1, 1881. The plaintiffs delivered the safe to the purchaser, with the name "E. S. Griffin" conspicuously painted on it. Notes were given for the purchase money, with a condition

embodied in these words: "This note having been given to said Herring & Co. in part payment for a safe, and in accordance with the terms of an agreement for the purchase thereof, said Herring & Co. do not part with any title thereto until the purchase money has been fully paid."

Some time after the purchase of the safe, and while it was in his possession, the said Griffin contracted debts with Steffens & Werner and P. H. Hanes & Co., who had no notice whatever of the claim of Herring & Co. to the safe. These creditors sued Griffin, and recovered judgment against him, having in the meantime attached the safe, which was sold by the sheriff under an order of court in said process. At the time of the sale, the sheriff had been notified of plaintiffs' claim, but no public notice was given of it on the day of sale. James F. Izlar, Esq., who had also heard of the claim of plaintiffs, became the purchaser at the price of $55, which was paid upon the judgments of said creditors. Izlar afterwards sold and delivered the safe to the defendant, who was sued for the same.

The Circuit judge charged the jury that the condition on the note being in writing was effective "not only between the parties, but as to all other persons whatsoever; that at the time this contract was made, the law did not require that it should be recorded, or that notice should be given of its existence." Under this charge, the jury found a verdict for the plaintiffs, and the defendant appeals to this court upon the following exceptions:

1. "Because it being in evidence that one E. S. Griffin purchased the safe from the plaintiffs, and gave for the purchase money thereof two notes, to each of which was added the condition [as before stated], and thereupon the safe was delivered to him, with his name, E. S. Griffin, conspicuously

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painted thereon *and remained in the possession of the said Griffin until seized under an attachment at the suit of subsequent creditors of the said Griffin, his honor, the presiding judge, erred in instructing the jury that 'at the time this contract was made, the law did not require that it should be recorded, or that notice should be given of its existence.'

2. "Because his honor erred in instructing the jury that such a contract, at the time above mentioned, was valid against subsequent purchasers for valuable consideration without being recorded or actual notice.

3. "Because his honor erred in instructing the jury that the decision in Talmadge v. Oliver must necessarily conclude this case."

Conditional sales of personal property delivered, annexing a secret condition to a visible transaction appearing to the world unconditional, gave rise, for many years, to much discussion and some difference of opinion in our courts. It may be safely stated that there was a general concurrence that such contracts might be enforced between the parties who made them; but as possession is prima facie evidence of title in relation to personal property, there were obvious difficulties as soon as they touched the rights of subsequent creditors and bona fide purchasers, who dealt with the apparent owner on the faith of title, springing from his unexplained possession. Such conditions in sales, whether verbal or in writing, were held valid as to the parties themselves and their subsisting creditors down to 1839. See Dupree v. Harrington, Harp., 391; Reeves v. Harris, and Bailey v. Jennings, 1 Bail. 563. But in that year was decided by a divided court the case of Bennett v. Sims, Rice, 426, which may be regarded as the leading case in sustaining such secret conditions, as it went so far as to hold that there was really no difference between a verbal and written condition, and in that case sustained one that was merely verbal.

That case, however, expressly excepted and reserved the question as to subsequent creditors and bona fide purchasers. In delivering the judgment of the majority of the Court of Errors, Judge Earle said: "It is a remarkable coincidence in all the cases, beginning with Dupree v. Harrington, supra,

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down to the *case under consideration, that neither the rights of subsequent creditors nor the rights of subsequent purchasers without notice are at all involved. * * * In regard to subsequent creditors, it will be time enough to provide for them when they complain. Whenever the vendor's right shall come in conflict with the claims of those who become creditors after the transfer of possession, then the court will endeavor so to modify the rule, or restrict its operation, as to protect the rights of bona fide creditors who may have trusted the supposed purchaser on the faith of the property in his possession."

In 1839 the law was thus announced, with a doubtful judicial saving as to the rights of subsequent creditors and bona fide purchasers, and immediately thereafter the legislature (possibly moved thereto by the decision in Bennett v. Sims) interposed, and passed the act of 1843, "To amend the law in relation to recording mortgages and to regulate the lien thereof" (11 Stat., 256), afterwards substantially embraced in the general registry act of 1876, and re-enacted as section 2346 of the general statutes. This act has three sections. The first provides that "no mortgage or other instrument of writing in the nature of a mortgage of real estate shall be valid so as to affect the rights of subsequent creditors or purchasers, &c., unless the same shall be recorded," &c. The second provides that "no mortgage or instrument of writing in the nature of a mortgage

of personal property, shall be valid so as to affect the rights of subsequent creditors or purchasers, &c., unless the same shall be recorded," &c. And the third declares "that every verbal agreement between the vendor and the vendee of personal property, whereby the vendor, who has parted with the possession thereof to the vendee, shall reserve to himself any interest in the same, shall be null and void as to subsequent creditors or purchasers for valuable consideration without notice."

It is insisted for the defendant that the paper in contention here is an "instrument of writing in the nature of a mortgage," which by the act was required to be recorded, and, not having been, is null and void as to the subsequent creditors of Griffin, the vendee. By the contract the vendors, who parted with the possession of the safe to Griffin, undertook to reserve to themselves an interest in the same, and therefore it is

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precisely such a *contract as is denounced by the third section of the act, and if it were merely verbal would certainly be void. But as it is in writing the question is, whether it is such an "instrument in the nature of a mortgage" as is required to be recorded by the second section of the act. It is plain that the purpose of the act in all its sections was to protect the rights of subsequent creditors and purchasers against secret liens, and the third section shows that such contracts as the one before us was, in the contemplation of the framers of the act. The mischief aimed at was the secret nature of the contract, not whether it was verbal or in writing, as to which distinction, Judge Earle in speaking for the Court of Errors in the case of Bennett v. Sims, declared that he "had tortured his faculties to conceive a ground of difference except only as to the facility and mode of proof."

There being, then, in this respect as to third parties no difference between a verbal agreement and one in writing, and the legislature having declared the former, incapable of registry, to be absolutely void, it would seem to be the natural and logical conclusion that as to the latter, which is capable of registry, they intended to accomplish the same result by declaring that it should be void unless recorded. We think such was the intention of the act. As was well said by Judge Cothran, in the Circuit decision of Lombard & Co. v. Black, sheriff,[1] "The plain purpose of the statute was to render secret liens upon personal property ineffectual as against subsequent creditors and purchasers bona fide; and this doctrine finds sanction in the very principles of justice itself, especially in this, that where one of two innocent persons is to suffer loss, it should fall on him by whose conduct it was caused."

[1]Decided at Walterboro, June term, 1853.

This view is not only based upon the express words of the act itself, and the principles of justice, but, as we conceive, is supported by the adjudicated cases. The first case that arose after the passage of the act was that of Cochran v. Roundtree, 3 Strob., 222. In that the condition was verbal, and although it was made before the act, it was held to be void. In delivering the unanimous judgment of the court Judge Wardlaw said: "Looking to the dangerous nature of such

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verbal stipulations (since that time *guarded against by the act of 1843, which amounts to a legislative declaration concerning a debated point of law), to the policy which forbids a seller from availing himself of a secret condition annexed to a visible transaction that appears to be unconditional, whereby an innocent purchaser has been deluded, and to the great advantage of having an inflexible rule of law rather than the uncertain determination of a jury, this court is unwilling to go beyond the case of Bennett v. Sims. Stopping where that stopped, we hold that, although the condition may have been binding on Williams, it did not bind a subsequent bona fide purchaser without notice."

The next case in which the act was referred to was that of McCorkle v. Montgomery, 11 Rich. Eq., 132. It is true that was in reference to the somewhat analogous doctrine of the equity of the vendor as to land; but in the course of his opinion Chancellor Dunkin said: "While something is due to the vendor who parts with his property, not less certainly is due to the subsequent creditor who has trusted the ostensible as well as the legal owner of the estate, without any knowledge of a secret incumbrance. Upon this subject the language of Chief Justice Marshall, in Bayley v. Greenleaf, 7 Wheat, 46, [5 L. Ed. 393], is instructive: 'To the world,' says he, 'the vendee appears to hold the estate, divested of any trust whatever, and credit is given him, in the confidence that the property is his own in equity as well as law. A vendor, relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of the estate on which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a court of chancery to the exclusion of bona fide creditors.' It may be added that the act of 1843, requiring all mortgages of real estate, however formal and perfect, to be recorded within sixty [now forty] days, may well be regarded as a legislative declaration of the prohibitory policy of the country against any such secret liens."

The next case, in the order of time, was

that of McKnight v. Gordon, 13 Rich. Eq., 223 [94 Am. Dec. 164]. That was as to a

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condition in writing *under the very section of the act involved here, in which Mr. Justice Inglis delivered an elaborate and exhaustive judgment, which is absolutely conclusive of the question here, if the paper in this case belongs to the same category as the one in that, and must, as there, be regarded as an "instrument of writing in the nature of a mortgage." Upon that point we have no doubt. The paper in that case was in these words: "For the full and better securing of W. G. McKnight from all liability for which he may become indebted as my surety on any notes, &c., I have bargained, sold, and delivered unto the said W. G. McK. my two negro fellows, Bill and James, to have and to hold the same as his own right and title, until he shall become relieved from all indebtedness incurred as security as aforesaid." In this case notes were given with the condition inserted: "This note, having been given to said Herring & Co. in part payment for the purchase thereof, and in accordance with the terms of an agreement for the purchase thereof, said Herring & Co. do not part with any title thereto until the purchase money has been fully paid." Was not this in all respects as much a mortgage as the bill of sale to McKnight? Here was a sale and delivery of the property, marked with the name of the purchaser, price agreed upon, and notes taken, but with a condition purporting to retain title in the property as a security for the purchase money. It is altogether unmeaning for the parties to say that it should not amount to a sale, when the transaction exhibits every element of a sale and transfer of ownership. It seems to us that the conditional note was an "instrument of writing in the nature of a mortgage."

The next in order was the recent case of Talmadge v. Oliver, 14 S. C. 522 cited and relied on in the court below. That was a case in which the contract was sued upon within the time for recording, and therefore the ruling did not touch the question as to the necessity of recording. So far as reference was made to the character of the paper, it was not at all in conflict with the view here presented, but on the contrary precisely in accord with the cases above cited. The chief justice, in delivering the judgment of the court, distinctly declared the conditional contract to be in the nature of a mortgage. He said: "But at all events, as to this case the agreement held by the appellant may be re-

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*garded as an equitable mortgage. It has all the elements of a mortgage. It was to secure a contract. The property was designated and the title reserved to insure the performance of the contract, and it is prior in date to respondent's mortgage. True, it was not recorded, and being without a witness, there might have been some difficulty in having it recorded; but the action was commenced within the time allowed for recording, so that respondent had actual notice within the time. This was sufficient and supplied the place of recording," &c. The last paragraph shows conclusively that the question of recording was not in the case, and the adjudication rests on that fact.

Upon the whole, considering the time and occasion of the passage of the act of 1843, the state of the law then recently announced in the case of Bennett v. Sims, and the policy of our law as to registry, as well as its express terms and the adjudications under it, we must conclude that it was intended to embrace such conditional sales as the one in this case, and in that way to cut up, root and branch, all secret liens, whether written or verbal, in respect to the rights of subsequent creditors and purchasers for valuable consideration without notice.

The plaintiffs' "contract in the nature of a mortgage" was not recorded as required, and the only remaining question is whether the defendant, Cannon, is entitled to the protection given to subsequent creditors and bona fide purchasers within the meaning of the act of 1843. It will be observed that the act embraces two distinct classes of persons, viz., subsequent creditors and bona fide purchasers, which have no necessary connection with each other; and in order to claim the protection afforded, it is not necessary that a party should unite in himself the character of both; but it is enough if he can show that he is entitled to the rights of either a subsequent creditor or a bona fide purchaser without notice. It is conceded in the case that the safe was seized and sold under legal process issued by subsequent creditors without notice, and therefore it is unnecessary to inquire whether Izlar, the first purchaser, or Cannon, to whom he sold, had actual notice of plaintiffs' claim at the time of their respective purchases. The purchase at the sheriff's sale for the benefit of suing creditors, admitted to be subsequent creditors

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without notice, gave *to the purchaser that protection which is extended to the class to which the creditor in execution belonged, whether he, the purchaser, had actual notice or not. As was said by Mr. Associate Justice Inglis, in the case of McKnight v. Gordon, supra: "To guarantee to one a right to sell, and deny to all others a right to buy, would be solecism in law. It would be imputing folly as well as mischief to the law under such circumstances to say that it either permitted the (subsequent) creditor alone to buy or precluded him also as a purchaser with, though a creditor without, notice."

But without now going into the learning upon the subject of notice to different successive purchasers of the same property,

we deem it sufficient to refer to the aforesaid case of McKnight v. Gordon for the argument and authorities upon the subject. That case is so full and clear and so exactly in point that it must be conclusive of this. It was there held that "the act of 1843 protects from an unrecorded mortgage two distinct classes of purchasers at sheriff's sales: (1) those who purchase without notice, even where the debt was contracted before the mortgage was executed; and (2) those who purchase for satisfaction of debts contracted with a subsequent creditor without notice; and here it is immaterial whether the purchaser had notice or not." We think the defendant is entitled to the protection extended to those who fall under the second class above stated, whether he or his vendor, Izlar, had notice or not.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the complaint be dismissed.

Mr. Justice McIVER concurred.

Mr. Chief Justice SIMPSON. I concur in this opinion on the ground that the paper in question must be regarded as a writing in the nature of a mortgage of personal property, and therefore covered by the second section of the act of 1843, incorporated into the general statutes.

Judgment reversed.

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21 S. C. *221

*WHALEY v. STEVENS.

(November Term, 1883.)

[1. *Easements* ⟸3.]

The distinction between a right of way in gross, and one appurtenant, is marked and important, the former being a personal privilege which dies with the possessor, while in the latter it inheres in the land to which it is appurtenant, is essentially necessary to its enjoyment, and passes with it; and a right of way appurtenant must have a terminus on the land to which appurtenant.

[Ed. Note.—Cited in Fisher v. Fair, 34 S. C. 208, 13 S. E. 470, 14 L. R. A. 333; Kershaw v. Burns, 91 S. C. 132, 74 S. E. 378.

For other cases, see Easements, Cent. Dig. §§ 8–12; Dec. Dig. ⟸3.]

[2. *Easements* ⟸3.]

Plaintiff alleged a right of way from a public road bounding his plantation across defendant's lands to a boat landing, and that the right of way was for the use of plaintiff's plantation and those connected with it. *Held*, that this was an allegation of a right of way in gross.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 10; Dec. Dig. ⟸3.]

[3. *Pleading* ⟸248.]

An amendment to the complaint by inserting an allegation that the right of way begins on plaintiff's land, would substitute a claim of a right of way appurtenant for that of a right of way in gross, and so substantially change the claim. Such amendment, therefore, cannot be allowed.

[Ed. Note.—Cited in McKnight v. Cooper, 27 S. C. 95, 2 S. E. 842; Gregory v. Ducker, 31 S. C. 146, 9 S. E. 780; Clayton v. Mitchell, 31 S. C. 204, 9 S. E. 814, 10 S. E. 390; Martin v. Fowler, 51 S. C. 169, 28 S. E. 312; Booth v. Langley Mfg. Co., 51 S. C. 419, 29 S. E. 204; Pickett v. Fidelity & Casualty Co., 60 S. C. 485, 38 S. E. 160, 629; Proctor v. Southern Ry., 64 S. C. 494, 42 S. E. 427; Kiddell v. Bristow, 67 S. C. 178, 45 S. E. 174.

For other cases, see Pleading, Cent. Dig. § 689; Dec. Dig. ⟸248.]

Mr. Justice McGowan dissented.

Before Cothran, J., Charleston, March, 1883.

The opinion sufficiently states the case.

[For subsequent opinions, see 24 S. C. 479; 27 S. C. 549, 4 S. E. 145.]

Messrs. Simonton & Barker for appellant.

Mr. Charles Inglesby contra.

April 26, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiff seeks, by this action, to recover damages for the obstruction of a private way which he claims to be entitled to over the land of the defendant, and also to obtain an order restraining the defendant from continuing such obstruction. It will be difficult, if not impossible, to make an intelligible statement of the facts of the case, without reference to the diagram incorporated in the record, which cannot be introduced here, but which should be embraced in the report of the case. But from the view which we take, it will not be necessary to go fully into the facts of the case.

The plaintiff is the owner of a plantation of John's Island known as "Caneslatch," which was devised to him by his father, Wm. S. Whaley, who died in July, 1872, and the

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defendant is *the owner of another plantation on said Island known as "Seven Oaks," which he acquired by purchase from John H. Screven and wife in 1853. Caneslatch plantation originally lay to the west of the public road to John's Island Ferry, and separated from said road by a portion of Seven Oaks plantation, which lay mainly to the east of said road, between it and Stono River, but extended across said road and joined Caneslatch. Soon after the defendant bought Seven Oaks, and in the same year, he conveyed 300 acres of it lying west of the public road to the plaintiff's father, thus leaving all of the Seven Oaks plantation retained by him lying east of the public road, except the portion designated on the diagram "pine land," on the west side of the road.

The plaintiff, in his complaint, after alleging that he was the owner of Caneslatch plantation, "containing about 600 acres of land, bounding on the east on a public road on said Island," proceeds to allege "that the

said plaintiff had a right of way, by means of a road leading from the said public road over the adjoining land of the said defendant, known as the Seven Oaks plantation, to a creek leading into the said Stono River, with horses, carts, carriages, and other vehicles; and further had the right to keep at the landing on said creek such boat or boats as he might desire, and that the right of way was for the use of the said Caneslatch plantation and those connected with it." The defendant in his answer admits that plaintiff is the reputed owner of Caneslatch plantation, "but he denies that he had a right of way by means of a road leading from the public road which bounds the said plantation, over the adjoining land of the defendant, known as the Seven Oaks plantation, to a creek leading into Stono River, * * and he denies that the plaintiff had the right to keep at the landing on said creek such boat or boats as he might desire, and he denies that the right of way, or any right of way, was for use of the said Caneslatch plantation and those connected with it," &c.

The issue thus distinctly presented by the pleadings was whether the plaintiff was entitled to a right of way leading from the public road which constitutes the eastern boundary of Caneslatch plantation to the creek which empties into Stono River.

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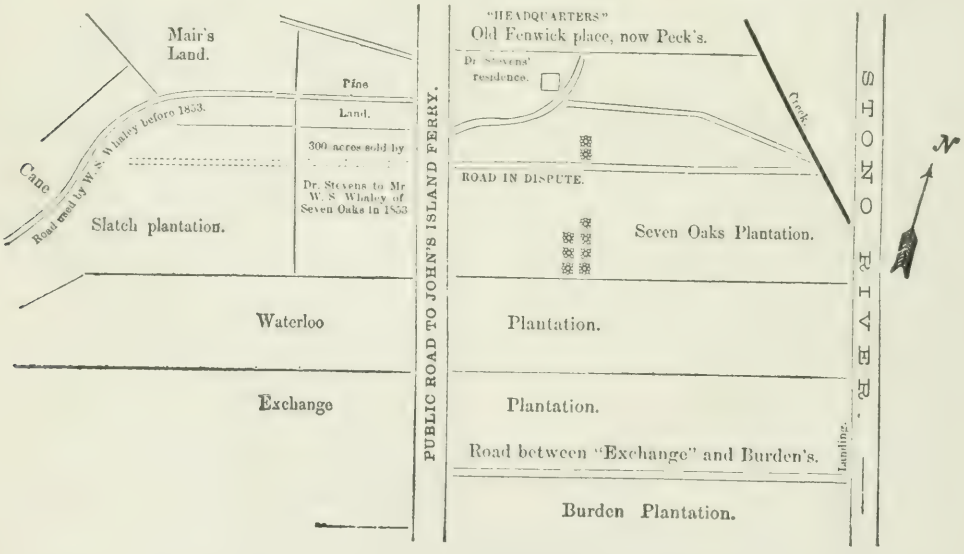

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*A right of way may be in gross, or it may be appendant or appurtenant to land, and the distinctions between the two kinds of rights are very marked and important. In the former, it is a mere personal privilege, which dies with the person who may have acquired it; while in the latter it inheres in the land it. An essential feature of a right of way to which it is appurtenant, is essentially necessary to its enjoyment, and passes with appurtenant is that it must have one of its termini on the land to which it is claimed to be appurtenant.

In view of these undisputed and indisputable legal propositions, what was really the issue presented by the pleadings in this case? Was it anything more than an issue whether plaintiff was entitled to a right of way in gross over the land of the defendant? Can it, by the most liberal construction of the pleadings, be regarded as an issue whether the plaintiff was entitled to a right of way appendant or appurtenant to his Caneslatch plantation? There is no such allegation in the complaint, for certainly the allegation that the right of way claimed "was for the use of the said Caneslatch plantation and those connected with it" cannot be regarded as sufficient, for such an allegation would be equally appropriate to claim of a right of way in gross as to a right of way appurtenant. There is no allegation that the way was necessary for the enjoyment of the land known as Caneslatch, or that it was in any way appendant or appurtenant thereto.

But a more fatal objection is that, in describing the right of way in question, it is not alleged that it begins on the Caneslatch plantation, or that it even leads from said plantation. Indeed, from the description of the way as given in the complaint, it does not appear that it touches Caneslatch plantation at any point or reaches to it. The allegation is, "leading from the public road," &c. Now, even adopting the theory that the public road being the boundary of Caneslatch plantation on the east, the plaintiff owns to the middle of the road, still the complaint cannot be construed as alleging that the way in question has one of its termini on the Caneslatch plantation; for as the creek, which is one of the termini named, lies east of the public road, and as the de-

fendant owns the land adjoining the road on the east, and consequently the eastern half

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of said road, the western as well as *the eastern terminus of the way, as described in the complaint, would be on the land of the defendant, and not on the land of the plaintiff. In Northeastern Railroad Company v. Payne, 8 Rich., 177, a point which seems to be identical with this was decided. The charter of the company authorized the construction of a railroad from Charleston, and it was held that from was a word of exclusion, and could not be construed to mean from within, and therefore the charter of the company did not allow it to cross the boundary line of the city. It seems to us, therefore, that the only issue presented by the pleadings was whether the plaintiff was entitled to the right of way as an easement in gross, and when he failed, as it is manifest he did, to establish any such right of way, the complaint should have been dismissed or the jury directed to find a verdict for the defendant.

It is claimed, however, by the respondent that if we should take this view of the case, then he should be allowed to amend his complaint by inserting an allegation that the right of way begins on the Caneslatch plantation. It is very true that the provisions of the code in respect to amendments are very liberal, but there is one qualification in this respect, and that is that the amendment asked for "does not change substantially the claim or defence." Code of 1882, § 194. So that the inquiry is, does the proposed amendment change substantially the claim of the plaintiff? It appears to us that it does. As we have seen, the claim set up in the complaint is a claim to a right of way in gross, and the amendment asked for is to change that claim into a claim to a right of way appurtenant to the land of the plaintiff. These two rights differ substantially, not in form merely, but in their nature and results. The violation of these rights present different and distinct causes of action, which would have to be asserted and established by different and distinct allegations and proofs, and hence we think the proposed amendment would change substantially the claim set up in the complaint, and cannot be allowed.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the complaint be dismissed.

Mr. Chief Justice SIMPSON concurred.

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*Mr. Justice McGOWAN dissenting. I cannot concur in the judgment pronounced by my brethren in this case. It seems to me that the statements of the complaint that the land of plaintiff bounded on the public road, and that he had a right of way leading from the same public road over the adjoining land of the defendant, amounted substantially to an allegation of right of way connecting with his lands. But if held strictly and literally not to be such allegation because of the public road running on the line and interposing an imaginary obstacle, the plaintiff should have leave to amend his complaint. That would not, in my judgment, violate the rule that an amendment should not "change substantially the claim or defence." The plaintiff manifestly intended to claim a right of way appurtenant to his plantation as stated "for the use of the said Caneslatch plantation and those connected with it," and therefore an amendment would not change the nature of the claim, but simply enable him to make perfect his imperfect allegations, which is the very object of amendment.

Judgment reversed.

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21 S. C. 226

KENNERTY v. ETIWAN PHOSPHATE COMPANY.

(November Term, 1883.)

[1. *Reformation of Instruments* ⟸25.]

A complaint alleged that plaintiff had executed to defendant a paper under seal containing a release and covenant not to sue for future damages, without reading the paper so executed and not knowing at the time that such release and covenant were therein inserted, but supposing that this paper, which was sent to him by his attorney, was a copy of another paper previously executed by plaintiff, in which there was no such release or covenant. The complaint contained no allegations of mutual error, nor of fraud, concealment, or imposition by defendant, but only showed a mistake by plaintiff, occurring through no fault of defendant; and judgment was prayed for a reformation of the instrument, and an injunction to restrain defendant from using it in bar of an action by plaintiff for damages. *Held*, on demurrer, that the complaint did not state facts sufficient to constitute a cause of action.

[Ed. Note.—Cited in Howlett v. Garner, 50 S. C. 10, 27 S. E. 533.

For other cases, see Reformation of Instruments, Cent. Dig. § 88; Dec. Dig. ⟸25.]

[2. *Cancellation of Instruments* ⟸24.]

If, under the prayer for general relief, a cancellation could be decreed, still the facts stated made no cause of action, especially as no offer was made to repay the money received by plaintiff from defendant under the terms of the said instrument.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 33–38; Dec. Dig. ⟸24.]

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[3. *Equity* ⟸273.]

*The complaint should have been dismissed, and the Circuit judge erred in granting leave to plaintiff to amend, as no ground appeared for any of the amendments authorized by section 194 of the code of procedure; and the plaintiff cannot, by way of amendment, make a new

cause of action, e. g., cancellation of instrument, instead of reformation.

[Ed. Note.—Cited in Bleckeley, Brown & Fretwell v. Branyan, 28 S. C. 449, 6 S. E. 291; Miller v. Stark, 29 S. C. 328, 7 S. E. 501; Gregory v. Ducker, 31 S. C. 146, 9 S. E. 780; Clayton v. Mitchell, 31 S. C. 204, 9 S. E. 814, 10 S. E. 390; Cuthbert & Co. v. Brown, 49 S. C. 518, 27 S. E. 485; Ruberg v. Brown, 50 S. C. 398, 27 S. E. 873; Martin v. Fowler, 51 S. C. 169, 28 S. E. 312; Booth v. Langley Mfg. Co., 51 S. C. 419, 29 S. E. 204; Whaley v. Lawton, 57 S. C. 267, 35 S. E. 558; Proctor v. Southern Ry., 64 S. C. 494, 42 S. E. 427; Knight, Yancey & Co. v. Etna Cotton Mills, 80 S. C. 216, 61 S. E. 396.

For other cases, see Equity, Cent. Dig. § 562; Dec. Dig. ⟸273.]

4. This case distinguished from Bischoff & Co. v. Blease, 20 S. C., 460.

[5. *Reformation of Instruments* ⟸16.]

An allegation that defendant had violated the agreement furnishes no ground for a reformation of the agreement.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 68; Dec. Dig. ⟸16.]

Before Cothran, J., Charleston, April, 1883.

The order of the Circuit judge in this case was as follows:

This matter came on to be heard by the court on a motion to dismiss the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. The question presented is purely one of pleading, in the consideration of which it must be borne in mind that the code of procedure has completely reversed the ancient rule of the common law, which allowed nothing by way of intendment, and required all construction to be made most strongly against the pleadings. In this matter the rule has been substituted in most, if not in all, of the cases, and certainly in ours, that "in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties." See Code, § 180. "When the allegations of a pleading are indefinite and uncertain, so that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment." This ought not to be, as it is too often, confounded with the remedy by oral demurrer, such as has been interposed here; the provision for amendments is very ample. See chap. VI., title VI., passim.

The complaint should contain a plain, concise, and intelligible statement of the material facts which constitute the ground of relief as they actually exist, and not the legal effect, or as part of those facts, and nothing of the mere evidence or probative matter by which their existence is established. It may as well be conceded, once for all, that the code of procedure is now the only source of authority from which the rules of pleading may be drawn; that its methods have

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completely supplanted those which *preceded it, and that the latter (which we have abandoned with such evident reluctance) can no longer be appealed to as possessing of themselves any force and authority. Pom. Rem., § 515. The object of the pleading is still, as it has always been, to arrive at a special issue upon a given and material fact; the primary requirement is, that the complaint shall contain a statement of the facts constituting the plaintiff's cause of action, not according to their legal effect, as such may appear to the mind of the pleader, but as they actually existed, and must be set forth in ordinary language. Presumptions of law must not be stated.

A demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action, does not necessarily deny the existence of the right or cause of action, but its effect is to raise the issue whether or not the complaint has alleged facts sufficient to put the defendant to his answer. Mr. Pomeroy (§ 519) has ventured to define the term, "cause of action," as follows: "(1) The plaintiff's primary right, and the defendant's corresponding primary duty, whatever be the subject to which these relate, whether of person, character, property, or contract; and (2) The delict or wrongful act or omission of the defendant, by which the primary right or duty have been violated." This seems to be philosophical and sound. The first inquiry then is, obviously, does a cause of action exist here? and, secondly, does the plaintiff's complaint state facts sufficient to put the defendants to their defence by way of answer?

It may be observed that the defendants have not thought it proper or necessary, up to this time, to answer the complaint. Had they done so, it would in no wise have affected the result of this motion. The complaint only is before me, and for the purpose of this motion, every allegation contained in it, which has been properly averred, must be taken to be true. Whether the defendants have the right thus to attack the complaint before an issue is made up by answer, demurrer, or notice of appearance (which would have taken the case to a docket), for other reason than to require the plaintiff to make the allegations thereof "more definite and certain," has not been questioned by him, and may therefore be considered as having been waived.

The plaintiff and defendant are contigu-

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ous land owners on *Charleston Neck, the one a truck farmer, the other engaged in the manufacture of commercial fertilizers. The occupation of his premises by the former is prior, in point of time, to the possession of theirs by the latter. Several years ago, the plaintiff, being aggrieved and in-

jured in his property by the action of the defendants in the legitimate business in which they were engaged, brought suit in this court and recovered a verdict for $2,000 damages against the defendants. That proceeding not being for a public nuisance, but for injuries sustained by the plaintiff, the damages given by the jury could in no event be estimated beyond the period at which the verdict was rendered.

It would seem that, as a right of action existed in favor of the plaintiff then, as was shown by the result of the suit, the same cause, if continued, would produce like results, with like remedy to the plaintiff for future damages; and suits toties quoties might have been instituted by the plaintiff against the defendants; and thus an abatement of the nuisance would have been accomplished by means of the increased severity of the verdicts of successive juries in punishment of the contumacy or obstinacy of the defendants. If, therefore, the plaintiff has not deprived himself of this continuing right by the terms of the so-called agreement (a fact to be determined, according to my view of the matter, at a future stage of this suit, and upon an issue differently made up to this), and if he has sustained damages at the hands of the defendants, as he alleges in his complaint, and as must be conceded under the rule of law applicable to the defence by way of demurrer, then is the conclusion irresistible that a cause of action exists against the defendants in this behalf.

Secondly. Does the complaint state facts sufficient to constitute a cause of action? The principle of law under which this proposition will be considered, and which commands the support of an array of authorities almost interminable, is well stated in the case of Morse v. Gilman, 16 Iowa, 504, citing a line of New York cases to be found in 4 Duer, 610, 5 Id., 697, and E. D. Smith, 554. It is as follows: "A complaint to be overthrown by demurrer must be wholly insufficient. If the complaint to any extent, or any portion of it, presents facts sufficient to constitute a cause of action, or if a good cause of action can be gathered from it, it

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will *stand. Contrary to the common law rule, every reasonable intendment and presumption is to be made in favor of the pleading, and it will not be set aside on demurrer unless it be so fatally defective that, taking all the facts to be admitted, the Court can say they furnish no cause of action whatever."

The plaintiff alleges in his complaint that he signed a certain paper which contains a stipulation on his part not to claim future damages from the defendants, and a covenant not to sue therefor; but he most positively denies that he was advised of, or in any way had knowledge of, such stipulation and covenant. That the said paper was procured from his attorney at law, the late M. P. O'Connor, Esq., "by overtures made by, or in behalf of, the said defendant corporation." That, admitting the efficacy and binding effect otherwise of such stipulation and covenant, the defendants themselves have violated the terms of said agreement by enlarging the capacity of their works, by reason whereof he claims to have been released from the terms of the said agreement. In paragraph 1 he alleges that "irreparable damage" will be done to him by the operation of the defendants' works. The effect of the demurrer is to admit the truth of these allegations.

Mistake, overreaching, breach of agreement, are all grounds of equitable jurisdiction and relief. These are all alleged in the complaint, and admitted by the demurrer. It is true that the complaint does not, in terms, allege that improper means (necessarily) were used in procuring the so-called release; in other words, fraud eo nomine is not charged; but he does allege that, "by overtures made by, or in behalf of, the said defendant corporation," this arrangement was effected with his attorney, without the knowledge of the plaintiff, without his assent or intelligent approval. Fraud is a mixed question of law and fact; so also, for example, is the term "indebted"; and I am not sure that each of these used in a complaint as the statement of a legal conclusion would not, under the code, be obnoxious to the rules of correct pleading. The correct rule seems to require the statement of facts, the proof of which establishes the fraud or debt, as the case may be.

It is easy to conceive of a case wherein a demurrer sustained would be an act of mer-

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cy to him against whom it operates, in *relieving him of the agony of protracted suffering and of inevitable death; but it is a blessing in such complete disguise as rarely to be recognized or appreciated; and it is so harsh, that, under the liberal practice of the code as to amendments, it should not be resorted to, unless the case is manifestly immedicable. If I were even more doubtful as to the correctness of the conclusions attained, I should hesitate to sustain the demurrer interposed here. Thus to deny the right of a hearing to the plaintiff upon the merits of his case (if it have any), would be to cut him off from all hope of redress; and if "irreparable damage" has been done to him, as admitted by the demurrer, the court itself would perpetuate the wrong. No such result can occur to the defendant. The costs and annoyance of litigation are by no means inconsiderable, but they are, in comparison with even possible "irreparable damage," but as the small dust of the balance. Nor can the statutes of limitations avail the defendants upon this motion, as contended for in argument. Section 94 of the code

limits this form of defence to the answer. Jones v. Massey, 9 S. C., 376.

The defendants have supported their motion with very elaborate arguments, with the enumeration of many indisputable propositions of law, and with much authority. Such may be of great service in a future stage of this proceding, when the merits of the case come on to be considered, provided such a state of facts shall then be made to appear as will justify their application. A consideration of these at this time, in the view of the case taken by me, would be premature and unnecessary.

Wherefore it is ordered and adjudged: 1. That the motion to dismiss the complaint be, and the same is hereby, refused. 2. That the defendants have leave to answer the complaint within twenty days after they shall have had notice hereof; and that the plaintiff have leave to amend his complaint if advised that it is necessary to do so. 3. Let the costs of this motion abide the final result of the cause.

The defendant appealed upon numerous and lengthy exceptions, which raised the precise points considered and determined by this court.

Messrs. B. J. Whaley and A. T. Smythe, for appellant.

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*Messrs. Robert Chisolm and A. G. Magrath, contra.

April 26, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. John Kennerty, plaintiff, respondent, owns a farm on Charleston Neck, on which he has for years been engaged in raising vegetables, strawberries, and other crops for the markets of Charleston, New York, and other places. Since he has been engaged in this business, the Etiwan Phosphate Company, defendant, appellant, has erected upon an adjoining plantation large works for manufacture of commercial fertilizers, in the preparation of which quantities of sulphuric acid are used, producing certain gases, fumes, and vapors, very injurious to both vegetable and animal life, and from which great injury resulted to the respondent; on account of which he brought action against the respondent and recovered a verdict for the sum of $2,000 and costs of suit.

From this verdict the defendant gave notice of appeal, pending which negotiations commenced between the attorneys of the respective parties for a settlement of the controversy. In the meantime, additional injury had resulted to the respondent. During these negotiations, an agreement was prepared by respondent's attorney, M. P. O'Connor, Esq., which respondent signed, in which, in consideration of the amount of the verdict and an additional sum of $250 to be paid him, with the costs of suit and the raising by appellants of their chimneys through which the gases and vapors escaped, twenty-five feet higher than formerly, he accepted the same as satisfaction of all damages up to that time, and agreed to discontinue the action then pending. It does not appear whether this paper ever went into the possession of the appellants, or that they knew of its execution. It is stated that they never assented to it.

After this, the negotiations between the attorneys continued, of which respondent alleges, however, that he had no knowledge, and subsequently as alleged, respondent's attorney sent him a second paper by his (respondent's) son, who received it directly from his attorney, Mr. O'Connor, with the request that he would take it and have it signed. That the respondent supposing, as he alleges, that it was not different from the previous

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paper, *signed and returned it to his attorney. This paper, in addition to the stipulations in the first, contained a release and waiver from all future damages resulting from the same cause of which respondent had previously complained, and a covenant under seal that he would not thereafter sue the appellant company for such damages as might, or would, be suffered by him in the future. This second paper was signed by the respondent, in the presence of T. Massalon and T. J. Kennerty, June 10, 1876, and at the bottom is endorsed a statement, signed by Mr. O'Connor, that said deed of release was read over again to John Kennerty, and acknowledged as his deed, in his presence, and dated June 17, 1876.

Notwithstanding these facts, the respondent avers in his complaint that he supposed the second paper was the same as the first; that he was never consulted by his attorney as to any change; that he had no knowledge as to the additional stipulations; that had he been informed thereof, he would have unhesitatingly refused to execute any such release or covenant; that he never authorized or empowered his said attorney to enter into any negotiation, or to make any settlement embracing such stipulations. He denies, too, that the release and covenant were ever read over to him, or that he ever knew they were contained in the paper until subsequently, when he directed his present attorney, Mr. Chisolm, to bring action for damages still resulting to his crops, he was informed by his said attorney that defendants had such a paper. Under these circumstances, the present action was commenced, in which, upon allegations as above stated, he prays judgment that the said paper in the possession of, and held by, the defendant corporation shall be brought into court, and the release and covenant be erased therefrom, and the same be decreed to have been inserted without the authority of the respondent, and that the de-

fendant be enjoined and prohibited from using the same to prevent the plaintiff from protecting his property from damage, &c., and for such further relief as may be proper, &c., &c.

At the February term of the court for Charleston county, upon previous notice, a motion was made to dismiss the complaint, on the ground that it did not state facts suf-

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ficient to constitute a *cause of action. This motion was overruled, and defendant was granted leave to answer the complaint within twenty days. Leave was also given the plaintiff to amend his complaint. By appeal from this order, the case is now before us.

The main question presented in the appeal is: admitting the allegations to be true, are they sufficient as facts to constitute a cause of action? A cause of action, defined in a few words, is a primary right of one, either legal or equitable, invaded by another. Do the facts alleged in this case show such a right, either legal or equitable, in the plaintiff, and that it has been invaded by the defendant? The right which the plaintiff claims, and for the violation of which he seeks redress, is to have a certain paper, which he acknowledges he executed, reformed by striking therefrom certain stipulations therein which he alleges he did not know the paper contained when he signed it, and also to enjoin the defendant from using it against him in its present form as a defence to such action as he may institute for the protection of his property. His purpose is to strike from this paper above referred to the release and the covenant not to sue for future damages.

To simplify the matter, it is an action to reform a written instrument executed by the plaintiff to the defendant. It may be well to state here that this paper seems to have been executed in 1876; was soon thereafter placed upon record by the defendant; that the stipulations as to the payment of the money required from the defendant, and raising the chimneys of the works twenty-five feet higher than formerly, have been complied with; and no offer or tender by the plaintiff of the money back has been made. It is alleged, however, that the defendants have materially enlarged their works, and in that respect have violated the agreement. It may be further stated that some time before the present action the plaintiff brought suit to enjoin the defendant from operating their works. In this suit, the paper now in question was brought into court by the plaintiff as the basis upon which he asked the equitable relief of a perpetual injunction, this paper, as he supposed, having precluded him from an action on the law side of the court for damages. In this suit, his complaint was dismissed upon two grounds: (1) that the ac-

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tion could *not be maintained until the legal right upon which the relief depended was established on the law side of the court; and (2) even with such right established, or not denied, there was nothing in the case to entitle the plaintiff to be released from his covenant not to sue contained in the said paper. See 17 S. C., 411 [43 Am. Rep. 607].

With these statements, we will recur to the question, do the facts alleged entitle the plaintiff to have the relief demanded, or any relief? Do they show a right on his part to have the instrument in question reformed, or to prevent the defendants from using it as a defence to any future action for damages growing out of their phosphate works, as they stood when the instrument was executed, leaving the paper as a settlement of the previous case?

The cases in which the question of relief in equity may arise in connection with an instrument in writing executed by the parties may be divided into several classes: 1. Where there is a mutual mistake as to the facts upon which it is based, or as to the terms and stipulations embraced therein. 2. Where one of the parties only is under such mistake, either of the facts or the stipulations, and such mistake has been occasioned by the fraud, deceit, or imposition in any form of the other. 3. Where one of the parties only is under such mistake, and this has occurred from no fault of the other, but solely by the negligence or inattention of the first party.

In the first two classes, where the mistake is made to appear by clear and competent testimony, equity will unhesitatingly afford the necessary relief, either by reforming the paper or cancelling it as the case may require. In the third, equity will refuse its aid, except under very strong and extraordinary circumstances, showing imbecility or something which would make it a great wrong to enforce the agreement, and this must be made to appear by competent testimony of the clearest kind; the general, and we might say the almost universal, rule being, as was expressed by Chancellor Dargan, in Murrel v. Murrel, 2 Strob. Eq., 148 [49 Am. Dec. 664], "that a party fully competent to protect himself, under no disability, advised as to all the circumstances by which he may be saved in his rights, or in a situation where he might by due diligence be so advised, not overreached by fraud, concealment, or misapprehension, nor the victim of a mistake against

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*which prudence might have guarded, has no right to call upon the courts to protect him." Without encumbering this opinion with extracts and quotations, we think the above principles will be found laid down by the standard authors, and in leading cases on this subject. See Story Eq. Jur., §§ 110, 127, 146, 151; Adams Eq., 171; Andrews & Shepherd v. Essex Fire Ins. Co., 3 Mason, 10; Nevius v. Dunlap, 33 N. Y., 676; Lyman v. United Ins. Co., 17 Johns., 373; Sawyer et al.

v. Hovey, 3 Allen, 331; Murrel v. Murrel, 2 Strob. Eq., 148 [49 Am. Dec. 664]; McDow v. Brown, 2 S. C., 108.

To constitute a cause of action in this case, under either the first or second class, it should appear in the complaint either that there was a mutual mistake as to the contents of the paper in question, to wit, some stipulation omitted, or inserted, without the knowledge and against the understanding of both, or that the plaintiff was so mistaken, or uninformed, resulting from the fraud, concealment, overreaching, or imposition in some way, in whole or in part, or at least in some degree, by the defendant. Now, admitting the allegations stated in the complaint to be true, and giving to them the most liberal intendment allowed by the spirit of the reformed procedure, do they bring the case under either of the above classes? We think not. There is certainly no allegation of a mutual misunderstanding of what the paper contained. On the contrary, it fully appears in the complaint itself that the release of and the covenant not to sue for future damages were the very matters which the defendants desired and were negotiating to have inserted. They declined the first paper because it did not contain these stipulations.

Secondly. Do the facts stated show that the plaintiff was mistaken as to these stipulations being inserted, and that he was misled in reference thereto by the fraud, imposition, or improper conduct of the defendant in any way? There is certainly no distinct charge of that kind made, nor, after most careful examination of the complaint, do we find a single fact stated from which it may be inferred that such a charge was intended to be made. The nearest approach to such an allegation is found in the twelfth paragraph of the complaint, where it is stated that pending the appeal in the previous case, some over-

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tures were made by the *defendant to plaintiff's attorney, M. P. O'Connor, &c. The meaning of the term overture is a proposition, an offer. Now, there is nothing essentially corrupt or fraudulent in all propositions, or offers, so that every one must necessarily have such a feature. This will depend upon the nature and character of the proposition or offer. Here the proposition was for a settlement of the controversy. That parties should desire to settle a litigation is not a fraudulent desire. Nor, in endeavoring to bring it about, is the fact that it was made to the attorneys of the party a fraudulent act. On the contrary, such mode is in the highest degree proper; and it would be better in all cases that such mode should be observed than that the parties themselves, over the heads of their attorneys and without their knowledge, should undertake it.

It is true the complaint alleges that the plaintiff was entirely ignorant of the insertion of these stipulations, although he had the paper in his possession, and signed it in the presence of witnesses. He also alleges that had he known of their insertion, he could not have been prevailed upon under any circumstances to sign the paper. He also alleges that having signed a previous paper with no such stipulations inserted, and containing only such terms as he was willing to make, and this second one being sent to him by his attorney to be signed, he supposed it was as the first and signed it without observing any change. All this may be true, but it in no way connects the defendants with the mistake. The defendants knew of and desired the insertions, and made no effort, nor resorted to any contrivance, to conceal this fact from the plaintiff. On the contrary, the stipulations were plainly expressed in the paper which was delivered to the defendants, signed and executed by the plaintiff in the presence of witnesses, one of them the son of the plaintiff. The defendants were not present even, and there is no allegation, not the most remote, that defendants had any agency whatever in obtaining plaintiff's signature.

We have seen that the case does not fall under the head of mutual error. It is equally apparent, from what we have said above, that it does not fall under the head of a mistake occasioned by fraud, imposition, mis-

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placed confidence, or overreach*ing by one party as against the other. But taking the case as stated, and giving the facts their fullest force and effect, it is one where the instrument expresses exactly what was intended by the one side, but contains important insertions that the other (that other being the party who executed it) did not know were embraced; of which want of knowledge the first party had no information or suspicion, nor had any agency in producing; on the contrary, had every reason to believe that the paper as executed was precisely in accordance with the understanding of both parties, and so believing, has since carried it out by paying the money called for, and otherwise conforming thereto.

This brings the case under the third class. Does the general rule of that class apply? Or do the facts stated rank it with the exceptions? Was the plaintiff an imbecile? Was he incompetent to protect himself? Was he laboring under any disability of mind or body? Was he unable to read? Was he in a situation where he could not have been fully advised by due diligence as to the contents of the paper? Was there any concealment, or circumstances of surprise? Could not reasonable and proper prudence have guarded him against the mistake? Do the facts stated in the complaint taken as true entitle him to invoke the benefit of any or all of these pleas? If not, in the language of Chancellor Dargan, supra, "he has no right to call upon the courts to protect him," be-

cause, upon his own showing, he has no cause of action for reformation. We do not find any fact stated in the complaint from which it may be inferred that he was excusably mistaken as to the contents of the paper which he so solemnly executed under seal and in the presence of two witnesses, and upon which the court, in the exercise of equity jurisdiction, can seize and afford him relief. If the plaintiff was really ignorant of the contents of the paper, it was an ignorance under circumstances which even the most careless might have avoided. He had nothing to do but simply to read it. This he had full opportunity to do, and if he failed to embrace said opportunity, he has no one to blame but himself.

The case presents itself in this attitude: the plaintiff has signed a paper in which he has for a consideration released certain rights and made a certain covenant. The pa-

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per has all the *incidents of a solemn and deliberate execution. It is under seal and was executed in the presence of two witnesses, who attested the same. He now comes into court and says that he was ignorant of the fact that the release and the covenant were embraced, and the only reason he gives for this ignorance is that he had some time before this execution signed a previous paper as to the same matter in which the release and covenant were not embraced, and he supposed therefore that this second paper was the same as the first. If he thought the second was the same as the first, where was the necessity of the second paper? We have no reason to doubt but that the plaintiff is truthful in his statements. In fact, the effect of the demurrer is to admit them, and the case in that aspect may be a hard one. But we cannot adjust matters according to the hardships arising in individual cases. An attempt to administer law or equity by such a principle would produce infinite confusion, uncertainty, and injustice, far beyond any compensation that might result from the relief afforded in a special case. The law is built up upon general principles, and the wisdom of the past has determined that it is much the safest to adhere to them as producing the greatest good to the greatest number, rather than undertake to relieve a present hardship in special cases. If this plaintiff is entitled to relief under the circumstances claimed, we do not see why any contract should ever be regarded as absolutely binding.

It should be observed further that the plaintiff does not ask that the paper should be entirely cancelled and the original status restored. He has received the consideration and has enjoyed it for years, but he makes no offer to return it. His purpose is to strike from the paper the part to which he objects and then allow it to remain as a settlement of the previous suit. The right of action which he claims is not cancellation, with restoration of original status, but reformation and the establishment of a different contract from that which appears in the paper. Here are two distinct causes of action presented, and requiring a different state of facts. A paper may be reformed when the mutual understanding of the parties requires it, without entire cancellation and without restoration of the original status, but an entire cancellation only takes place when no valid contract has been made,

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*and the parties are to be put back as they stood at the beginning. These are different rights, and their invasion gives rise to different causes of action, requiring in the complaint a statement of facts suited to each.

The plaintiff here does not demand a cancellation in express terms; whether he intended to do so, under the general prayer for such further and other relief as may be proper, we do not know. If he did, however, then we say, that the facts stated in the complaint do not constitute a cause of action in that respect, especially as he makes no offer or tender to restore the original status.

The second question in the case grows out of the order granting plaintiff leave to amend his complaint. Under the former practice, demurrers were of two kinds, general and special. The first went to the substance and the latter to the form. Upon a judgment on the first, amendments were not allowed; upon the latter, however, they were generally permitted—the distinction being the fact that the one was founded on substance, showing the absence of a cause of action, which was fatal, and the other on a mere matter of form, which could be remedied. In Frazer v. Legaré, Bail. Eq., 389, it was held that where demurrer for want of parties is sustained, leave may be granted to amend so as to make necessary parties. In Mobley v. Mobley, 7 Rich., 431, it was held, that before judgment rendered on general demurrer, leave to amend may be granted. See also Macfarland v. Dean, Cheves, 64, as to special demurrer. But after judgment on general demurrer, a motion to amend could not be allowed. Chalk v. McAlily, 10 Rich., 92. On general demurrer to a declaration, the court has no power to permit the plaintiff to amend. Bagley v. Johnston, 4 Rich., 22. Still more, an order granting leave to amend generally (as in this case) without stating in what particular, is irregular. Thompson v. Malone, 13 Rich., 252.

Thus stood the law under the former practice. Have the courts any greater power under the reformed procedure? The two sections in the code which have special reference to amendments, are sections 193 and 194. The first more especially refers to amendments by the parties themselves. This is not a case of that kind, and therefore that

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section need not be considered. *The second, to wit, 194, is the one which expressly gives power to the courts to permit amendments, and is therefore the one which we must consider. That section provides: "That the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved."

Has the leave to amend here been granted in accordance with this section? The section authorizes amendments either before or after judgment. There is no limit, therefore, as to the time or the stage of the proceeding; but this general latitude does not extend to the character of the amendment. On the contrary, the section specifies the character, and therefore the power of the court conferred therein only extends to amendments of the character thus specified. Expressio unius est exclusio alterius. The name of any party may be added, stricken out, or corrected, as also a mistake in other respects. Other allegations material to the case may be inserted, or when the amendment does not change substantially the claim or defence, the pleading or proceeding may be conformed to the facts proved. And these amendments, as we have stated, may be allowed either before or after judgment.

Does it appear that the leave granted here was intended to meet any one of these specifications? The leave in its terms was general and permits any amendment which the plaintiff may be advised to be necessary. This, we think, went beyond the intent of the section under consideration. But confining the leave to the requirements of the section, does it appear that the complaint was defective in any of the particulars mentioned as the subject of amendment therein, and to which the leave could apply? Would any amendment to the complaint, by adding, striking out, or correcting the name of any party, be of any service? Is there any mistake to be corrected? Were there any allegations material to the case as made left out? Were there any facts proved, to which the pleadings might be made to conform? We must

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*give a negative answer to all of these questions. There is certainly no name to be added, corrected, or stricken out. Nor is there any mistake to be corrected. Nor have any allegations material to the case as made been omitted.

The plaintiff's case is one for reformation of the paper, not for cancellation, and he cannot now in any event make a new claim, or state a new cause of action. He must stand or fall upon the cause of action with which he started out, and especially must this be the case when, as we think, the judgment of the court below should have been a dismissal of the complaint. We must look at the case in that aspect. Suppose the Circuit judge had sustained the demurrer and dismissed the complaint, could he then, after such judgment, have permitted, under the section supra, an amendment by which the case could be restored with a new cause of action? We think not. This section is intended to perfect a proceeding in which the plaintiff has been successful, and not when he has lost the case. It is intended to have the judgment of the court completed and perfected, and not as the means of obtaining a new trial upon a new cause of action after the case has been lost on the cause upon which it was instituted. We think it was error to allow this general leave to amend under the circumstances of the case.

This case may be distinguished from the recent case of Bischoff & Co. v. Blease, 20 S. C., 460, in the fact that there a material allegation to the case made was wanting. The plaintiffs sued as partners, but neglected to allege in terms a partnership, though that fact was stated in the title.

It is alleged in the complaint that the defendants have violated the agreement. If this be so, it may afford an opportunity to the plaintiff to bring action for such damages as he may have sustained thereby; but it is not a fact which in any way strengthens the cause of action upon which he relies in the present case, and which we have held to be insufficient.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the complaint below be dismissed.

Mr. Justice McIVER concurred generally, but Mr. Justic McGOWAN only in the result.

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21 S. C. *243

*HARLEY v. WEATHERSBEE.

(November Term, 1883.)

[*Exemptions* ⇐108.]

A tenant indebted to his landlord for rent cannot claim a chattel exemption against a distress warrant duly issued by the landlord to enforce the payment of such rent—a distress warrant not being an attachment, nor a mesne or final process issued from any court.

[Ed. Note.—Cited in Rookard v. Atlanta & C. A. L. R. Co., 89 S. C. 371, 376, 71 S. E. 992.

For other cases, see Exemptions, Cent. Dig. § 129; Dec. Dig. ⇐108.]

Before Wallace, J., Barnwell, November, 1883.

This was an action of claim and delivery by Philippa H. Harley against A. J. Weath-

ersbee and W. E. McMichael, to recover a piano, or its value and damages, the piano having been seized on plaintiff's premises by McMichael, under a distress warrant issued to him by Weathersbee requiring a distress for rent in arrears due by Mrs. Harley.

Mr. H. M. Thompson, for appellant.

Mr. J. J. Brown, contra, cited Const., art. II., § 32; Gen. Stat., §§ 1999, 2000; 4 McCord, 378; 17 S. C., 454.

April 26, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The question involved in this appeal is whether a tenant, indebted to his landlord for unpaid rent, can claim a homestead exemption in personal property against a distress warrant issued by the landlord to enforce the payment of said rent. It is admitted that the plaintiff, though a married woman, was the tenant of the defendant, and at the time of the taking under the distress warrant was indebted to defendant to the amount of $76 for rent in arrears for the preceding six months. These facts distinguish this case from the case of Wallace v. Johnson, 17 S. C., 454, and therefore the principle applied there can have no application here. The Circuit judge held that the plaintiff was entitled to the exemption, and the appeal brings up the single question stated above.

The constitutional provision in reference to homesteads, and the acts which have been passed in accordance therewith, embrace the law under which the right of homestead exists, and by which a claim for homestead is

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to be determined. As has been fre*quently announced heretofore, no new estate is created by these enactments in the debtor. On the contrary, his title and interest in the property exempted remains precisely as before the exemption, and the effect of the enactments is simply to exempt the property from certain modes of enforced sale by creditors, i. e., from attachment or sale on any mesne or final process issued from any court. This being the only effect of the homestead law, before a debtor can successfully invoke the benefit of this law he must show that his property is endangered by an attachment or threatened by levy and sale on some mesne or final process issued from a court.

In the case before the court it is not claimed that the property of the plaintiff was threatened with levy and sale by any mesne or final process of a court; it is therefore clear that the plaintiff cannot have the benefit of that exemption. Can the term "attachment" afford the protection? The exact language of the constitution on the subject of homestead is as follows: "The General Assembly shall enact such laws as will exempt from attachment and sale under any mesne or final process issued from any court," &c., &c. Art. II., § 32. It will be observed that this is an entire sentence, and that both attachment and sale is subject to the limitation of the process being issued by a court. This view is strengthened by the fact that at the time of the adoption of the constitutional provisions referred to the right of a landlord to enforce payment for rent in arrears by a distress warrant existed. This distress warrant, as was known too, was not a process, mesne or final, issued from a court, but it is a proceeding which the landlord issues by his own act and upon his own responsibility.

We must conclude, therefore, that while a distress warrant for rent does not fall under the inhibition of the constitution in terms, it must have been omitted intentionally, the omission being founded on a reason analogous to that on account of which the purchase money of a tract of land may be enforced against the land purchased, notwithstanding the homestead exemption as to other debts. But whatever may have been the reason, it is apparent that there is nothing in the terms of the constitution or in the acts on this subject which inhibits a land-

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lord from enforcing *his claim for rent by the summary proceeding allowed him by the act on that subject. That act has not been repealed, but is now of force, and the defendant should not be deprived of his rights thereunder.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

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21 S. C. 245

ADICKES v. ALLISON & BRATTON.

(November Term, 1883.)

[1. *Appeal and Error* ⇐964.]

A Circuit judge having by statute the right to adjourn his court to a future day in case "a dangerous and general disease" is prevailing, and an adjournment of a regular term to a future day having been ordered, no inquiry can be made as to whether the conditions existed that authorized the exercise of this power; and a judgment rendered at such adjourned term is not void.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3834; Dec. Dig. ⇐964.]

[2. *Appeal and Error* ⇐1007.]

In a case at law tried by the Circuit judge without a jury, his findings of fact cannot be reviewed on appeal.

[Ed. Note.—Cited in Witte v. Weinberg, 37 S. C. 590, 17 S. E. 681.

For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3955-3995½; Dec. Dig. ⇐1007.]

[3. *Principal and Agent* ⇐51.]

The power of attorney in this case held to give the attorney authority to consent to a sale of his principal's property, and to the application of the proceeds to executions in a stated order; and such consent being given, and by all parties acted on for ten years, the principal

is estopped from claiming a different application by law of such proceeds.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 83; Dec. Dig. ⟸51.]

[4. *Limitation of Actions* ⟸94.]

An action was commenced against a partnership, but one of the partners, being out of the state, was not served; judgment was rendered against the partnership and the partner served. Several years afterwards, the absent partner having returned to the state, summons was served upon him to show cause why he should not be bound by this judgment, and in his return he pleaded the statute of limitations as a defence. *Held*, that the claim not being barred when the action was commenced, the plea could not be sustained. Code, § 380.

[Ed. Note.—Cited in Adams v. Richardson, 32 S. C. 141, 10 S. E. 931; Pope Mfg. Co. v. Charleston Cycle Co., 55 S. C. 536, 33 S. E. 787.

For other cases, see Limitation of Actions, Cent. Dig. §§ 471, 472; Dec. Dig. ⟸94.]

[5. *Judgment* ⟸20.]

The decision of the Circuit judge disposed of all the issues, directed judgment for the balance due on a former judgment particularly stated in the record, and ordered execution to issue, but referred it to the clerk to calculate the interest and ascertain such balance. *Held*, that it was a final judgment and in proper form.

[Ed. Note.—Cited in Small v. Usher, 77 S. C. 114, 57 S. E. 623; Jones v. A. H. Williams & Co., 89 S. C. 581, 72 S. E. 546.

For other cases, see Judgment, Cent. Dig. § 9; Dec. Dig. ⟸20.]

[6. *Reference* ⟸102.]

Such a reference was a mere incident to the enforcement of the judgment already rendered, and did not require confirmation.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 181–187; Dec. Dig. ⟸102.]

[7. *Trial* ⟸387.]

In an action at law tried by the court, the decision of the judge is not the formal judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 903–907; Dec. Dig. ⟸387.]

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[8. *Interest* ⟸22.]

*It was error to make the interest due on the former judgment an interest bearing sum from the time the absent partner was declared individually liable. The form of judgment in such cases suggested.

[Ed. Note.—Cited in Brown v. Rogers, 80 S. C. 292, 61 S. E. 440.

For other cases, see Interest, Cent. Dig. §§ 43–53; Dec. Dig. ⟸22.]

[9. *Courts* ⟸117.]

[The court of common pleas is a court of general jurisdiction, and its records are absolute verities not to be impugned.]

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 374; Dec. Dig. ⟸117.]

Before Kershaw, J., York, March, 1883.

The decision of the Circuit judge was as follows:

The plaintiff, H. F. Adickes, in the above stated case, obtained judgment therein on February 14, 1874, on two promissory notes of the defendants, as copartners, for the sum of $641 and costs, $22.70, the principal of said judgment bearing interest from February 11, 1874. The summons in said case was served only on James B. Allison, and the judgment was entered against the firm. The plaintiff died, and Mary L. Adickes, the executrix of his will, having duly qualified, issued a summons against the defendant, J. R. Bratton, requiring him to show cause why he should not be bound by said judgment in the same manner as if he had been originally served with summons in said action; which said summons was served on the defendant Bratton in March, 1882.

The said defendant answered the summons, and resisted its demands on several grounds: 1. He denied that any such judgment was recovered by the plaintiff. 2. He claimed that if any such demand ever existed, it had been paid and satisfied from sales of his property. 3. He alleged that this proceeding was not commenced within the time limited for the commencement of civil actions or proceedings. These are not literally, but substantially, the propositions contained in the answer.

The cause was heard upon testimony and the arguments of counsel. For convenience, the facts will be grouped under the several heads, and stated in connection with the conclusions of law upon each point presented. Under the first head, the point made by the defendant is, that the Court of Common Pleas for York county was not in session at the time the alleged judgment was rendered, as claimed; and hence, that the paper described as a judgment was not a judgment. The facts are these: the time fixed by the statutes for holding the Court of Common Pleas for the winter term of 1874 was the Wednesday after the second Monday of January. On the second day of January, 1874, the presiding judge of that Circuit wrote

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a letter to the clerk, direct*ing him after he should have opened the Court of General Sessions on the second Monday of January, pursuant to law, to adjourn the same to the second Monday of February, 1874, and to open the Common Pleas and adjourn the same to the Wednesday after the second Monday in February, and to make due publication thereof.

On Thursday, January 8, the said letter, with a proper heading, was published by the clerk in the Yorkville Enquirer, and the publication continued for five issues of that paper, being a weekly newspaper published at Yorkville. Wednesday, January 14, 1874, the Court of Common Pleas was opened by the clerk of York county, and adjourned to the Wednesday after the second Monday in February then next ensuing, at 10 o'clock, a. m., and such action was entered upon the minutes. Wednesday, February 11, 1874, the court met pursuant to adjournment, the Hon. T. J. Mackey, Judge of the 6th Circuit, presiding: which also appears upon the minutes. During the term thus opened, on Feb-

ruary 14, 1874, the judgment above stated was rendered in favor of the plaintiff, and duly entered under the direction of the court, by default of defendant to answer or demur.

On February 24, 1874, an order was entered, signed at chambers, made on the motion of W. C. Beatty, Esq., attorney for plaintiffs in the cases of W. H. Schieffelin & Co. v. Allison & Bratton, William McGill and Thomas McGill v. same, and H. F. Adickes v. same, reciting that a levy had been made by virtue of the said executions upon property of the firm, some of which was of a perishable nature, and ordering that the said property be sold by the sheriff on March 13, next after the date of said order. This order was consented to in writing by the defendant, James B. Allison, and by John T. Lowry, who signed the name of J. R. Bratton, per John T. Lowry.

John T. Lowry was made the attorney in fact of the defendant, J. R. Bratton, by letters duly executed, bearing date January 18, 1872. These letters authorized the said attorney to do the following acts for his said principal: to sell, transfer, and deliver all his personal property in the county of York, in said state; to ask, demand, levy, and require, recover, and receive all moneys, debts, goods, wares, merchandise, effects, and

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things, due, owing, *payable, and belonging and coming unto the said Bratton; to sell and convey all his real estate in said county, whenever, in his discretion, it should become advisable to do so, or, if the said attorney should deem best, to make a deed of gift of the real estate to Mrs. Bratton for life, with remainder to the children that he, said Bratton, should beget of her; to sign, execute, and deliver all such deeds and conveyances as the said attorney should deem fit and expedient for the purpose of carrying out the powers conferred; to use all due means, course, and process in law for the full, effectual, and complete execution of all the business aforesaid, and, in the name of the said Bratton, to make and execute due acquittance and discharge; to appear for the said principal, and to represent him before the governor, judges, justices, officers, and magistrates of the law in any court or courts of judicature, and, on his behalf to answer, defend, and reply to all actions, causes, matters, and things whatever relating to the premises. Also, to submit any matter in dispute, respecting the premises, to arbitration or otherwise, &c., &c.; and generally to say, do, act, transact, determine, accomplish, and finish all matters and things whatsoever relating to the premises, as fully as he, the said Bratton, ought or might personally do if present, although the matter should require more special authority than therein comprised; he, the said Bratton, ratifying, allowing, and holding firm and valid whatsoever his said attorney should lawfully do, or cause to be done, in and about the premises, &c.

The firm of Allison & Bratton was dissolved June 3, 1872, and due notice thereof given in the newspapers. By the said notice, all demands against the firm were required to be presented for payment to Dr. J. B. Allison or John T. Lowry, the latter of whom (it stated) "was legally authorized to represent Dr. J. R. Bratton in all settlements." This notice was signed by J. R. Bratton and J. B. Allison.

From the time of its rendition, the said judgment was regarded and acted upon by all parties as good and valid and of force, without any question until these present proceedings were instituted. Sales were made by the sheriff by virtue of the levy recited in the above-mentioned order; and moneys derived from other sales made by the sheriff, under executions in his office,

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*have been applied to this execution; and the judgment was relied on as a subsisting judgment, having a lien to sustain a sale of land, in the case of Adickes v. Lowry, 12 S. C., 107, to the printed briefs of which the court has been referred, by consent of counsel, for some of the facts in this case. Upon this point I conclude, as matter of law, that for the purpose of this decision, the said judgment is sufficient to constitute a basis for this proceeding.

The next point to be considered is, as to whether the said judgment has been paid or satisfied. The following judgments were proven by the production of the judgment rolls:

a. Hugh Galloway v. J. R. Bratton, entered and execution issued thereon January 15, 1871, for $100.60.

b. Schieffelin & Co. v. J. B. Allison and J. R. Bratton, judgment entered and execution issued May 22, 1872, for $354.36.

c. Dowie, Moise & Davis v. same, judgment entered and execution issued July 28, 1873, for $194.49.

d. L. M. Grist v. same, judgment entered and execution issued July 29, 1873, for $125.40.

e. McGills, administrators, v. same, judgment entered and execution issued September 30, 1873, for $675.05.

f. Agnes B. Harris v. J. R. Bratton, judgment entered February 11, 1874, for $666.95, and execution issued February 14, 1874.

g. H. F. Adickes v. James B. Allison and J. R. Bratton, judgment entered and execution issued February 14, 1874, for $663.76.

Of these, the judgment of Agnes B. Harris was paid from other sources, and need not further be considered.

The following executions were levied on land of the defendant, J. R. Bratton, at the dates hereinafter named, to wit: Grist v. Allison & Bratton, September 22, 1873;

Dowie. Moise & Davis v. same, the same day; Schieffelin & Co. v. same, November 5, 1873; McGills v. same, the same day. From the recitals of the consent order above mentioned, dated February 24, 1874, it is in proof that levies had been made of the executions of Schieffelin, McGills, and Adickes, on the personal property of the firm of Allison & Bratton, prior to that date.

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*The levy in the case of Schieffelin was the first made. This execution, therefore, was entitled to the proceeds of the sale of the personalty, if the levy was valid. It was recognized by the consent order aforesaid. Mr. Beatty, the attorney for the plaintiffs in all three executions, directed this application of the proceeds to that execution, and the sheriff so applied them, except the sum of $25.00 paid to the plaintiff, H. F. Adickes, for rent. The first levy made under this execution of Schieffelin was on land of defendant Allison, August 27, 1873.

So far as any facts in evidence here inform us, that execution had lost its active energy before that period, and no valid levy could then or thereafter be made without renewal, as the law then stood. (See case of Adickes v. Lowry, supra.) The proceeds of the sales of personalty, therefore, would have been applicable to the other two executions levied upon it, pro rata, except for the effect of the consent of Bratton to the order, by his attorney, Lowry, recognizing the levy and sale under the execution of Schieffelin and the others therein named.

Lowry was authorized to represent Bratton in all settlements of the copartnership affairs, as appears from the published notice of dissolution above mentioned. As that order and the proceedings under it related to the business of the copartnership, and were in effect, to the extent they went, a settlement of the copartnership affairs, it was competent for Lowry to consent for Bratton to the application of the personalty as above set forth. This view is greatly strengthened by the acquiescence of Bratton for so many years. I conclude, therefore, that the judgment and execution of plaintiff herein are not entitled to be considered as affected by the levy and sale of the said personal property of the firm, and the applications of the proceeds to the execution in favor of Schieffelin & Co.

The other payments made, which are hereinafter to be stated, still leave a portion of the debt of the plaintiff unpaid and the judgment unsatisfied. On this point, it may be proper to remark that the levy and sale, and the application of the proceeds of the sale of the Dennis tract of land of the defendant Bratton, can in no wise be treated as payment or satisfaction of plaintiff's judgment in this case, beyond the money paid to plain-

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tiff therefrom, because *the judgment and execution thereon could only affect the joint property of Allison & Bratton and the individual property of the defendant Allison. The separate property of Bratton could not have been levied on by virtue of the judgment, nor could the sheriff apply the proceeds of such property, when sold, to such judgment or execution, when it appeared from the record that he had not been served with process in the case.

The next question to be disposed of is that of the effect of the statute of limitations. If that defence had been set up to the action when originally commenced, it would not have been applicable, because the causes of action were not then barred. If, however, the action is to be regarded as having been commenced at the date of the service of the present summons upon the defendant Bratton, the result would be quite different.

As this question is new here, reference has been made to decisions made elsewhere, showing how it has been dealt with by the courts of New York, from which state we derive these provisions of our code. The case of Bruen v. Bokee, 4 Denio, 56, relied on by the counsel for defendant Bratton, does not appear to me to apply to the case here. That was a proceeding by action on a joint judgment against a party not served in the original action. Such was the remedy provided by the statutes of New York at that time. The plea was "that the cause of action" upon which the suit was brought "did not accrue at any time within six years next before the commencement of this suit." The question presented, therefore, was, did the judgment prevent the running of the statute of limitations? Upon the authority of Carma v. Townsend, 6 Wend., 206, it was held that the plea was good.

The case of Berlin v. Hall, 48 Barb., 442, is more to the point. The code in New York, prior to 1847, authorized the proceeding by summons, as here, and allowed the party summoned to answer, denying the judgment, or setting up any defence which may have arisen subsequently; and, in addition thereto, if he be proceeded against according to section 375, he may make the same defence which he might have originally made to the action. By an amendment to this section, adopted in 1849, the following words were

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added: "except the statute of *limitations." It was contended in Berlin v. Hall that the proper construction of the section, as amended, required that the words added should be considered as transferred to the first paragraph, so as to qualify that portion of the section authorizing the party to interpose defences arising subsequently to the judgment. The court held otherwise; and, arguendo, remarked that the code, by its literal rendering, precluded the defence of the statute of limitations when it arose before the commencement of the original action, but al-

lowed it when it arose subsequently. If this were correct, the judgment would have the effect of renewing the causes of action, but leaving them subject to the statute from that time, as in the case of a new contract. It proceeded upon the principle that the suffering of a judgment by a joint debtor was equivalent to an admission of the debt, which, under the decisions there, as here, would renew the debt against all the parties to the contract. In order to give effect to the five words added to this section of the New York code by the amendment of 1849, this construction was necessary and not unreasonable.

Since the decision in Berlin v. Hall (1867), these words have been stricken out by a subsequent amendment, and our code has the section as last amended. In lieu of the words "except the statute of limitations," we have the following: "If the summons were originally commenced, and such defence had been then interposed." (See Code, § 380, formerly 396.) A party proceeded against, in a case of this character, is allowed to answer, "denying the judgment," or "setting up any defence which may have arisen subsequently," and also any defence which he might have made to the action, if the summons had been served on him at the time when the same was originally commenced, and such defence had been then interposed to such action. If the defence of the statute had been "then interposed," it would not have been good, and under this section no greater effect can be given to it now when it is a defence which has arisen since the judgment and sufficient time has elapsed to make it a good plea. The language employed by the court in Berlin v. Hall is applicable to this case: "It had long been held that a payment or a promise by one member of a firm revived the debt and barred the statute, although the firm had been long dissolved at the time of

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the pay*ment or promise. * * * The amendment gives the same effect to a judgment, which is in effect a confession of the debt by record evidence." The language of our code as effectually excludes the plea of the statute as the express exception inserted by the amendment of 1849, and the effect is the same as that given to the exception by the decision in Berlin v. Hall.

The summons against the defendant Bratton was served March, 1882. The judgment against Allison & Bratton was entered February 14, 1874. The defendant, J. R. Bratton, left the state October 15, 1871. He returned in June, 1872, remained one month, and again left the state, and did not return until November 19, 1878. Regarding the entry of judgment as a new starting point for the statute, and deducting the period of Dr. Bratton's absence, the bar of the statute was not complete when the present summons was served. Hence the statute of limitations is not a valid defence.

Another and simpler answer to the statute is that it is not a new action, but the service of a summons upon a joint debtor to show cause why he should not be bound by a previous judgment recovered against his co-contractor in an action commenced before the bar of the statute was complete. For the purposes of the statute, the action was commenced, as to Bratton, when the summons was served upon his co-defendant, Allison. Code, § 120. The action was not barred then, and that is the time to which reference must be had. The statute does not run pendente lite.

It has been supposed that the execution of plaintiff should be credited with the amount derived from the sales of personal property under the order dated February 24, 1874. I arrive at a different conclusion. The application of that money to the execution of Schieffelin & Co., though improper, was virtually assented to by Lowry, as the attorney of Bratton, acting within the scope of his authority, and was in like manner approved by the long acquiescence of Dr. Bratton without complaint. Plaintiff, without any fault on his part, and without prospect of recovery, would suffer the loss if that application of the money were now set aside.

The defendant Bratton, by his attorney, recognized the levy of the execution of Schief-

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felin & Co. That levy was the first *made upon the goods in question, and, if a levy at all, constituted the first lien on them. That lien having been recognized by the other parties interested, and having been acted on by the sheriff, without notice of dissent or complaint until after a lapse of six years, when the sheriff, if he were held liable for the same, could no longer protect himself by a recovery of the money from the party to whom it was paid, and the plaintiff himself would be without remedy, the defendant Bratton and all the other parties so consenting and acquiescing, are equitably estopped from asserting that the said application was not correct. Doe v. Oliver, 2 Sm. Lead. Cas., 562; Bollmann v. Bollmann, 6 S. C., 46.

It is therefore ordered and adjudged that the said plaintiff, Mary L. Adickes, executrix of H. F. Adickes, deceased, have judgment against the defendant, J. R. Bratton, for the amount of the aforesaid judgment recovered by the said H. F. Adickes against the said Allison & Bratton, for the amount of said judgment and interest thereon now remaining due and unpaid; that it be referred to the clerk of this court to compute the amount so due and unpaid, in accordance with the principles herein declared; and that the plaintiff have judgment for the same, together with the costs of these proceedings, to be adjusted by the clerk, and that plaintiff have execution therefor.

From this decision, J. R. Bratton appealed on the following exceptions:

1. Because of error in holding that the Court of Common Pleas for York was legally holden on February 14, 1874, and the judgment then rendered in favor of H. F. Adickes against Allison & Bratton was a valid judgment.

2. Because of error in holding that said judgment, if properly rendered, had not been satisfied, in whole or in part, by the sales of personal property, levied under the execution thereon in March, 1874.

3. Because of error in holding that the dormant execution of Schieffelin & Co. against said firm was entitled to be paid out of the proceeds of sales of personal property, by reason of a consent order for said sale, in preference to valid existing executions of active energy.

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*4. Because of error in holding that a consent to sell, made on February 24, 1874, could give validity and priority to a void levy alleged to have been previously made under a dormant execution.

5. Because of error in admitting oral evidence of a levy under a dormant execution, when such execution, on being produced, contained no evidence of such levy.

6. Because of error in holding that J. T. Lowry had authority, as attorney in fact, to consent to a renewal of an execution against the firm of Allison & Bratton under the power produced, which limited his authority to the individual concerns of J. R. Bratton.

7. Because of error in holding in effect that a consent to renew a dormant execution gives it vitality, without taking out new process from the court.

8. Because of error in holding that the defendant Bratton had acquiesced in the illegal application of moneys to a judgment not of force against him, and while he was absent from the state.

9. Because of error in not holding that the statute of limitations could be interposed as a bar to plaintiff's claim.

10. Because the judgment rendered against the defendant is a nullity, inasmuch as it fails to specify any sum whatever to be inserted therein.

Messrs. Hart & Hart and Giles J. Patterson, for appellant, cited 15 Stat., 325, 456; Const., art. IV., § 16; 3 S. C., 567; 7 Id., 374; Gen. Stat. of 1872, ch. XXII, § 20; Freem. Judg., § 121; 20 Ark., 77; 1 Bail., 142; 2 McMull., 156; Dudley, 46; 19 S. C., 461; 2 Bail., 361, 413; Code (1870), §§ 306–316; 3 Hill, 283, 292; 3 McCord, 560; 13 S. C., 120; 5 Id., 58.

Mr. C. E. Spencer, contra.

April 26, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. [Omitting the statement of facts, which is fully given in the Circuit decision.] Exception 1 makes the point that the original judgment of H. F.

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Adickes against *Allison & Bratton was illegal and void, for the reason that the court which rendered it did not have jurisdiction to do so. [Here follows a statement of the facts as given in the Circuit decision, ante, p. *246.] Did the court have jurisdiction to render the judgment at the time it was rendered? "The power to hear and determine a cause is jurisdiction; it is coram judice whenever a case is presented which brings this power into action; but before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected." Freem. Judg., § 118. There is no doubt here as to the subject matter and the parties being within the jurisdiction of the court or as to the alleged judgment having been rendered according to the usual practice in such cases. But the technical objection is raised that its date shows that it must have been rendered when the tribunal which undertook to do so was not in judicial harness or possessed of that peculiar virtue known as judicial power.

The Court of Common Pleas is a court of general jurisdiction, and the records of such courts are absolute verities, not to be impugned by averment or proof to the contrary. In a collateral proceeding, nothing shall be intended to be out of the jurisdiction of a superior court but that which expressly appears to be so. Freem. Judg., § 124. But it is said that the record itself here shows that the alleged judgment was rendered on February 14, 1874, which the statute shows was a time not within the regular term for York county. That is true; but the same record shows that the Circuit judge directed the court to be adjourned to another day, which he had the power to do under section 30 of the code of procedure (1870), which provided that "the judge of the Circuit Court shall have power to direct any Circuit Court in his Circuit to be adjourned over to a future day designated in a written order to the clerk of said court, whenever there is a dangerous and general disease at the place where such court is usually holden." The judge of the Circuit Court in this instance exercised that power, and no inquiry is admissible as to whether there was or was not "a dangerous and general disease" at Yorkville at the time

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fixed for the regular term of *the court. It was in the province of the judge to determine that matter for himself, and we are not at liberty to assume that he decided it wrong. Even if in that regard he committed error in

fact, we do not see that it should follow that a judgment regularly entered at the adjourned term would for that reason necessarily be void in the absolute sense. See Freem. Judg., § 122, and notes.

Exceptions from 2 to 8, inclusive, complain of the decision of the Circuit judge adverse to the plea of payment. That was a question of fact, and this being a proceeding at law, this court has no right to review the evidence upon that subject. The decision of the Circuit Court must stand as the special verdict of a jury. It is alleged, however, that there was involved in the finding an error of law in this that the Circuit judge held in effect that consent to renew a dormant execution gave it vitality without taking out new process by the court and that J. T. Lowry, as attorney for Bratton, had the authority to consent to the renewal of an execution against the firm of Allison & Bratton under his power, which limited his authority to the individual concerns of Bratton. In very general terms the facts are that certain personal property, perishable in its nature, drugs, &c., had been levied by the sheriff under the executions of Schieffelin & Co., McGill's administrators, and the aforesaid execution of H. F. Adickes; and on February 24, 1874, John T. Lowry, the agent of John R. Bratton, consented to an order, setting out all these executions according to their dates, reciting the levy and directing sale of said articles so levied; which sale was made and the proceeds applied to the execution of Schieffelin & Co., which was the oldest, and, as stated, had been first levied.

Under these circumstances, it was urged for the defendant Bratton, that the execution of the plaintiff Adickes (though junior in date) should have been credited with the amount of said sales, and, that not having been done by the sheriff, the said judgment to that extent must be regarded as ipso facto paid. We think that in this objection the precise point ruled by the judge is overlooked. He did not hold that the consent to the sale in the terms of the order directing it, was intended or had the effect, without new process, actually to renew the exe-

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cution of *Schieffelin & Co., to which the money was applied. But as we understand it, he held, first, that the very general and comprehensive terms of the power of attorney to Lowry, authorized him to consent to the sale, which under the circumstances was a virtual consent to the application of the proceeds as made; and second, that after such consent had been given and acted on by all parties, it estopped Bratton himself from afterwards objecting to it, precisely as if he in person had given that consent. Taking this view of the rulings of the Circuit judge, we cannot say that he committed error of law, either as to the right of Lowry under the power of attorney from Bratton to give his consent to the sale, or as to the effect of that consent so given and acquiesced in by all parties since 1874—ten years ago.

Exception 9 objects that the Circuit judge committed error in not holding that the statute of limitations could be interposed as a bar. Upon this subject the decision of the Circuit judge is so full and clear that we can add nothing to it. Section 380 of the revised code (1882) provides in such case as this as follows: "Upon such summons any party summoned may answer within the time specified therein, denying the judgment, or setting up any defence thereto, which may have arisen subsequently to such judgment, and in addition thereto, if the party be proceeded against according to section 377, he may make any defence which he might have made in the action if the summons had been served on him at the time when the same was originally commenced, and such defence had been then interposed to such action." If the defence of the statute "had been then interposed," it would not have been good, and under this section no greater effect can be given to it now, when it is a defence which has arisen since the judgment, and sufficient time has not elapsed to make it a good plea. We concur with the Circuit judge in his interpretation of this section of the code.

The last exception is: "Because the judgment rendered against the defendant is a nullity, inasmuch as it fails to specify any sum whatever to be inserted therein." A judgment is registration of what the court decides. In order to authorize an execution, its first requisite is that it must be final. Section 266 of our code defines a judgment to be "the final determination of the rights of

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*the parties in the action." And in reference to what is such a final determination, Mr. Freeman, at section 12 of his work on judgments, says: "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory; but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final." See Ex parte Farrars, 13 S. C., 258. Taking this as the test, it seems to us that the decision of Judge Kershaw was a final judgment. It disposed of every issue in the case, directed judgment for the amount remaining unpaid upon the first judgment of H. F. Adickes against Allison & Bratton, and ordered execution to issue. Nothing else was left for the Court to do.

But it is suggested that, although the whole case was decided, the decision was not sufficiently definite, inasmuch as it failed to name the precise amount in dollars and cents. The objection really goes to the form rather than the substance. The decision did

give judgment for a particular amount, to wit, the balance due on a record of the court, which in the summons was set out particularly. Nothing was lacking but a calculation of the interest, which was not necessary; but if so, being a mere clerical matter, it was referred to the officer of the court, whose duty it was to enter the formal judgment of the court. It is a proper case for the application of the maxim: Id certum est quid certum reddi potest.

We agree that there is no longer a provision of the code declaring that the decision of a referee upon the issues submitted "shall stand as the judgment of the court." But this was not a reference of issues, as to which confirmation was necessary. On the contrary, it was a mere incident to the enforcement of the judgment already rendered; somewhat like the taxation of costs, or a reference to the clerk in our old practice under the act of 1809, to ascertain the precise amount due after order for judgment by default upon a liquidated demand, which could be done by a mere inspection of the paper. In an action at law tried by the court, we do not understand that the decision is the formal judgment in the case under the seal

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of the court. It is required *to be filed and "judgment upon the decision shall be entered accordingly."

We do not think the decision of the Circuit judge was fatally defective for want of particularity in stating the amount adjudged to the plaintiff; but we think it was error to add the interest to the principal, and thus make the interest, at the time the absent partner, Bratton, was declared liable, an interest bearing amount. Section 377 of the code declares that the partner not served in the first instance, but summoned afterwards, "shall be bound by the (first) judgment in the same manner as if he had been originally summoned." As this is the first case which has reached us, under sections 377 and 378 of the code, we think it may be well to settle the practice; and in order to avoid the necessity of entering two judgments upon one joint cause of action, that the judgment against the partner not served in the first instance, should run somewhat in this form: The judgment herein of H. F. Adickes, having been recovered against the partnership of Allison & Bratton and also against James B. Allison, who alone was served with process, and the other partner, J. R. Bratton, now having been served and heard, it is adjudged, that the said Bratton be bound by the aforesaid judgment against the partnership of Allison & Bratton from this date; and it is further ordered that the plaintiff have leave to enter execution on said judgment against the said Bratton personally.

Taking the view that under the code the defendant Bratton was simply adjudged "to be bound by the first judgment against Allison & Bratton," there should have been no addition of interest to the amount due at the time of the second judgment. Bratton was liable, but the order for the execution to issue should have been for the balance of the first judgment, viz.: $511.58, with interest from April 3, 1877, until paid.

The judgment of this court is, that the judgment of the Circuit Court be so modified as to conform to the conclusions herein announced, and that in all other respects it be affirmed.

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*McPHERSON v. McPHERSON.

(November Term, 1883.)

[1. *Appeal and Error* ⇐712.]

This court will not consider alleged refusals to charge when the requests and refusals so to charge nowhere appear in the "Case," but only in the exceptions.

[Ed. Note.—Cited in State v. Anderson, 26 S. C. 603, 2 S. E. 699; Arthur v. Screven, 39 S. C. 84, 17 S. E. 640; Sloan & Son v. Courtenay, 54 S. C. 345, 32 S. E. 431.

For other cases, see Appeal and Error, Cent. Dig. § 2951; Dec. Dig. ⇐712.]

[2. *Execution* ⇐272.]

At a sheriff's sale an attorney gave notice that the land was claimed by his client, a third person, saying he held in his hands two deeds for this land. On being asked by A permission to see them, he refused, saying, "They are on record." A then purchased the land. As recorded, one of these deeds was without seal, but the original was sealed. *Held*, that A was not remitted by the attorney to the record as a substitute for the actual notice given, and was therefore not a purchaser without notice. McIver, A. J., concurring in result.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 785; Dec. Dig. ⇐272.]

[3. *Fraudulent Conveyances* ⇐91.]

A party, indebted to several persons, conveyed a tract of land to his sister, in payment of two notes given for gold borrowed several years before, and at the date of his deed barred by the statute of limitations. *Held*, that adding to the notes the premium on gold at the time they fell due, and paying the notes when barred, were not badges of fraud.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 235; Dec. Dig. ⇐91.]

[4. *Fraudulent Conveyances* ⇐74.]

In charging the jury that a consideration, as to the adequacy of which persons may differ, will not avoid a deed on the ground of inadequacy, but that it must be a grossly inadequate consideration to be a badge of fraud, the Circuit judge committed no error.

[Ed. Note.—Cited in McGhee v. Wells, 57 S. C. 285, 35 S. E. 529, 76 Am. St. Rep. 567.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 187; Dec. Dig. ⇐74.]

[5. *Fraudulent Conveyances* ⇐102.]

When an insolvent brother had conveyed his home place to his sister, in payment of an antecedent debt, and a few days afterwards the sister reconveyed to a trustee in trust for the wife and children of such brother, who continued to occupy the place, the judge charged that, if

the deed to the sister was made without agreement for the reconveyance, and was not induced by her promise to reconvey, but was really in satisfaction of the debt, the deed would not be avoided, even though the brother expected that his wife and children would receive some donation from his sister. *Held*, that in this there was no error.

[Ed. Note.—Cited in McElwee v. Kennedy, 56 S. C. 170, 34 S. E. 86.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 331; Dec. Dig. ⟸102.]

[6. *Fraudulent Conveyances* ⟸146.]

If after such reconveyance the brother remained in possession by permission of the trustee, managing the property as agent for his wife and children, his possession was the possession of the wife and children, and would not avoid the deed.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 471; Dec. Dig. ⟸146.]

[7. *Appeal and Error* ⟸969.]

In charging a jury, the judge may arrange and classify the testimony, and in doing so, much must be left to his discretion. It cannot be declared error of law that the judge, in the opinion of counsel, stated the facts on one side with more fulness, clearness, and emphasis than he did on the other.

[Ed. Note.—Cited in Kaminitsky v. Northeastern R. Co., 25 S. C. 66.

For other cases, see Appeal and Error, Cent. Dig. §§ 3845–3848; Dec. Dig. ⟸969.]

Before Pressley, J., Marion, October, 1883.

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*The opinion fully states the case.

Messrs. G. W. Dargan, J. J. Ward, and C. A. Woods, for appellant.

The charge of the presiding judge was a violation of the constitution, art. IV., § 26. 16 S. C., 148, 629; 15 Id., 392; 18 Id., 108. The facts here proved fraud, and Miss McPherson and those claiming under her took nothing. Gen. Stat., § 1786; 1 Hill, 380; 2 Bail., 324, 118; 1 Hill, 24; McMull. Eq. 31; 1 Hill Ch., 304; 2 Id., 34; 2 Bail., 205; 4 S. C., 257; 16 Id., 610. Notice, to supply the want of registration, must be full, explicit, and clearly proved. Speer Eq., 212; 3 Strob., 266, 565; 6 Wall., 91. Notice that defendants had title was not actual notice of the existence of the deed, and was constructive notice only of what the record showed. 2 Pars. Cont., 671. Plaintiff having asked to see the deed and been refused, had no further means of acquiring the knowledge desired, and therefore had no notice, actual or constructive. On the record there was no seal. She pursued her inquiry, but was refused an inspection of the original. Her means of information were therefore exhausted. 6 Rich. Eq., 181; 7 Id., 519; 10 Id., 149; 37 Wisc., 449; 46 Mo., 472.

Messrs. W. W. Sellers and Johnson & Johnson, contra.

August 15, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. C. E. McPherson owned a tract of land, containing 818 acres, known as his "Home place," and also another tract known as the "Willow Creek place." He was in debt, owing his sister, E. Ann McPherson, two promissory notes, one bearing date in January, 1867, for $444, and the other a few days after, in May, 1867, for $245. These notes were given for gold borrowed at the dates indicated. C. E. McPherson also owed a large debt to Wm. K. Ryan, secured by a mortgage of the Willow Creek place, about $2,500 to Samuel McPherson as administrator, and about $800 to Samuel McPherson individually.

On January 4, 1876, more than six years

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after the notes for *the gold bore date, a statement of Miss McPherson's debt was made, which, adding a premium of 30 per cent. for gold and counting the interest at what was then customary, 12 per cent., amounted to $1,850; and in payment and satisfaction of this debt, C. E. McPherson conveyed to his sister the Home place aforesaid by deed bearing date January 4, 1876, which was recorded on January 8, 1876. The said Miss Ann McPherson, on January 7, 1876, in consideration of her love and affection for the wife and children of her brother, C. E. McPherson, and the nominal sum of $10, conveyed the said land to J. P. Gregg, as trustee for them. Jerome P. Chase drew both deeds—that to Miss McPherson and hers to Gregg, trustee. Miss McPherson wanted her debt settled, and the land conveyed for the benefit of her brother's wife and children, so that he could no more endanger it by his bad management. C. E. McPherson said he expected to remove to Willow Creek, which was mortgaged to Ryan, but concluded to remain on the Home place after he learned that it was conveyed for the benefit of his wife and children; and he with his family did remain upon it. It seems that the record of the deed to Miss Ann McPherson had no seal attached, but the deed itself, the original, had a seal.

At the time of these transactions, C. E. McPherson had not been sued; but afterwards, on October 30, 1881, Samuel McPherson, as administrator, recovered a judgment against him for $2,626.61; and under the execution based on this judgment, the said Home tract of land was levied and sold by the sheriff, as still the property of the defendant in execution. On the day of sale, Mr. Sellers, as attorney for defendants, forbade the sale, on the ground that C. E. McPherson had previously sold and conveyed the land. Before the sale, when asked to show the deeds, he declined, saying that they were "on record"; but when he gave notice of the title of the defendants, he had both deeds, the originals, in his hands. The sheriff sold, and Mrs. Frances A. McPherson bid off the land for $100, took sheriff's title and brought this action against C. E. McPherson

and his wife and children and their trustee, Gregg, to recover the premises.

Much testimony was offered on one side to impeach the bona fides of the deeds to and

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by Miss Ann McPherson, and on the *other to sustain them. Under the charge of the judge the jury found for the defendants, and the plaintiff appeals to this court upon the following exceptions:

I. Because his honor refused to charge the following propositions:

1. "If the plaintiff did not have actual notice of a duly executed deed, she stands in the position of a purchaser for valuable consideration without notice, and the verdict should be for the plaintiff.

2. "The statement by the defendant's attorney, at the sheriff's sale, referring to the record, which was without a seal, and refusing at the same time to allow the plaintiff's attorney to inspect the original papers then in his hands, does not affect the plaintiff with notice of a duly executed deed, and the verdict should therefore be for the plaintiff.

3. "To defeat the plaintiff's recovery, notice of the deed must be proved, other than the record and the statement made at the sale by the defendant's attorney.

4. "If the defendants had a valid title, derived from C. E. McPherson, and refused to supply the defects in the records by allowing the plaintiff to inspect the deed before her purchase, they are now estopped from setting it up against her.

5. "A deed is fraudulent when made to defeat the collection of a debt, and the law implies fraud—(1) When the property is immediately reconveyed for the benefit of the debtor's family. (2) When an absolute conveyance is made in payment of an antecedent debt. (3) When the debtor and grantor remains in possession of the property conveyed. (4) When there is a reconveyance to a trustee for the benefit of the debtor's family, and the trustee and all parties concerned totally disregard and ignore the terms of the trust deed, and the debtor retains the possession and management of the property without any contract with the trustee, and without any accountability to him.

6. "If C. E. McPherson retained possession of the land in dispute, using it as her own, after he had conveyed it to his sister, E. A. McPherson, in consideration of a pre-existing debt, he being at the time heavily in debt, the law infers fraud, and the inference is incapable of being rebutted by proof.

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*II. "And his honor erred in charging the jury:

1. "That the notice given by Mr. Sellers at the sheriff's sale was sufficient.

2. "That the consideration in this case must be grossly inadequate to constitute a badge of fraud.

3. "That even where a deed is made by a debtor in payment of an antecedent debt, for the purpose of defeating other creditors, the deed is valid unless the grantee was a party to the fraud.

4. "That the adding of thirty per cent. premium for gold, and the calculation of interest at twelve per cent. per annum on notes which were not payable in gold, which expressed no rate of interest, and which may have been barred by the statute of limitations, do not of themselves constitute badges of fraud.

5. "That the proof was that Miss McPherson frequently applied for payment, and C. E. McPherson frequently promised to pay.

6. "That Miss Ann McPherson did not know of the indebtedness of C. E. McPherson at the time of the execution of the deed.

7. "That in order to avoid the deed of C. E. McPherson to his sister, there must be not only an expectation on his part, but an express promise that she should reconvey for the benefit of his family.

8. "That it was a fulfilment of the terms of the trust deed, and not a badge of fraud, for C. E. McPherson to remain in the occupation and enjoyment of the land, if he remained there, not claiming it as his own, but in right of his wife and children.

9. "Because his honor erred in charging the jury—(1) In stating fully, and in the strongest possible terms, all the testimony relied on to show that the consideration of the deed was bona fide and adequate, while he stated very incompletely and in the weakest possible light the testimony tending to show the inadequacy of the consideration, thus intimating his own estimate of the testimony on the subject. (2) In intimating to the jury that the deed from C. E. McPherson to his sister, and from her to J. P. Gregg, trustee for his wife and children, were not parts of the same fraudulent transaction, and in stating as strongly as possible all the testimony relied on to show that there was no understanding that the land should be reconveyed

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for the benefit *of McPherson and his family, while none of the testimony tending to prove the fraudulent transaction was stated. (3) In stating in the strongest possible way all the testimony in behalf of the defendants, in explanation of C. E. McPherson's possession, while no allusion is made to the testimony on behalf of the plaintiff on this point.

10. "Because the presiding judge erred in charging the jury with respect to all matters of fact involved in the controversy and submitted to their determination.

11. "Because the judge charged the jury that if they believed C. E. McPherson remained in possession of the land, in dispute, working it as the agent of his wife and children, by permission of the trustee, such possession would not be a badge of fraud, though there was no pretence that the so-called trustee ever gave such permission, and no testimony

whatever going to show that the so-called trustee had any knowledge even of the existence of the so-called trust deed.

12. "Because, although the judge undertook to state to the jury all the material testimony, he omitted to allude even to the uncontradicted testimony of J. P. Chase, a witness for defendants, as well as of the plaintiff, which testimony was to the effect that about the time of the so-called deed from C. E. McPherson to Ann McPherson, the said C. E. McPherson told the witness that his reason for executing the so-called deed was, because he was afraid that the Willow Creek place would not sell for enough to pay Ryan's mortgage, and Ryan was mean enough to sell his other property."

This is an action at law for the recovery of a tract of land, and the question involved being one of alleged fraud, and the testimony somewhat conflicting, it was peculiarly proper for the decision of a jury. This court has no jurisdiction to review the testimony and weigh its force and effect, but only to consider alleged errors of law in the charge of the judge.

As to the error of law charged on the part of the judge in refusing certain requests to charge. These alleged requests are printed in the brief, but among the plaintiff's exceptions. They are not in the "Case" prepared for this court. The judge makes no allusion whatever to them in his charge, which for-

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tunately touched all *the points of the case and is reported in full. Under these circumstances we are not authorized to consider that these requests were regularly made and refused by the judge. It is a rule absolutely necessary to the proper and satisfactory dispatch of the large business of this court that nothing can be considered here except what appears in the official record. Exceptions of counsel and the argument thereon, as we have repeatedly held, are no part of the "Case," but in their nature must be ex parte. As was said in the case of the State v. Wilder, 13 S. C., 347: "It must be manifest to every one that we have no right to decide a case upon facts which do not appear in the record, and can only be learned from ex parte statements of counsel made in the argument;" and see the case of Thompson v. Thompson, 6 S. C., 279.

It was stated at the bar, that the requests were read in court, but it seems, not until after the judge had made his charge to the jury, and that he took no notice of them. We suppose the judge, having charged the jury on all points deemed necessary, was unwilling to repeat what he had already said to the jury. Rule XI. of the Circuit Court requires that "all requests for instructions to the jury shall be submitted to the court in writing, without comment, by counsel on either side, at the close of the arguments." Fortunately, from the charge being printed in full, it appears that the judge did charge on all the points indicated in the paper containing the requests, and also what he charged, so that the objections made can be considered under the exceptions to the charge.

Exception I. complains that the judge charged that the notice given by Mr. Sellers at the sheriff's sale was sufficient. On that subject the judge charged as follows: "Was not Mr. Sellers' notice sufficient notice to her? The testimony is, Mr. Sellers appeared at the sale with two papers in his hands, and gave notice that he had two papers in his hand conveying that property, and forbade the sale. The attorney for the plaintiff, Mr. Woods, approached Mr. Sellers and said, 'Let me see the deed.' Mr. Sellers petulantly refused and said, 'They are on record.' I do not think that is such a reference to the record as to bind Mr. Sellers to the notice there given. The inclination of my opinion is, that a verbal notice was sufficient at that sale. I don't remember any case in which I have

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given such notice. At all events, *having no light upon the subject, I now charge you that the verbal notice of Mr. Sellers, that the land had been conveyed, was sufficient notice to put the party on the inquiry. It would not have been so if Mr. Sellers had referred him to the record under such circumstances as would have bound him to what the record said. If his intention was to stand by the verbal notice, he had a right to do so, and his verbal notice was sufficient," &c.

We suppose that the seal on the deed to Miss McPherson, having been omitted on the registry book, the record furnished no notice of that deed; or rather, the record gave notice of a paper as it was on record, that is to say, of a paper which was no valid conveyance. This, however, was no fault of Miss McPherson and did not actually avoid her deed, which had a seal. But the effect was the same as if there had been a total failure to record it. It is too well settled now to be controverted that express notice of a deed will stand in the place of recording as to all persons claiming to be subsequent creditors or purchasers. Tart v. Crawford, 1 McCord, 265; McFall v. Sherrard, Harper, 295; Knotts v. Geiger, 4 Rich., 34; Barr v. Kinard, 3 Strob., 73; Reeves v. Sims, 10 S. C., 308.

It is urged, however, that this was not explicit notice, that it was not sufficient for Mr. Sellers to stand up with two deeds (originals) in his hands, and saying "that he ha[d] two papers in his hands, conveying that property, and forbade the sale." We think this was sufficient notice to all present not to buy the property—that it was claimed by others. Could any one present and buying after this notice, properly claim that he had purchased without notice? We do not think so. As was said by Judge Withers in Barr v. Kinard, supra, "The notice required under former acts has been characterized in Tart v.

Crawford, as necessary to be 'actual' and 'explicit.' But notice of what? Scarcely of the particulars, but rather, it seems to us, of the fact that there was an existing lien, of a particular description, in favor of a certain party, upon the property, in the view of one about to become subsequent creditor or purchaser. Would not this subserve all the purposes supposed to be in contemplation of the law, the leading end being to admonish the purchaser or creditor of a snare?" In

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the case of Reeves v. Sims, supra, it *seems to have been held sufficient simply to forbid the sheriff's sale.

But admitting that the notice was sufficient generally, it is insisted that it was not sufficient as to the plaintiff, for the reason that at the sheriff's sale her attorney asked Mr. Sellers "to let him see the original deeds," and Mr. Sellers refused, saying, "They are on record"; that the plaintiff is not, like others present, bound by the notice of the original deeds in the hands of Mr. Sellers, but can say that she had no notice whatever except that afforded by the imperfect registry; that the clients of Mr. Sellers, so far as the plaintiff is concerned, lost all benefit of the actual notice by his saying, "They are on record." It seems to us that this would be a narrow construction and not required by the facts of the case. There is no evidence that Mr. Sellers knew that the record was imperfect, or that, by making the statement that the deed was on record, he meant to substitute that record, whether true or false, for the actual notice he was then in the act of giving. If it had been the intention to rely upon the record as constructive notice, there would have been no need of the actual notice then given. We suppose that, by the statement, "They are on record," Mr. Sellers meant no more than to give a sort of reason for withholding the originals.

It is very apparent that the plaintiff did have actual notice that there was a claim of title to the land under an alleged conveyance. It is not claimed that as to the existence of such paper she was without notice; but, assuming the perfect correctness of the registry, she proceeded on the ground, the legal theory, that the deed was void for the want of a seal. It turned out that in this she was mistaken, or it may be misled—not, however, with the knowledge and consent of the defendants, or by any intentional act on their part, but by the accidental omission in the registry of the deed. It was probably as great a surprise to the defendants that the record was without seal as it was to the plaintiff that the original had a seal. Under the charge of the judge, the jury found that Mr. Sellers "intended to stand by his verbal notice, and not to adopt the notice afforded by the record," and we cannot say that such notice was insufficient.

Exceptions 2, 3, 4, 5, 6, 7, and 8 complain

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of the judge's *charge on the different badges of fraud, which makes it necessary to ascertain what he did charge on the different points indicated.

(1) As to the manner in which the gold debt of Miss McPherson was ascertained, the judge charged as follows: "The question is, was there any fraud in computing that transaction by adding 30 per cent. as a premium for the gold? You have heard the testimony, and you must judge that for yourselves. If that was the premium upon gold at the date, one day after the day of lending, and if the law in reference to the computation of the value of Confederate money is to govern in the matter, then the adding of 30 per cent. to the money was not unfair and unlawful in him; but if, on the contrary, that was an afterthought, if you come to the conclusion, from all the circumstances, that in 1876 that matter was arranged for the purpose of raising the supposed amount of the consideration, then the adding of that in order to make the consideration look large would be a badge of fraud." We cannot say this was error, or that there was error in reference to the statute of limitations. C. E. McPherson was under no moral obligation to plead the statute against his sister, even if he could have done so. Weinges v. Cash, 15 S. C., 44.

(2) As to the alleged inadequacy of the consideration, the judge charged: "Another badge of fraud is the inadequacy of the consideration. Well, upon that point my opinion is that a consideration about which persons may differ as to whether it is adequate or otherwise is not such a one as will avoid a deed. The term used is 'grossly inadequate consideration,' &c. It must be a consideration so far short of the value of the property as to arouse a presumption in the mind that the person who takes that property takes it under some kind of secret trust. When property is conveyed for a grossly inadequate consideration, then that becomes a strong badge of fraud, and one which warrants the jury in setting it aside," &c. It seems to us that this ruling was in conformity to the settled law.

(3) As to the second conveyance for the benefit of the wife and children of the vendor, C. E. McPherson, and the effect of his remaining in possession after the execution of the deed to his sister, the judge charged as

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follows: "This is a conveyance by *one in debt to a creditor for a precedent debt, and although the law says very clearly that a debtor who cannot pay all his debts may appropriate his property so as to pay those whom he prefers to pay, yet he cannot do so lawfully if the consideration of his doing so is that he is to receive some benefit for himself. In other words, where a man owes another a debt, and his creditors are about to take his property, and he goes to that

creditor and arranges with him, saying, 'I will make a preference to you if you will allow me to use the property and keep it, or if you will allow me to hold it until I can buy it back'—all arrangements of that kind are looked upon as fraudulent. Inasmuch as such arrangements cannot always be proved —generally they are hard to be proved—the law says that certain things shall be regarded as evidence, as badges of fraud. * * * It will hold not only that the debtor himself intended to defraud, but concludes that the debtor remaining in possession, the creditor also was a party to the fraud, and therefore they are both tainted with the fraudulent matter. and the deed will be set aside because both debtor and creditor intended to defraud. That is one badge of fraud, and is regarded as a conclusive badge of fraud. * * * One of these deeds was executed on January 4th and the other on the 7th, and both recorded on the same day. Are they now the same transaction? In other words, was the whole thing agreed upon between them before the first deed was executed? If it was so agreed upon as that the making of the second deed was a part of the consideration of the first, then that is such a badge of fraud as will avoid the transaction; but if it was not a matter agreed upon, if he really made this deed to his sister in order to satisfy that debt with her, and she received it in settlement of the debt, without intending at that time to make his wife and children her beneficiaries in reference to that land, the deed should not be avoided, unless that matter was communicated to him as a motive for making that deed. In other words, the mere expectation on his part that his wife and children might receive some donation from his sister would not make the deed void," &c. We cannot say that this was error. It will be observed that the land was not reconveyed to the vendor himself, but to a trustee for the benefit of his wife and children.

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*In regard to his remaining in possession, the judge charged: "Did he remain there in his own right, retaining possession of the property as he did before, or did he remain there with his wife and children with the permission of the trustee, he managing the property as the agent of his wife and children, as any other husband would have done under the circumstances? · If so, then it was the possession of the wife and children," &c. This seems to us to be in conformity to the doctrine of Jones & Briggs v. Blake & wife, 2 Hill Ch., 629, where it was held that "the decision in Smith v. Henry, 1 Hill, 16, that a debtor in giving a preference by conveyance of his property to one creditor over another, shall not secure an advantage to himself at the expense of creditors as the price of such preference, means a certain direct benefit or advantage to be derived from the use of the property. And therefore where a debtor transferred slaves to his daughter in satisfaction of a precedent debt, and retained possession of them under an agreement to pay hire, the conveyance was held to be valid, and was sustained against the other creditors. If the possession is satisfactorily explained, it will not necessarily avoid the deed. Pregnall & Bro. v. Miller & Kelly.[1]

But assuming that the law was charged correctly, all the other exceptions complain that the Circuit judge violated art. IV., § 26, of the constitution, in charging the jury "in respect to matters of fact." No particular words or phrases are pointed out as constituting the alleged violation; but an opinion is expressed that the judge, in charging upon the different alleged badges of fraud, "stated fully and in the strongest possible terms" all the testimony in favor of the defendants, while he omitted to call the attention of the jury to some evidence tending to favor the view of the plaintiff, and that which he did state was referred to "very incompletely and in the weakest possible light," &c. As was said in the case of the State v. Summers, 19 S. C., 94, "there is no more difficult duty imposed upon this court than that of deciding questions arising under this section of the constitution, the chief difficulty arising from the vague nature of the subject, as to what is properly embraced

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in the right 'to state the testi*mony.' Who can fix with certainty the exact limit and apply it to the infinite combination of circumstances which may exist?"

But there are some general boundaries. It has been decided more than once that the Circuit judge has the right to arrange and classify the evidence under proper heads, in order that the jury may properly judge of its force and apply the law. Benedict v. Rose, 16 S. C., 629. It has also been recently decided, even in a state case, that there is no rule requiring the judge "in summing up" to make express reference to all the evidence in the case on pain of having the verdict set aside. As admonished by numerous decisions of this court, the Circuit judge should not in any way indicate his opinion of the facts to the jury; but he has the right to arrange the testimony, and in doing so something must necessarily, from the nature of the case, be left to the judgment and impartial discretion of that officer who is personally present, and before whom the testimony is offered. If desirable, it would not be practicable to take an absolute control over that discretion, which properly exercised and in due subordination to the rule of the constitution is beyond the reach of this court. It would be said in every case that important testimony had been omitted.

We cannot declare it error of law that

[1] This case will be found at a subsequent page of this volume. [21 S. C. 385, 53 Am. Rep. 684.]

counsel are of opinion that in referring to the evidence thought to be important the Circuit judge stated it with more fulness, clearness, and emphasis on one side than on the other. Opinions of opposing counsel would not be likely to agree upon that subject. Most of the questions of fact were so evenly balanced that differences of opinion might well be entertained. They were delicate in their nature, and properly for the jury, which, under a long and careful charge, has decided them; and we see no error of law so gross as to justify us in setting aside the verdict and reopening this family controversy.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Mr. Chief Justice SIMPSON concurred.

Mr. Justice McIVER. I concur in the re-

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sult, but I cannot *agree to what is said in the opinion in reference to the notice given at the sale by Mr. Sellers, on behalf of the defendants. If he had simply contented himself with forbidding the sale, or giving verbal notice that the land had been previously conveyed, the notice would, as held in Reeves v. Sims, 10 S. C., 308, have been sufficient. It would have put a purchaser upon the inquiry, and that would have been sufficient, as is held in numerous cases. The purchaser then would have been regarded as affected with notice of whatever facts such inquiry, properly prosecuted, would have disclosed.

But when such inquiry was commenced, as it was by Mr. Woods, in behalf of the plaintiff in this case, asking for an inspection of the deeds, and the inquirer was misled, whether intentionally or not, is of no consequence (and knowing Mr. Sellers well, I would not think of imputing to him an intention to deceive), then the inquirer can only be regarded as having notice of such facts as could be discovered by pursuing the channel pointed out to him by the party giving the notice. Mr. Sellers having declined, on request, to permit an examination of the original deeds, and having said they were on record, in effect referred Mr. Woods to the record for the information he was seeking, and Mr. Woods and his client could only be regarded as having such knowledge as the record furnished.

I do not see how any other view can be taken of the effect of Mr. Sellers' reply to the request of Mr. Woods. It seems to me that it is the same as if he had said, "I will not allow you to see the original deeds, but here are copies of them which you can look at;" and surely if the copies had no seals to them, Mr. Woods could only be regarded as affected with such knowledge as the copies furnished. So here, when he was referred to the record, as I think he unquestionably was by the reply of Mr. Sellers, he can only be regarded as having such notice as the record would afford. It seems to me, therefore, that the plaintiff in this case, through her attorney, can only be regarded as having notice that C. E. McPherson had undertaken to convey to his sister the land in question by a paper purporting to be a deed, lacking the essential requisite of a seal. Now, while such a paper would not be sufficient to pass the legal title, yet it

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might be sufficient to create *an equitable title in Miss Ann McPherson, and notice to the plaintiff, through her attorney, of such an equity would be sufficient to defeat her claim of being a purchaser for valuable consideration without notice. For this reason I concur in holding that the notice was sufficient.

Judgment affirmed.[2]

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[2] This completes the cases of November Term, 1883.—REPORTER.

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21 S. C. 275

COPELAND v. YOUNG.

(April Term, 1884.)

[1. *Appeal and Error* ⇐846.]

No appeal lies to this court from the findings of fact by a Circuit judge in a case involving a purely legal demand, triable by jury, but improper conclusions of law from such findings, and mere errors of calculation may be here corrected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3347; Dec. Dig. ⇐846.]

[2. *Money Paid* ⇐1.]

Where A advanced money at the request of B to redeem lands of B held by a purchaser at tax-sale, and A, to secure this debt, took deed to himself from such purchaser, A may bring action against B to recover the amount so advanced, without a tender to B of such title as he (A) had.

[Ed. Note.—For other cases, see Money Paid, Cent. Dig. § 16; Dec. Dig. ⇐1.]

[3. *Set-Off and Counterclaim* ⇐34.]

If an unsuccessful action to recover land could, in any case, be proper ground to sustain a suit for damages, that, as also interference with defendant's possession of such land, would be torts, and could not be set up as counterclaims to an action on contract.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 56, 57; Dec. Dig. ⇐34.]

[4. *Set-Off and Counterclaim* ⇐44.]

Plaintiff brought action against two defendants, who set up as a counter-claim money due to them for the use and occupation of land which was held by them as tenants in common. Plaintiff having recovered judgment against only one of the defendants, *held*, that the counterclaim was a joint demand of defendants, and could not be set up against the debt due by only one of them to the plaintiff.

[Ed. Note.—Cited in Humbert v. Brisbane, 25 S. C. 513.

For other cases, see Set-Off and Counterclaim, Cent. Dig. § 82; Dec. Dig. ⇐44.]

[5. *Pleading* ⟸372.]

The court cannot adjudicate the title to land, where such title is not put in issue and is not within the scope of the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1212–1216; Dec. Dig. ⟸372.]

[6. *Appeal and Error* ⟸1151.]

Mere inadvertences and errors of calculation in the Circuit judgment, corrected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498–4506; Dec. Dig. ⟸1151.]

[This case is also cited in Garlington v. Copeland, 32 S. C. 70, 10 S. E. 616, as to issues involved.]

Before Witherspoon, J., Laurens, February, 1883.

At the hearing of this appeal, Honorable T. B. Fraser, judge of the Third Circuit, sat in the place of the Chief Justice, who had been of counsel in the cause.

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*The case is fully stated in the Circuit decree, which was as follows:

The complaint herein substantially alleges:

I. That plaintiff, on October 16, 1875, at the instance and for the benefit of the defendants, George F. Young and Mary Garlington, paid the sum of $377.07 for the redemption of a certain tract of land in Newberry county, before then sold for taxes, whereby said defendants recovered the possession of said land.

II. That plaintiff, on December 21, 1875, at the instance and for the benefit of the defendants above named, paid one Mathews $1,136.30 for the redemption of the Calmes Quarter tract of land in Laurens county, which had been sold and purchased by said Mathews at delinquent land sale, May 18, 1874, and conveyed by the auditor to Mathews February 24, 1875, whereby said defendants obtained full possession, and have since possessed said land.

III. That on February 12, 1878, plaintiff took from said Mathews a title deed for said land as evidence of the final redemption of the same and to secure repayment of redemption money paid as aforesaid.

IV. That at delinquent land sale for Laurens county, May 3, 1875, plaintiff bought about 1,000 acres of land for which he paid $757.51 cash, upon agreement between plaintiff and the last named defendant, that plaintiff was to retain of said tract under the purchase aforesaid about 550 acres thereof, originally belonging to estate of Wm. R. Young, for the benefit of said estate, of which estate plaintiff was administrator with will annexed, and defendants were to take possession of the remainder of said tract, about 450 acres, whereby defendants became indebted to plaintiff in the sum of $340.91, their proportionate share of said purchase money, and then agreed to pay same.

V. That for the benefit of said last named defendants, plaintiff paid taxes on the aforesaid lands in Laurens county, in possession of said defendants, from February 10, 1876, to February 10, 1879, amounting to $241.71.

VI. That plaintiff is justly entitled to repayment by said defendants of the several sums of money set forth, with interest, all of which remaining unpaid, and on January 16, 1881, with interest, amounts to $2,828.38.

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*VII. That defendant, Mary Garlington, is the wife of the defendant, Stobo D. Garlington.

VIII. That Mary Garlington has a valuable estate in her own right that has been benefited by the payments made as aforesaid, and should be held liable for the satisfaction thereof. Plaintiff prays judgment against defendants for the sum of $2,828.38, together with costs, and for such other relief as justice may demand.

Defendants, in their joint answer, substantially submit—

I. The defendant, Mary Garlington, states she has no knowledge of the allegations of paragraph I. of complaint. The defendant, George F. Young, admits that plaintiff redeemed the Newberry land for said defendant Young.

II. Defendant, Mary Garlington, has no knowledge of allegations in paragraph II. of complaint. The defendant Young alleges that plaintiff did agree to redeem for defendant Young the land referred to in said paragraph II., but took title in his own name. The defendants Young and Stobo D. Garlington allege that plaintiff brought action to recover this land under the deed from Mathews, and by said action and in other ways plaintiff subjected defendants to $1,000 damages by interfering with defendants' possession. Defendants say they have no knowledge of amount paid by plaintiff to Mathews, or the necessity thereof, and demand proof.

III. Defendants deny so much of paragraph III. as alleges plaintiff took title from Mathews as evidence of redemption of land and to secure repayment of redemption money.

IV. Defendants admit plaintiff bid off 1,000 acres of land as set forth in paragraph IV., but deny that it forms any part of the 1,000 acres admitted by plaintiff on day of sale to have been bid off. They allege that the 1,000 acres was bid off for defendant Young, and was so publicly announced at the bidding. Defendants deny all other allegations in paragraph IV. of complaint.

V. Defendant, Stobo D. Garlington, admits that plaintiff did pay certain taxes in 1876, but denies taxes paid as set forth. He alleges he protested against plaintiff's paying taxes after 1877. The defendants Young and

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Mary Garlington have no knowledge *of allegations in paragraph V. (payment of taxes) of complaint, and demand proof.

VI. Defendants deny their indebtedness to plaintiff as alleged in paragraph VI. of complaint.

VII. Defendant, Mary Garlington, admits she is seized of an estate in her own right, but has no knowledge of payments made by plaintiff, and if made, does not know that her estate has been benefited thereby, and demands proof of same.

The defendants set up as counter-claim $6.71, taxes paid in 1880 on plaintiff's land, still due, and also for rents and profits of the 550 acres, known as the Wm. R. Young tract, from 1875, referred to in paragraph IV. of complaint. Defendants allege that plaintiff agreed to pay rent, and that they are entitled to 52 bales lint cotton for rent, for which they could have realized $2,650. The defendants allege that all the lands referred to in plaintiff's complaint are part and parcel of the estate of Samuel Young, and that defendants hold said lands by virtue of a deed from Wm. Young, executor of Samuel Young. Defendants also allege that the lands referred to by plaintiff were sold for delinquent taxes, and said lands had not been declared forfeited before sale. Defendants allege that the rental value of the Wm. R. Young tract is not less than 10 bales of lint cotton of 425 lbs. each. Defendants deny indebtedness to plaintiff, but demand judgment against plaintiff for $3,656.71 and costs.

The plaintiff in reply denies that he ever agreed to pay defendants rent for the W. R. Young tract of land, as well as the other allegations of the answer inconsistent with the allegations of the complaint.

I have attempted to give in substance the allegations of the complaint and answer to indicate the nature of the action as well as the issues involved. It appears from the order of reference in the case that by consent of counsel it was referred to the master to take and report this testimony to the court. In the order of reference the master is directed to report in full all transactions between the parties, as to advancements, the sale of the land, and the title to the same, that the court may determine all the equities arising between the parties. The master has merely reported the testimony as directed, and the cause came on to be heard,

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*without a jury, at February term, 1883, of the Common Pleas for Laurens county.

The plaintiff's complaint is on a money demand, a legal action based upon an alleged contract or agreement whereby plaintiff claims to have paid and advanced certain sums of money for defendants at their instance and request. The defendants' answer seeks to change the character of plaintiff's claim from a legal to an equitable action. Whilst defendants have the right to interpose an equitable defense, they have no right by their answer to change a legal into an equitable action. There has been no order or amendment of the complaint, and plaintiff, upon the hearing, insisted upon the legal character of his demand. I do not think the order of reference, merely to take and report testimony, would change the character of the action as presented by plaintiff. I must therefore consider this as a legal action based upon contract or agreement between plaintiff and defendants. Taking this view as to the legal character of this action, it is not deemed necessary, nor is it intended herein, to adjudicate the title to any of the lands referred to in complaint, or the validity or regularity of the delinquent land sales referred to in the complaint.

The first question to be considered and determined as made by the complaint is, whether or not plaintiff paid or advanced the several sums of money, or any part thereof, to the defendants, or either of them, at their instance and for their benefit, as alleged in the complaint. To determine this, reference must be had to the testimony taken by the master. From a review of the testimony I am satisfied and conclude that plaintiff did not pay or advance at the instance or request of either of the defendants, Mary Garlington or Stobo D. Garlington, any sums of money, nor does it appear that there was any contract or agreement between plaintiff and said defendants, Mary Garlington and Stobo D. Garlington, with reference to plaintiff paying money for them, or either of them, as alleged in the complaint. The plaintiff having failed to establish by the testimony his demand against the said defendants, the complaint should be dismissed with costs as to the defendants, Mary Garlington and Stobo D. Garlington.

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*The testimony, however, does show, and I must conclude, that under an agreement between plaintiff and the defendant, George F. Young, plaintiff did pay and advance for the defendant, George F. Young, the following sums, to wit: On May 3, 1875, the sum of $661.89 to enable said defendant to redeem certain lands of the estate of Samuel Young, then sold at delinquent land sale, of which said sum plaintiff in his complaint only demands the sum of $340.91, and in his recovery against defendant plaintiff must be limited to the demand as set forth in his said complaint; that on October 16, 1875, under agreement between plaintiff and defendant, George F. Young, plaintiff paid for said defendant, George F. Young, the sum of $377.07, to enable said defendant to redeem a certain tract of land of the estate of Samuel Young, in Newberry county, that had been sold for taxes; that on December 21, 1875, under an agreement between plaintiff and defendant, George F. Young, plaintiff, at his instance, paid for the said George F. Young to one B. H. Mathews, who had purchased the Calmes Quarter tract of land in Laurens county of the estate of Samuel Young, sold at delinquent land sale, to en-

able said defendant to redeem said land, the sum of $1,136.30.

Under the agreement between plaintiff and the defendant, George F. Young, the said George F. Young was to pay plaintiff the amount of money advanced and paid as aforesaid, with interest thereon, and no part of the money paid or advanced by plaintiff as aforesaid or interest has ever been paid by the said George F. Young. Plaintiff, in the 5th paragraph of his complaint, alleges that he paid certain taxes on the delinquent lands sold as aforesaid for the benefit of defendant. It is not alleged by plaintiff, nor does it appear from the testimony, that the payment of said taxes was embraced in the agreement between plaintiff and the defendant aforesaid, nor does it appear that said taxes were paid at the instance and request of either of the other defendants, Mary Garlington or Stobo D. Garlington. The evidence as to the payment of taxes on delinquent lands sold as aforesaid is not clear, as in many instances the tax alleged to have been paid is embraced in tax receipt, including plaintiff's own lands. As the testimony

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fails to show any agreement or *authority from defendants to plaintiff to pay said taxes, plaintiff's demand for taxes alleged to have been paid in 5th paragraph of complaint cannot be allowed.

It was contended by defendants' counsel that the statute of frauds presented a bar to plaintiff's recovery; that plaintiff, having title and never having tendered titles to defendants, could not recover; that the sale of delinquent lands, May 18, 1874, was irregular and void, and that plaintiff could not acquire a valid title to land sold at said delinquent sale. Roddy v. Purdy, 10 S. C., 137. These are matters that might avail defendants if plaintiff in this action was setting up title to land, or seeking to enforce a lien upon land. The testimony shows that plaintiff advanced the $1,136.30 to defendant, George F. Young, long after Mathews had purchased at delinquent land sales, and defendant failed to pay plaintiff. Plaintiff alleges he took title from Mathews February 12, 1878, merely as evidence of redemption, and to secure from defendants the repayment of money advanced and already paid for defendant Young. When plaintiff paid the money to Mathews for the defendant, George F. Young, it does not appear as part of the agreement between the parties that the liability of Young to plaintiff depended upon the validity of said tax sale. The payment was made for the benefit of the defendant, George F. Young, and plaintiff should not lose his money on account of irregularity of tax sale, when he is not asserting title to land sold, or attempting to enforce a lien upon the land. But, as already stated, these matters cannot arise or be adjudicated in this action to recover money paid by plaintiff at the instance of defendant.

Defendants in their answer, by way of counter-claim, allege that in 1880 they paid $6.71 taxes on plaintiff's lands. The evidence of such payment is a tax receipt for second instalment of taxes paid by defendant, Stobo D. Garlington, November 15, 1880, on 2,850 acres of land assessed against plaintiff, the amount of taxes being $34.80. There is no testimony that plaintiff authorized or requested defendants to pay said taxes, and the counter-claim of $6.71 cannot be allowed.

Defendants further allege and set up in their answer, by way of counter-claim, that plaintiff promised and agreed to pay de-

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fen*dants a certain number of bales of cotton as annual rent for the Wm. R. Young tract of land for the year 1875, and the intervening years up to and inclusive of the year 1880, which rent has never been paid by plaintiff, and that defendants are entitled to judgment against plaintiff for the sum of $2,650 the value of said rent. It appears from the testimony that the William R. Young tract of land was conveyed by the executor of Samuel Young to the defendants, George F. Young and Mary Garlington, jointly. Under the code, a defendant can set up a counter-claim where a cause of action exists in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action. 2. In an action on contract any other cause of action arising also on contract and existing at the commencement of the action.

Did the plaintiff, as matter of fact, promise or agree to pay defendants rent for the William R. Young tract of land? Plaintiff testifies positively that he did not. It appears that in order to effect a settlement of the money advanced for defendant, George F. Young, as aforesaid, plaintiff did propose to defendant, Stobo D. Garlington, at a time subsequently to the transaction with George F. Young, May 3, 1875, to account for rent received by plaintiff from the William R. Young land, but it does not appear that this was a part of the original agreement between plaintiff and George F. Young, but was merely a proposal to effect a settlement which was never accomplished. The defendant, George F. Young, testifies that he regarded plaintiff as acting in his own interest, but states positively that there was no understanding about plaintiff taking possession of the Billy Young tract of land any more than his taking possession of anything else he (defendant) had. The testimony fails to show that plaintiff ever promised or agreed to pay rent as such to defendants for the William R. Young tract of land, and the counterclaim cannot be allowed. But even if there was satisfactory evidence that plain-

tiff agreed to pay defendants rent, the counter-claim as set up in defendants' answer

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could not be sustained *in this action, for the reason that plaintiff's claim herein established as set forth in the answer would be in favor of defendants jointly. I must therefore conclude that the counter-claim, as set up in defendants' answer, cannot be allowed under the code of procedure.

Defendants further allege in their answer that they have sustained damages by reason of plaintiff's seeking to eject them from the Calmes Quarter tract of land, under the deed from Mathews, and by other interference with defendants' possession of said land. The alleged conduct of plaintiff is in the nature of a tort that cannot be set up as a defence to plaintiff's action.

I find as matters of fact:

I. That plaintiff did not pay or advance money to the defendants, Mary Garlington and Stobo D. Garlington, or either of said defendants, at their instance, as alleged in his complaint.

II. That plaintiff, at the instance and request of the defendant, George F. Young, did pay for and advance to the said George F. Young the following sums of money, which said sums of money and interest the defendant, George F. Young, agreed to pay plaintiff, to wit: May 3, 1875, the sum of $340.91; October 16, 1875, the sum of $377.07, and on December 21, 1875, the sum of $1,136.30, which said several sums of money still remain due by defendant to plaintiff, and with interest up to January 16, 1881, amounts to $2,537.54.

I find as matters of law:

I. That the defendants, Mary Garlington and Stobo D. Garlington, are not indebted to plaintiff, as alleged, and that the complaint should be dismissed with costs as to the defendants, Mary Garlington and Stobo D. Garlington.

II. That the defendant, George F. Young, is indebted to plaintiff for money paid and advanced at his instance and request, in the sum of $2,537.54, with interest from January 16, 1881, together with the costs of this action.

III. That the counter-claim set up in the answer of defendants should not be allowed.

It is therefore ordered and adjudged, That George P. Copeland, the plaintiff, have judgment, with leave to issue execution against the defendant, George F. Young, for the sum

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of *$2,537.54, with interest from January 16, 1881, together with costs. It is further ordered and adjudged, That plaintiff's complaint be dismissed with costs as to the defendants, Mary Garlington and Stobo D. Garlington.

From this judgment the defendants appealed on the following exceptions:

Because it is respectfully submitted—

1. His honor erred in giving judgment in favor of plaintiff, and against the defendant, George F. Young, for $1,136.30—money paid by plaintiff to Mathews in connection with Calmes Quarter tract of land.

2. His honor erred in giving judgment in favor of plaintiff, and against defendant, George F. Young, for $340.91—money alleged to have been paid by plaintiff in connection with delinquent land sales made on May 3, 1875.

3. His honor erred in not finding that plaintiff must tender title, or such title as was in him, to the lands in connection with which the alleged moneys were advanced, before he can maintain this action against the defendants for the enforcement of his legal rights, or the recovery of the moneys advanced as alleged.

4. His honor erred in not finding the sale of lands sold as delinquent on May 18, 1874, and on May 3, 1875, not only irregular, but null and void.

5. His honor erred in not finding that there was no agreement between plaintiff and George F. Young touching the disposition of lands bid off by plaintiff on May 3, 1875, at the sale of delinquent lands.

6. His honor erred in not finding as void any verbal agreement entered into between plaintiff and George F. Young for the disposal of the 1,000 acres of land, or any part thereof, and bid off by plaintiff at the sale of delinquent lands on May 3, 1875.

7. His honor erred in not finding that if George F. Young had entered into any verbal agreement with plaintiff under a misapprehension of his legal rights, he could withdraw from such agreement and assert his rights in an action to enforce legal rights.

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*8. His honor erred in not finding the legal title to the 1,000 acres of land, of which the W. R. Young tract is alleged by plaintiff to be a part, and bid off by plaintiff at sale of delinquent lands on May 3, 1875, to be in the defendants, George F. Young and Mary Garlington, and that they are entitled to the rents and profits of the W. R. Young tract of land.

9. His honor erred in finding that the damages resultant to the defendants from the action brought by plaintiff to eject Stobo D. Garlington and others from the Calmes Quarter tract, were resultant from conduct in the nature of a tort and cannot be set up as a counter-claim in this action.

10. His honor erred in finding that the counter-claim set up by the defendants for the rents and profits of the W. R. Young tract of land cannot be maintained in this action.

11. His honor erred in not finding and adjudicating the equities of the parties as revealed by the pleading and the evidence in this action.

Mr. J. W. Ferguson, for appellants.

Messrs. Holmes & Simpson, B. W. Ball, and H. L. Farley, contra.

June 10, 1884. The opinion of the Court was delivered by

Mr. Justice FRASER. Only a brief outline of the facts will be necessary in this opinion, as the case is very fully stated in the decree of the Circuit judge. Samuel Young, late of Laurens district, died in 1865, leaving in force a will by which, in certain contingencies, he gave his estate, real and personal, to his son, William Young, charged with pecuniary legacies of $20,000 each, to his two grandchilren, the defendants, George F. Young and Mary Young, who has intermarried with the defendant, Stobo D. Garlington. Finding this charge on the estate in his hands a very heavy one, in consequence, we suppose, of the changed condition of affairs at the close of the Confederate war, William Young conveyed, in April, 1876, the whole estate, reduced to about 8,000 acres of land and a small amount of per-

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sonalty, to *the defendants, George F. and Mary L., as "tenants in common," in payment for the said legacies.

The real estate consisted of a large number of parcels or tracts of land, and, amongst them, some land known as the "Calmes tract" of 1,300 acres, and the "Wm. R. Young tract" of 550 acres. This tract of 550 acres had been the property of W. R. Young, who died in 1863, and had been sold as a part of his estate under some proceedings and in some way not material here, and conveyed to the said Samuel Young in his life-time, and by William Young conveyed to George F. and Mary L., with the other property of his estate. These defendants having failed to pay, in due time, the taxes assessed on these lands, and the lands or a portion of them having been sold as delinquent, the plaintiff furnished the money on several occasions to redeem them, or so much of them as had been sold for taxes.

The complaint alleges that the money was advanced on an agreement between the plaintiff, who is the respondent in this case, and the defendants, George F. and Mary L., two of the appellants, to repay the money and interest. The Circuit judge has rejected several of the sums claimed in the complaint, and he has also found as a fact that there was no agreement made by Mary L. to repay these moneys. He has found, however, as a fact that George F. did promise to pay and is liable for $377.07, and interest from October 16, 1875, the money loaned by plaintiff to redeem a tract of land in Newberry county, for $1,136.30, and interest from December 21, 1875, the money paid to B. H. Mathews to redeem the Calmes tract, which he had bought at a tax sale, and $340.91, and interest from May 3, 1875, money advanced to buy in at a tax sale a portion of the said real estate at the same time that plaintiff claims to have bought in the W. R. Young tract for himself or for parties whose interest he claims to represent as executor or administrator of W. R. Young. These sums, with interest, amount on January 16, 1881, to $2,539.90, and for this sum and interest from January 16, 1881, to the date of the decree, the Circuit judge has given judgment.

The plaintiff's claim, thus adjudicated, is a purely legal demand, triable by a jury, and in such cases when the case has been tried, as this case has, by the Circuit judge instead

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of a jury, *there can be no appeal to this court from his findings of fact. Mere errors of calculation, however, or improper conclusions of law from the facts found by the Circuit judge as will hereafter appear, may be corrected in this court without any infringement of the rule which does not permit this court to review the findings of fact by a Circuit judge in a jury case.

Besides the general denial of the plaintiff's cause of action, the defendants set up in their answer by way of defence, 1. That on the occasion when plaintiff advanced the sum of $1,136.30, December 21, 1875, to redeem the Calmes tract, B. H. Mathews, who had purchased the same at the tax sale, made a title, such as he had, to the plaintiff for the same, and that it was incumbent on the plaintiff in any action to recover the money to tender back to defendant such title, and that he has failed to do so here. 2. By way of counter-claim, defendants allege that plaintiff had, before the commencement of this action, brought an action against the defendant, Stobo D. Garlington, and the tenants, to recover possession of the Calmes tract; that by this action and other interference with the possession, plaintiff had caused damage to the defendants to the extent of $1,000, for which amount the defendants set up a counter-claim in this action. 3. Further, by way of counter-claim, the defendants allege that the plaintiff has been in possession of the said W. R. Young tract, and has received the rents and profits thereof from the year 1875, including that year, to the present time; that the title to the said W. R. Young tract is in the defendants, George F. and Mary L.; that the rents and profits of the said land for the time plaintiff has been in possession thereof are worth $2,650; that plaintiff agreed to pay the same; and for this sum defendants set up a counter-claim. 4. Defendants also set up as a counter-claim the sum of $6.50, money advanced for plaintiff in the payment of some taxes.

The Circuit judge has rejected this defence and all of these counter-claims. There has been no appeal as to the items in the complaint rejected by the Circuit judge, or as to the item of $377.67, advanced October 16, 1875, or as to the counter-claim of $6.50.

The appeal brings up all the other questions in the case on exceptions by the defendants.

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*1. The first two exceptions are as to the findings of fact by the Circuit judge on the plaintiff's cause of action, and have been disposed of above.

2. The 3d, 4th, and 9th exceptions relate to the failure of the plaintiff to tender back title to the Calmes tract, and damages to the possession thereof. It is clear from the testimony that B. H. Mathews conveyed to plaintiff such title as he had to the Calmes tract only as a security for the repayment of the money, $1,136.30, advanced by plaintiff to the defendant, George F., for its redemption, the said George F. going into possession thereof and retaining it, either by himself or others. If this had been an agreement between the plaintiff and George F. for the sale to George F. of the Calmes tract on the payment of $1,136.30, there would have been good reason for the claim now made by George F., that plaintiff should have tendered title either before action or, at least, in his complaint, in which he sues for the purchase money, before he could be allowed to recover. A creditor who holds a claim secured by a mortgage of real estate, or other collaterals, is under no obligation to resort to his mortgage or other collaterals, in the first instance, if he is satisfied to sue for and obtain a purely personal judgment against his debtor. Neither is he under any obligation to tender back title to the mortgaged property or a delivery of the collaterals, in his complaint, as a condition of his right to recover a judgment for his debt. If the defendant, the mortgagor, is apprehensive of injury or loss, as he might well be when the mortgage has been made by way of a deed absolute on its face, or when the property pledged for the payment of the debt consists of negotiable securities, the proper remedy for the defendant is to tender in his answer the money due to the plaintiff and demand, by way of counter-claim, a reconveyance of his land unincumbered by the plaintiff, or a redelivery of his securities.

It is not difficult to conceive of circumstances which would make this course necessary and proper on the part of the defendant in order to protect himself against a loss of his securities after he has paid the debt for which they were pledged; but in such cases it would be the duty of the defendant debtor and not of the plaintiff creditor to tender

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performance as the foundation *of his demand for judgment. It was not the duty of the plaintiff in this case in his complaint to tender back such title as he has to the Calmes tract, and which, it seems, he has once failed to establish in the courts, but of the defendant, George F., to tender payment, in his answer, of the amount secured by such title. If this had been done, the court might have ordered a reconveyance as a condition of a payment for this sum in favor of plaintiff, but not otherwise.

3. Defendants also set up a counter-claim for damages growing out of an action brought by plaintiff against the defendant, Stobo D. Garlington, and certain tenants, to recover the possession of the Calmes tract, and other alleged interference with the possession of defendants. If any action would lay in this or in any other case for merely bringing an action to recover possession of land, which proves unsuccessful, or if there has been any thing in the conduct of the plaintiff in reference to the possession of the Calmes tract, as shown by the testimony taken in this case, on which an action could be founded, such action cannot, in any proper sense, be said to be founded on contract. If any thing, these matters are torts, either trespass or case, and are not proper subjects of a counter-claim in an action founded on a contract for the payment of money loaned.

Exceptions 5, 6, 7, 8, and 10, refer to the title of the W. R. Young tract and the counter-claim set up in reference to the rents and profits of said tract while in possession of the plaintiff. We will consider first the counter-claim for rent. It appears that this tract of land was at one time the property of W. R. Young, and after his death was conveyed by some process, the validity of which is in dispute between the plaintiff and the defendants, to Samuel Young, and was conveyed by William Young, who claimed under the will of Samuel Young, to the defendants, George F. and Mary L., "as tenants in common." Assuming, for the purposes of this case, so far as the question of rent is concerned, that the title of Wm. R. Young has passed to Samuel Young, and that Samuel Young's title has passed to defendants, George F. and Mary L., under the deed made by William Young, and that there has been no valid conveyance of the W. R. Young tract to plaintiff, the title remains in George F.

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Young and Mary Young *Garlington, "as tenants in common." They have this title if any, and no other.

There has been no proof of any express contract on the part of plaintiff to pay to George F. or Mary L., or either of them, rent for the W. R. Young tract. They can stand, therefore, only upon the implied agreement based upon the plaintiff's use and occupation of the land, the title to which is in them "as tenants in common." Their claim for rent on an implied promise is joint, and not several. "As each (tenant in common) has a separate and distinct freehold, if they have been disseized and seek to recover the estate they must bring separate actions and may not join. And if one tenant in common recover judgment for possession in an action for the whole land, he can recover

damages pro rata according to his actual interest in the estate. But as they have one possession, they must join in actions for injuries to this, as trespass quare clausum fregit, nuisance, and the like." 3 Wash. Real Prop., 572. To the same effect, see 1 Chit. Pl., 13, note 1, with the authorities cited. The wrong done here was to the possession, and the tenants in common are permitted to elect to sue on the implied contract instead of the trespass. Their possession is one, and any claim based on this possession must necessarily be joint.

If there had been an express contract, the case would have been different, and the contract would have been joint or several according to the agreement of the parties. The claim for rent of this land is therefore one for which George F. and Mary L. could only have sued jointly, and the question now is, can this joint demand be set up in this action, in which it is found that plaintiff has a valid demand against only one of these defendants. It is conceded, that if the plaintiff had failed entirely in his action against all and each of the defendants, such a counter-claim, though it be joint, could be set up against him. Pom. Rem., 739. In the case before the court, the plaintiff has established his demand against one and only one of the defendants. By setting up a counter-claim, the defendants become, in reference thereto, the plaintiffs, and the plaintiffs become quoad hoc defendants. Plyer v. Parker, 10 S. C., 464.

The general rule laid down in Pom. Rem.,

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761, is this: *"Fifthly, when two or more persons have a joint right of action and unite as plaintiffs to enforce the same, a counter-claim cannot be admitted against one or some of them in favor of any or all the defendants." According to this rule, if defendants had brought a joint action for rent and established their demand, plaintiff could not have set up his several claims against one of them as a counter-claim. These two matters cannot be adjudicated in the same action, and one of them must be rejected. Plaintiff has come into court to enforce his demand, and cannot be deprived of his right by the presentation of a counter-claim, the allowance of which would have the effect of remanding him to another action. If either party must resort to another action, the defendants in this case must do so. Plaintiff has chosen his ground for the contest, and if he has rights, they must be accorded to him here. There may perhaps be cases of insolvency, or other circumstances where the application of this rule might be practically a total defeat of the party, who is turned out of court for the reason here assigned, but no such circumstances or special equity have been alleged by the defendants here.

These exceptions also allege as error that the Circuit judge did not settle the questions between plaintiff and defendants as to the title to the W. R. Young tract. We have examined the pleadings in the case carefully and do not find any such issue raised by them; whatever is said in reference to this subject is merely by way of recital to explain the matters above alluded to, and as to which relief is sought. The complaint is not framed with any view to enforce the performance of any contract in reference to the W. R. Young tract, and the answer is not framed with any view to recover possession of said land. While parties may have any relief to which it appears by the evidence they are entitled, it must be something within the scope of the pleadings. There was, therefore, no error in refusing in this action to adjudicate the title or possession of the W. R. Young tract.

All that it is intended to decide in reference to these counter-claims, and as to the titles to the Calmes tract and the W. R. Young tract is, that these are not proper matters to be adjudicated in this action.

As above intimated, there are several er-

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rors or mere inadver*tencies apparent on the face of the Circuit decree which should be corrected. 1st. The whole amount paid by plaintiff on May 3, 1875, as found by the Circuit judge, was $661.89, and not $757.59, as alleged in the complaint. The defendant, George F., was to pay of this amount in the proportion which 450 acres bears to 1,000 acres of land. The true sum, from this finding of the Circuit judge, should have been $297.85, and not, as stated in the decree, $340.91. The total of the principal will therefore be $1,810.96, and of the interest $667.70, in all, $2,478.68, and not $2,529.90, as stated in the decree. 2d. Of this sum only the principal should bear interest from January 16, 1881, the date of the commencement of the action, to the date of the decree, August 30, 1883, while the Circuit decree allows interest on the whole sum, principal and interest. The judgment should have been for $2,478.66, and interest on $1,810.96 from January 16, 1881, to August 30, 1883.

Subject to these modifications as to the amount of the plaintiff's demand, it is ordered and adjudged that the judgment of the Circuit Court be affirmed.

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21 S. C. 292

STATE v. BERLIN.

(April Term, 1884.)

[1. *Constitutional Law* ⊜205, 207, 240.]

An act of the legislature prohibiting the sale of spirituous or intoxicating liquors outside of incorporated cities, towns, and villages, while permitting such sale under license within cities, towns, and villages, does not violate article I.,

section 12, of the constitution of this state, nor the 14th amendment of the United States constitution.

[Ed. Note.—Cited in Kaminitsky v. Northeastern R. Co., 25 S. C. 64, 65; Utsey v. Hiott, 30 S. C. 366, 9 S. E. 338, 14 Am. St. Rep. 910; Town Council of Summerville v. Pressley, 33 S. C. 66, 11 S. E. 545, 8 L. R. A. 854, 26 Am. St. Rep. 659; Stehmeyer v. City Council of Charleston, 53 S. C. 280, 31 S. E. 322; Brown v. Tharpe, 74 S. C. 209, 54 S. E. 363.

For other cases, see Constitutional Law, Cent. Dig. §§ 591-624, 631, 698; Dec. Dig. ⟸205, 207, 240.]

[2. *Intoxicating Liquors* ⟸15.]

Laws regulating the sale of liquors are police regulations, and the legislature may prescribe different regulations in different localities; but such laws must apply equally to all persons within the territorial limits affected.

[Ed. Note.—Cited in Town Council of McCormick v. Calhoun, 30 S. C. 95, 8 S. E. 539.

For other cases, see Intoxicating Liquors, Cent. Dig. §§ 17, 18; Dec. Dig. ⟸15.]

Before Wallace, J., Berkeley, June, 1883.

This was an indictment under the act of 1880, against Carl Berlin and G. Staevens for selling liquors without a license. The defendants pleaded in bar, that the act was

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void because contrary *to the constitution of this state (Art. I., § 12), and of the United States (14th Amendment). The State demurred to the plea, which was overruled. The case then went to the jury. The evidence showed that defendants were owners of a store upon Edisto Island, which is outside of any incorporated city, town, or village, and that a clerk in the employment of defendants sold to witness a drink of whiskey. The judge charged the jury that the act of 1880 was constitutional, and that if they believed from the evidence that the defendants authorized the sale, they should find against them. The jury found the defendants guilty. The defendants appealed upon two grounds, which were substantially as follows:

1. Because said act is contrary to the constitution of this state in that it prohibits the sale of liquors in the country, while it permits such sale in cities and towns; and said act is unequal and unjust, and is contrary to the common rights of citizens of the state, in that it confers a privilege upon one citizen which it denies to another.

2. Because said act is contrary to section 1 of article XIV., of the amendments to the constitution of the United States.

Mr. B. J. Whaley for appellants.

The question here made is not res adjudicata, because the grounds now taken were not raised in the cases heretofore decided, 16 S. C., 482; 18 Id., 103. The sale of liquors may be regulated and licenses required, 5 How., 504; 2 McMull., 233. But this law is objectionable because violating the constitutional provisions stated in the plea. Cool. Con. Lim (4th edit.), 489-494, 732; 18 Cent. Law J., No. 11; 2 McMull., 236.

Mr. Solicitor Jervey contra, cited Cool. Con. Lim., 182; 42 Md., 71; 18 S. C., 81; Ibid, 103; Cool. Tax., 128; Burr. Tax., 69, 147; 29 La. Ann., 283; 30 Id., 991; 22 Minn., 312; 35 Ark. 69; 2 McMull., 233; 4 Strob., 241.

June 23, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The sole question raised by this appeal is as to the constitutionality of the first section of the act of

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*1880 (17 Stat., 459), incorporated in the general statutes as section 1731. Although the constitutionality of this law has been twice before affirmed by this court (State v. Mancke, 18 S. C., 81, and State v. Turner, Ibid, 103), yet, as the counsel for the appellant seems to think that the attention of the court was not directed, in the argument of those cases, to the ground upon which they now assail the constitutionality of the act, we have not been unwilling to reconsider the question.

That ground is, that inasmuch as the first section of the act absolutely forbids the sale of spirituous liquors outside the limits of incorporated cities, towns, and villages, while in a subsequent section it provides for the granting of licenses to sell such liquors within the limits of incorporated cities, towns, and villages, it establishes a discrimination in favor of one class of persons as against another, and is therefore in conflict with the provisions of article I., section 12, of the constitution of this state, as well as the provisions of the 14th amendment of the constitution of the United States. The provision of the 12th section of article I., which this law is supposed to violate is expressed in the following words: "No person shall be * * * subjected in law to any other restraints or disqualifications, in regard to any personal rights, than such as are laid upon others under like circumstances;" and the language of that portion of the 14th amendment, with which this law is supposed to conflict is as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellants contend that their privileges and immunities, as citizens of the United States, are abridged by the law in question, which is therefore in violation of the constitution of the United States, and that the

restraints and disqualifications imposed by the act upon their personal rights are in violation of the provisions of the constitution of the state. It will be observed that the act in question makes no discrimination what-

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ever *in regard to persons or to classes of persons as such, but that it only discriminates as to localities, leaving the rights, privileges, and immunities of all persons in each locality precisely the same. It must also be remembered that laws regulating the sale of spirituous liquors are to be regarded as police regulations, over which the state has absolute control, limited only by some constitutional prohibition. The state, therefore, in the exercise of this police power, may pass laws absolutely prohibiting the sale of spirituous liquors, except unbroken packages while in the hands of the importer, and except, perhaps, where the rights of property, existing at the time of the passage of the law, might be destroyed, or it may throw around such traffic such restraints as in the judgment of the legislature may be most conducive to the peace and good order of society, by preventing the evils which might flow from an unrestrained traffic in such articles. License Cases, 5 How., 504 [12 L. Ed. 256]; Bartemeyer v. Iowa, 18 Wall., 129 [21 L. Ed. 929]; Heisembrittle ads. City Council, 2 McMull., 233; City Council v. Ahrens, 4 Strob., 241.

The practical question, therefore, presented in this case is, whether the legislature can, in the exercise of the police power, prescribe different regulations for the sale of spirituous liquors, in different localities within its borders. It is quite clear that regulations which might prove very effective in one locality, might be found very inefficient in another; and it would seem, therefore, that to render the exercise of this admitted power most effective, the regulations should be adapted to the wants and conditions of the different localities to which they are to be applied. It seems to us that the rule upon this subject has been well expressed by Judge Cooley in his work on Constitutional Limitations (2d edit.) at page 390: "Laws, public in their objects, may, unless express constitutional provision forbids, be either general or local in their application. * * * The authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a subdivision of the state or a single class of its citizens only. The circumstances of a particular locality or the prevailing public sentiment in that section of the state, may require or make acceptable different police reg-

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ulations from those *demanded in another. * * * The legislature may therefore prescribe different laws of police * * * in each distinct municipality, provided the state constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. * * * If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge." The whole matter is well summed up in a note on the same page, in the following words: "To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the state; all that is required is, that it shall apply equally to all persons within the territorial limits described in the act."

The same principle has been recognized by the Supreme Court of the United States and applied to a case of a different character from that now under consideration, in Missouri v. Lewis, 101 U. S., 22 [25 L. Ed. 989]. It seems that by the laws of Missouri, an appeal lies to the Supreme Court of the state, from a final judgment of a Circuit Court in the state, except those held for the counties of St. Charles, Lincoln, Warren, and St. Louis, and the city of St. Louis, for which counties and city a separate court of appeals is established, called the "St. Louis Court of Appeals," and from its decisions, no appeal lies to the Supreme Court, except in certain specified cases, of which the case before the court was not one. It was contended that this provision of the Missouri law was in conflict with the 14th amendment of the United States constitution, because it denies to suitors in the courts of St. Louis and the counties named, the equal protection of the laws, in that it denies to them the right of appeal to the Supreme Court of the state in cases where it gives that right to suitors in the other one hundred and nine counties of the state. It was held that this provision of the Missouri law was not in conflict with the 14th amendment or any other provision of the constitution of the United States.

Mr. Justice Bradley, in delivering the opin-

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ion of the court *uses this language, which may well be applied to the case now under consideration: "Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory, and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny to it this right. * * * We might go still further and say, with undoubted truth, that there is

nothing in the constitution to prevent any state from adopting any system of laws or judicature it sees fit for all, or any part, of its territory. * * * If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons, or other classes in the same place and under the like circumstances."

The same principle has been applied in the state of Alabama, in Davis v. State (68 Ala., 58, 44 Am. Rep., 128), where it was held that a statute making it unlawful to transport or remove cotton in the seed, in certain counties, after sunset and before sunrise of the succeeding day, was not in conflict with any provision of the state or federal constitution.

If, as we have seen, the legislature has the power to prescribe different police regulations for different localities within the territory of the state, we do not see how the law in question can be said to violate section 12 of article I. of the constitution of this state. It does not subject any person to any restraint or disqualification in regard to any personal right, to which all persons in the same locality and under the like circumstances are not subjected, but all in that locality stand precisely upon the same footing, and no one has any right to complain of any infraction of his constitutional rights. To use the language of Judge Cooley quoted above, while it is true that the statute in question

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is not *"equally applicable to all parts of this state," it is equally true that it does apply "equally to all persons within the territorial limits described in the act."

The judgment of this court is that the judgment of the Circuit be affirmed.

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21 S. C. 298

MITCHELL v. FOWLER.

(April Term, 1884.)

[*Justices of the Peace* ⇐176.]

Where the defendant in a trial justice's court did not admit the plaintiff's case, but on appeal to the Circuit Court and on trial there de novo, orally admitted the execution of the note sued on and the plaintiff's ownership of it, defendant is not entitled to open and reply, not having admitted "by his pleadings" the plaintiff's case.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 700; Dec. Dig. ⇐176.]

Before Hudson, J., Spartanburg, October, 1883.

Action by C. W. Mitchell against W. D. Fowler, commenced in a trial justice's court on September 18, 1880, and there tried in October, 1880. The opinion states the case.

Messrs. Wofford & Jennings for appellant.

Messrs. Bobo & Carlisle, contra.

June 23, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The error assigned in this case is the refusal of the Circuit judge to allow the defendant to open and reply. The action was on a note and originally brought in a trial justice's court, where the plaintiff proved his case and the defences were, first, usury and, second, that the defendant, who was the surety on the note, had been discharged by an agreement between the plaintiff and the principal for an extension of time. The trial justice rendered judgment for the plaintiff and, the defendant appealing, the case came on for trial de novo in the Circuit Court. The pleadings were altogether oral, and at the trial in the Circuit Court the plaintiff stated as his cause of action the note which he exhibited, and stated

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that the plaintiff was the *owner of the note. Counsel for defendant admitted the execution of the note by the defendant and the plaintiff's ownership of it, and pleaded as his defences, usury and discharge by extension of time to the principal. Thereupon he claimed the right to open and reply, which being objected to, defendant's counsel stated that he admitted plaintiff's right to recover, unless he introduced testimony as to the defences interposed, and again claimed the right to open and reply. This was refused by the Circuit judge, who held "that the defendant is entitled to open and reply only when he admits the plaintiff's case, and takes upon himself the burden of proof; that this must be done in the defences set up, and that the defences here set up did not admit but denied the plaintiff's case; that admitting the execution of a note and its ownership by the plaintiff did not admit the plaintiff's case, but the defence struck directly at the validity of the note as against the defendant in its origin, as well as owing to the subsequent dealings of principal and payee."

After this decision was announced the plaintiff was introduced as a witness and proved the signature to the note, and his ownership of it. After testimony was heard on the part of the defendant in support of his defences, to which the plaintiff was permitted to offer evidence in reply, judgment was rendered in favor of the plaintiff, from which the defendant appeals, upon the ground that the Circuit judge erred in refusing to allow the defendant to open and reply, and in allowing that privilege to the plaintiff.

While we concur with the Circuit judge in the conclusion which he reached, we prefer to rest our judgment upon a different ground from that adopted by him. The practice in regard to the right to open and reply is regulated by Rule 59 of the Circuit Court, which provides that the defendant shall have this

right "where he admits the plaintiff's cause by the pleadings, and takes upon himself the burden of proof." In a trial justice's court, "the pleadings may be oral or in writing; if oral, the substance of them shall be entered by the trial justice in his docket; if in writing, they shall be filed by him, and a reference to them shall be made in the docket." Code, § 88, subdiv. 2. Whether the practice as prescribed by Rule 59 can be applied to cases in

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a *trial justice's court, especially where the parties have proceeded by oral, rather than written, pleadings, is a question which we are not called upon to determine, inasmuch as in this case there was no admission of the plaintiff's cause of action in that court, either "by the pleadings" or otherwise, but, on the contrary, it is stated in the "Case" that when the case came on for trial before the trial justice, "the plaintiff proved his case, the defendant pleading usury," &c.

When the case was carried by appeal to the Circuit Court there were no new pleadings, but it was tried upon the pleadings as they stood in the trial justice's court, and as it is conceded that the defendant did not, by his pleadings, in the trial justice's court admit the plaintiff's cause of action, it is quite clear that the defendant did not bring himself within the rule which entitled him to open and reply. For the rule is explicit that the admission of the plaintiff's cause of action must be made "by the pleadings," so that it may be matter of record; and such has been the construction placed upon the rule by the decisions of this court. Brown v. Kirkpatrick, 5 S. C., 267; McConnell v. Kitchens, 20 Id., 430 [47 Am. Rep. 845]. There can be no oral pleadings in the Circuit Court, and therefore the fact stated in the record that the defendant, at the trial in that court, orally admitted the execution of the note sued upon, as well as the plaintiff's ownership of it, cannot affect the question under consideration. The foundation of the defendant's right to open and reply is the rule of court above referred to, and unless he brings himself within the terms of that rule, as construed by the decisions of this court, he cannot successfully claim any such right.

The case of Bennett v. Sandifer, 15 S. C., 418, relied upon by appellant, does not touch the question involved in this case. The only points there decided were, first, that the mere fact that the defendant was appellant, in a case originating in a trial justice's court and carried by appeal to the Circuit Court, did not constitute him the actor in such a sense as would entitle him to the right to open and reply in the Circuit Court, under the provisions of Rule 59; and, second, that an error in ruling this point was appealable.

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*The judgment of this court is that the judgment of the Circuit Court be affirmed.

21 S. C. 301

CAMPBELL v. SLOAN & SEIGNIOUS.

(April Term, 1884.)

Executors being sued for a debt of their testatrix, a devisee in possession obtained from his wife the amount due upon the note in suit, and paid it to the attorneys of the payee; the suit was then dropped, and the note taken by the devisee to his wife with the statement, "This is your property," but there was no written assignment. After this the husband, with the wife's knowledge and acquiescence, mortgaged the land acquired under such devise, and she renounced her dower to the mortgagees, who knew nothing of her claim; afterwards she brought action against the executors on this note, obtained judgment by default, and then sought to subject this land to the payment of this note and to enjoin the foreclosure of such mortgage—meantime the personal assets of testatrix were lost or wasted. *Held*,

[1. *Payment* ⟸50.]

That the action could not be sustained, because the circumstances showed that the note was not purchased from the payee, but was satisfied by the husband with money given to him by the wife for that purpose.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 132; Dec. Dig. ⟸50.]

[2. *Payment* ⟸66.]

That twenty years having elapsed from the last credit endorsed upon the note to the commencement of plaintiff's action against the executors, her right to bring this action was barred by lapse of time.

[Ed. Note.—Cited in Shaw v. Barksdale, 25 S. C. 205, 214.

For other cases, see Payment, Cent. Dig. §§ 176–188; Dec. Dig. ⟸66.]

[3. *Mortgages* ⟸413.]

That the laches of plaintiff, and that of the original payee, were sufficient to bar this action.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1187–1201; Dec. Dig. ⟸413.]

[4. *Husband and Wife* ⟸129.]

That by renouncing dower on the mortgage, she is estopped from setting up her stale claim against the mortgagees.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 283; Dec. Dig. ⟸129.]

Before Kershaw, J., Laurens, June, 1883.

The facts of this case are fully stated in the opinion of this Court. The Circuit decree, omitting such statement, was as follows:

From these facts I conclude that the note is paid by lapse of time. Notwithstanding the judgment against the executors, Sloan & Seignious may avail themselves of it. Bird v. Houze, Speers Eq., 250; Gilliland v. Caldwell, 1 S. C., 197. The action is upon the sealed note of the testatrix, and that is pre-

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*sumed to be paid by the lapse of twenty years from the date of the last payment. The omission of the executors to plead to the action against them, and the consequent judgment, cannot affect the right of defendants, Sloan & Seignious. As against them, the note will be treated as paid. Boyce v. Lake, 17 S. C., 482 [43 Am. Rep. 618].

There has been such gross laches in the

prosecution of this claim that the action will not be entertained in a Court of Equity. There was most abundant personal assets to pay this and all other debts of the testatrix. These parties holding the notes have stood by for over twenty years and seen the property turned over to the legatees, and all lost or wasted but this tract of land, and took no action until it was about to be subjected to the debt of Sloan & Seignious. The primary fund for the payment of debts is the personal estate. If a creditor stands by and sees it wasted, he cannot subject lands in the possession of the heirs or devisee to the payment of his debt, even when he has judgment against the executors. Mobley v. Cureton, 2 S. C., 146; Bird v. Houze, Speers Eq., 250.

The circumstances show that John B. Campbell had control of the negotiations for the settlement of the note, and it does not appear that his wife did not intend the money with which he took it up as a gratuity. If she so intended, or if he used her money without authority to take up the note, it was paid, and could not afterwards be set up as a subsisting demand. Her silence, acquiescence, and participation in the mortgage, show that she considered she had no claim against the land. It was evidently an afterthought to set it up. The only way to account for her conduct is to assume this. Her rights will be postponed to those of Sloan & Seignious. She can claim no better position than if she was a prior encumbrancer at the time of the mortgage, or holding a prior title to the land. And even in that case, she would be postponed to the defendants, Sloan & Seignious. Pom. Eq. Jur., 780, 781.

If, holding such prior title, the party being informed of the purpose of another to invest in the land, and being brought in contact with and made cognizant of the transaction, he simply keeps silent and permits the person to contract, he will be compelled to release in favor of the purchaser. Plain-

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tiff is estopped *in equity from enforcing this claim against the land in derogation of the rights of Sloan & Seignious, under their mortgage. She stood by and allowed the mortgage to be given, and joined in the security by renouncing her dower therein; and if she had an equity to be first paid out of the land, she should have made it known then. Hand v. Railroad Company, 12 S. C., 351; Lead. Cases Eq., 64; Big. Est., 500, 511.

Plaintiff has established no title to the note. It was not assigned, nor was it transferred by delivery. It was paid to the attorneys at law of the obligee, and by them delivered to Campbell for the plaintiff. The attorneys would have had no right to assign, and, a fortiori, could not transfer it by delivery. Mayer v. Blease, 4 S. C., 14. At most her title was purely equitable, and could not prevail against a legal right acquired for valuable consideration without notice. In such a case the equities would be at least equal, and the court could not interfere. Any of these principles are conclusive against the recovery sought by the plaintiff.

It is ordered and decreed, That the complaint herein be dismissed, and that the plaintiff pay the costs of the proceeding; that the order of injunction herein granted be set aside, and that the defendants, Sloan & Seignious, be allowed to proceed to enforce their remedies against the said land.

From this decree the plaintiff appealed upon the following exceptions: 1. Because his honor erred in holding the settlement of 1863 a settlement of Sally M. Hall's estate. 2. Because his honor erred in holding the sealed note paid by lapse of time. 3. Because his honor erred in holding that there were abundant personal assets to pay this sealed note and all other claims, and that the plaintiff stood by and allowed these assets to be wasted. 4. Because his honor erred in holding that the plaintiff stood by and saw the property turned over to legatees, and took no action until it was about to be subjected to the debt of Sloan & Seignious. 5. Because his honor erred in holding that the plaintiff intended the money which took up the A. R. Simpson note, as a gratuity to defendant Campbell, or that he used her money without authority. 6. Because his

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honor erred in holding that the *plaintiff's silence and participation in the mortgage show that she considered that she had no claim in the land. 7. Because his honor erred in holding that the plaintiff kept silent and permitted Sloan & Seignious to invest in the land. 8. Because his honor erred in holding that plaintiff stood by, allowed mortgage to be given, and joined in the mortgage by renouncing her dower without making known her claim. 9. Because his honor erred in holding that Sloan & Seignious, for a valuable consideration without notice, acquired a legal right in the land. 10. Because his honor erred in holding that the A. R. Simpson note was neither assigned, transferred, nor delivered to plaintiff, and therefore she could not maintain this action. 11. Because his honor erred in holding that Sloan & Seignious could avail themselves of lapse of time, judgment having been rendered against the executors. 12. Because his honor erred in holding that the rights of the plaintiff must be postponed to those of Sloan & Seignious, or that she is estopped.

Mr. J. W. Ferguson, for appellant.

Messrs. James Farrow and B. W. Ball, contra.

June 25, 1884. The opinion of the Court was delivered by

Mr. Justice McIVER. Sallie M. Hall departed this life in the latter part of 1857,

having first duly made and executed her last will and testament, of which Dr. E. G. Simpson and Dr. William Phillips were the duly qualified executors. The testatrix left a very considerable estate, both real and personal, the great bulk of which, including the tract of land which is the subject matter of the present controversy, she gave to her grandson, the defendant, John B. Campbell, to be kept by the executors under their control until he arrived at the age of twenty-one years, when it was to be turned over to him absolutely. The testatrix, at the time of her death, owed but few debts, the principal one being a note under seal to A. R. Simpson for $1,000, payable one day after its date, and bearing date February 17, 1857. Upon this note a credit, dated April 6, 1858, for $70 is endorsed, as received from E. G. Simpson, executor.

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*In October, 1862, the defendant, John B. Campbell, the principal legatee and devisee under the will, having attained the age of twenty-one years, the executors turned over to him the whole estate, although all the specific legacies and debts were not then paid, since which time, both of the executors testify, they have in no way interfered with the estate of the testatrix, Sallie M. Hall. Sometime after this, though at what particular date does not appear, each of the executors made separate returns in the ordinary's office of their receipts and expenditures as such, which was probably about September 16, 1863, as the interest seems to be calculated up to that day. A suit having been commenced by A. R. Simpson on the note above mentioned against the executors of Sallie M. Hall and John B. Campbell, the defendant, John B. Campbell, testifies "that he went to the office of Simpson & Simpson in June, 1869, and took up said note with money belonging to plaintiff, paying $1,000; that he took the note home and gave it to plaintiff, saying, 'This note is your property;' that it had been property of plaintiff from that time to present." The only other witness who testified as to this matter said, "That she was with plaintiff when Campbell returned from Laurens, the day that he took up the A. R. Simpson note; that he handed the note to plaintiff, saying, 'This note belongs to you; Colonel Simpson says that you had better take care of this note, it may be worth something to you some day.'"

On February 19, 1876, the defendant, John B. Campbell, executed a mortgage on the land in question to his co-defendants, Sloan & Seignious, and the plaintiff, who is the wife of said John B. Campbell, indorsed upon said mortgage a relinquishment of her dower in the said land, as against the mortgage debt. In 1877 the A. R. Simpson note was placed by John B. Campbell in the hands of attorneys for collection, although no action was commenced thereon until the early part of 1881, when suit was instituted against the executors of Mrs. Hall, and judgment by default obtained against them in February, 1881. On March 18, 1882, judgment of foreclosure and sale was obtained by Sloan & Seignious against John B. Campbell, and the object of the present action is to subject the tract of land in the possession of John B. Campbell, devised to him by the will of Mrs.

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Hall, *to the payment of her note to A. R. Simpson, of which the plaintiff claims to be the owner and holder, and also to enjoin the sale of said land under the judgment of foreclosure by Sloan & Seignious.

Although one of the questions made in the case is, whether the note which constitutes the foundation of the plaintiff's claim shall be presumed to be paid by lapse of time, yet, singular to say, it nowhere distinctly appears precisely when the present action was commenced. The date is stated in the Circuit decree, but it is manifest that it is incorrectly stated (probably through a misprint), and as corrected by the admission of counsel, it seems to be inconsistent with a succeeding statement in the decree. For, as corrected by counsel, it is fixed at August 31, 1881, but as the decree states that one of the objects of the action was to enjoin the sale of the land under the judgment of foreclosure, which was not obtained until March 18, 1882, it must have been commenced after that date, and accordingly we find that in the statement of facts prefixed to the appellant's "Points and Authorities," the date of the commencement of the present action is fixed at June 5, 1883. Fortunately, however, it happens in the present case, that this confusion as to dates will work no injury to the parties, for whether the action was commenced in 1881 or 1883 will make no practical difference.

The Circuit judge rendered a decree dismissing the complaint and dissolving the temporary injunction previously granted upon the several grounds considered therein, and from this judgment the plaintiff appeals upon various grounds set out in the record.

It is very manifest that the fundamental inquiry in this case is whether the plaintiff ever became the owner of the A. R. Simpson note, for it is quite clear that unless she did she has no cause of action, and the other questions discussed cannot properly arise. The Circuit judge seems to have reached the conclusion that she never bought the note, but simply furnished the money with which it was paid as a gratuity to her husband and to relieve him from a liability then pressing upon him; and in this conclusion we fully concur. It is not pretended that the note was ever assigned to her, or that there was any agreement or understanding that it should be; and although a formal assignment

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*might not be necessary, yet the fact that

none was taken and none was asked for, is a circumstance of no little weight in considering what was the true nature of the transaction. The testimony as to what occurred at the time the note was obtained, all of which is set out above, is very far from indicating that the mission of John B. Campbell was to buy up the note for his wife, to be held by her as a debt against him, but point rather to the conclusion which we have adopted. The expression "took up" the note, used by both of the witnesses who testified as to this matter, was much more appropriate to the payment rather than the purchase of the note.

Then, too, the subsequent conduct of the plaintiff points to the same conclusion. Although the note was then in suit and costs had been incurred, yet instead of allowing the note to go into judgment, and obtaining a lien upon her husband's land, which she could enforce or not as occasion might require, the suit is dropped and the note goes into her possession, where it remains unheard of for about eight years, until after a creditor of her husband has taken a lien upon the land, with her knowledge and acquiescence, as evidenced by her relinquishment of dower, when the note is resurrected and placed in the hands of an attorney for collection, and even then, for some unexplained reason, it was allowed to slumber for four years longer before any action was commenced upon it. All the circumstances point to the conclusion adopted by the Circuit judge, that this effort on the part of the plaintiff to set up this note as a debt due to her, in derogation of the rights of her husband's creditors, is an afterthought which cannot avail her.

But even if we were able to reach the conclusion that the plaintiff did in fact purchase the note in question, we think it clear that her right of action thereon is barred by lapse of time. Twenty years from the date of the payment indorsed on the note expired in 1878, and we see nothing in the case to rebut the presumption arising from such lapse of time. The judgment obtained against the executors of Mrs. Hall certainly cannot have such effect, for the action in which such judgment was obtained was not commenced until nearly three years after the twenty years had run out. Bird v. Houze, Speers Eq., 250;

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Gilliland *& Howell v. Caldwell, 1 S. C., 198; Wilson v. Kelly, 19 S. C., 160.

Again, we think that the laches of the plaintiff and of her alleged assignor, of which she must bear the consequences, is sufficient to bar her action. Mobley v. Cureton, 2 S. C., 140.

So, too, we agree with the Circuit judge that the plaintiff, by joining with her husband in the mortgage is estopped from setting up this stale claim against the mortgagees.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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21 S. C. 308

GLENN v. GLENN.

(April Term, 1884.)

[1. *Wills* ⟸498.]

A testator by his will gave power to his son to sell a tract of land "to any of my issue and to make a good fee simple title to the purchaser." The son conveyed this land in fee to his son, a grandson of testator. *Held*, that the grandson was embraced in the word "issue," and that he took a good fee simple title.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1088; Dec. Dig. ⟸498.]

[2. *Powers* ⟸36.]

The conveyance having been made to such grandson, who, two days afterwards, conveyed it to G, who was not a descendant of testator, G took a good title, even if the deed to the grandson was intended merely as one of the links in the chain to carry title to G.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 139; Dec. Dig. ⟸36.]

[3. *Wills* ⟸603.]

Quere: Would a devise to "A for and during his natural life, and after his death to his issue forever, which issue shall take per stirpes," give to A a fee conditional, or would it give a life-estate?

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351–1359; Dec. Dig. ⟸603.]

Before Wallace, J., Newberry, November, 1882.

The facts are stated in the opinion. The Circuit decree was as follows:

It will be seen on reference to the sixth clause of David Glenn's will that any of the sons was authorized to sell the land, if he did not wish to reside on it, to any of the issue of David Glenn. The fact that William Glenn resided in Alabama and sold the land shows that he did not wish to reside on it. The fact that he sold the land to his son, who two days afterward sold and conveyed to G. W. Glenn, sr., shows that he intended to conform to the condition of his power to convey.

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*Is A. J. Glenn, the son of William Glenn and grandson of David Glenn, embraced in the words "any of my issue"? "'Issue' is nomen collectivum, and a word of very extensive import. The term embraces descendants of every degree wheresoever existent, and unless restricted by the context cannot be satisfied by being applied to descendants at a given period." 3 Jarm. Wills, 200. So unless there are terms to restrict the word "issue," it certainly would include "grandsons." By the term "issue" occurring in the second clause of the will copied above, it is obvious from a mere inspection that the testator meant more than children. Nor is

there anything in the will which shows an intent to restrict the sons in a narrower circle than is described by the term "issue" in its unrestricted sense. The sale to the son, then, by William Glenn was in accordance with the direction of the will and conveyed a good title.

Other questions as to the nature of the estate that the sons took under the will, and the statute of limitations, need not be discussed. It is ordered and adjudged that the complaint be dismissed.

Mr. M. A. Carlisle, for appellant.

Messrs. Jones & Jones and Geo. S. Mower, contra.

June 26, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. David Glenn, late of Newberry county, departed this life in 1862, leaving a will, by which, among other things, he devised as follows: "I will and devise all my land to my three sons (Posey, John, and William), to be equally divided according to valuation among them, which valuation shall be fixed by five disinterested appraisers, to be appointed by the ordinary of Newberry district, and each of said sons shall have and hold such share as may be assigned him by the said appraisers for and during his natural life; and after his death to his issue for ever, which issue shall take per stirpes; but in case of the death of either of my said sons without leaving issue of a predeceased child or grandchild, then the land of such son shall go to and vest in fee simple in his children living at his

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*death, share and share alike. * * * Sixth. That in case either of my sons shall be desirous of changing his place of residence, or not wish to come to the same to reside on it, he is authorized to sell the land I have given him to any of my issue, and to make a good fee simple title to the purchaser, but the proceeds of such sale to be reinvested by my said son in property, either real or personal, subject to the same limitations as are imposed on the land in the second clause of my will, but this provision is not to authorize said land to be sold for debt or any other purpose than as herein provided," &c.

The land was divided among the three sons, and William went into possession of the part assigned to him, described as a tract of land in Newberry county, containing 177 acres more or less, &c. A. J. Glenn, testified, subject to exception, that he resided with his father in Talladega, Alabama; that after he got possession of his part of the land, his father, the said William, on December 25, 1862, made a conveyance of the land to him (A. J. G.), and that by previous arrangement he, immediately thereafter, conveyed it to his uncle, George W. Glenn, sr., for a consideration, which was not paid to him, but under some arrangement was made to his father, the said William Glenn.

In 1877 William Glenn died intestate, and his surviving children, the plaintiffs, instituted these proceedings to recover the land and the rents and profits thereof, claiming that their father William had only a life estate in the land under the will of his father, and that his conveyance to his son, A. J. Glenn, and that of A. J. Glenn to George W. Glenn, sr., were unauthorized by the will; that the life tenant had only the power to sell to "any of the issue" of the testator David, and that A. J. Glenn, being a grandson, and not a son, was not in the category of such "issue." But if it should be so held, they insist that it is perfectly certain that George W. Glenn, sr., was not of the "issue" of the testator, and that he was really the purchaser of the land; that the two conveyances, first to A. J., and then by him to his uncle, George, were in truth only one from William to George W., which corrupt combination to do by indirection what could not be done directly, was an abuse of the power in the will, and void.

The cause was heard by Judge Wallace,

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who held that A. J. *Glenn, a grandson of the testator, was, nevertheless, included in the class of "the issue" of the testator, and that his father's conveyance to him was not in violation of the will, but was good as the execution of the power created by the sixth clause thereof, and dismissed the complaint. From this judgment the plaintiffs appeal to this court upon the following exceptions:

1. "Because the Circuit judge construed the will of David Glenn to include by the words 'my issue,' grandsons as well as sons, and that the context of the will did not limit or restrict it to the children of David Glenn.

2. "Because the Circuit judge erred in holding that William Glenn, the son of David, by the sale and conveyance of the land to A. J. Glenn and in two days afterwards by A. J. Glenn to G. W. Glenn, sr., executed the power conferred upon him under the will, and in that manner showed that William Glenn intended to conform to the power.

3. "Because the Circuit judge erred in construing that the power was fully executed, when the investment of the proceeds of the sale of the land was a part of the execution of the power.

4. "Because the Circuit judge erred in holding that William Glenn could convey to his son, under the power conferred by the will," &c.

After giving the land to William for life, with certain limitations over to his issue, the testator superadded the power to sell the land "to any of my issue and to make a good fee simple title to the purchaser," &c. Without reference to the other questions raised in the case, the Circuit judge held that this power was well executed by the conveyance

of the devisee, William, to his son, A. J. Glenn, a grandson of the testator, and that he took "a good fee simple title." In this view we concur with the judge for the reasons given by him. The word "issue" does not embrace simply children, but grandchildren as well. "The word 'issue,' when not restricted by the context, is co-extensive and synonymous with descendants, comprehending objects of every degree." 2 Jarm. Wills, 25; 2 Redf. Wills, 396; Burleson v. Bowman, 1 Rich. Eq., 111. We see nothing in the will which requires us to construe "issue" as limited to children.

It seems that the judge below did not

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think it necessary to *consider the view that the conveyance to A. J. Glenn should be entirely ignored, and that alone considered which was made by him to George W. Glenn, as if it had been directly made to him by William himself. Whether the testimony of A. J. Glenn was or was not competent, it is possibly true that the deed from William to A. J. Glenn, was intended merely as one of the links in the chain to carry title to George W. Glenn; but even on that assumption we think we have no right to disregard that conveyance. As William had the power under the will to convey to A. J. Glenn, who was one of the issue and remaindermen, the land after such conveyance undoubtedly became his property, with which he could do as he pleased. He conveyed it to his uncle George, and although he may now be willing to repudiate the act, the court is not at liberty to do so and to hold that it was illegal and void.

Such circuitous conveyances are not unknown in the law. Our old Court of Appeals held, that a married woman who, under the act of 1795, was incapable of conveying her inheritance to her husband directly, yet might do so indirectly—that is to say, join her husband in conveying to a third person, who, by previous understanding, might immediately reconvey to the husband. Garvin v. Ingram, 10 Rich. Eq., 130. In that case Chancellor Wardlaw, in delivering the judgment of the court, said: "But it is argued that as the conveyance must be to a third person, the purpose to benefit the husband is unlawful and annuls a conveyance nominally to a third person, but really for the husband's profit. This conclusion is illogical. The act makes no change of the common law, inhibiting one from conveying to himself, (Fryerson v. Fryerson, 3 Strob., 461), but it authorizes, or at least does not inhibit, the power of the wife to bestow her whole estate upon her husband indirectly. * * * Dr. Blackstone remarks (2 Bl. Com., 88), that the donee of fees conditional were careful to alien the estate as soon as they had performed the condition of having issue, and afterwards re-purchased the estate, to enable it to descend to heirs general by the common law; and Judge Evans, in Kottman v. Ayer, 1 Strob., 570, says: 'I have known more than one case where the forms of law (1795) have been observed, merely to invest the husband with the fee of the wife's land, by a reconveyance from a pretended purchaser.'"

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*It was further contended for the defendant, that the very terms of the direct devise to William, under the operation of the rule in Shelley's case, gave him a fee-conditional in the land, and after the performance of the condition by the birth of issue, he had the absolute right to alienate generally, without any regard to, and independent of, the limited power given for that purpose in the sixth clause of the will. The terms of the devise are "for and during his natural life, and after his death to his issue for ever, which issue shall take per stirpes." At first view, it would seem that this is a case within the very terms of the rule, which declares that "where an estate of freehold is given to the ancestor, and a remainder be thereon limited to his heirs * * the heirs of his body or his issue, such remainder is immediately executed in possession in the ancestor, so taking the freehold, and he takes an estate in fee or in tail according to the terms of the limitation." But in opposition to this view it is earnestly urged that there are other words in the will, which limit the generality of the word "issue," and evince an intention that it should be taken to express a class as purchasers, creating a new stock of inheritance, and not to indicate an indefinite line of descent. See McIntyre v. McIntyre, 16 S. C., 290. The question is not free from difficulty, and as it is not necessarily involved in the decision of the case, we prefer to reserve our judgment, and to make no ruling upon it.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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21 S. C. 313

GODFREY v. FIELDING.

(April Term, 1884.)

[1. *Improvements* ⇦4.]

In the assertion of a claim under the betterment act, great promptness is required; and there is no authority for substituting heirs or purchasers in the place of the plaintiff in the original action.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. § 4; Dec. Dig. ⇦4.]

[2. *Ejectment* ⇦148; *Improvements* ⇦4.]

The words "final judgment" in the betterment act, are not used in their strict technical sense, but mean the final determination of the rights of the parties as to the land. Therefore, where the claim for betterments was made on the day of the entry of the formal judgment, but four years after verdict rendered, the act

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*in question afforded neither the authority nor machinery to enable the defendant to make his

claim either against the purchasers in possession, or the heirs-at-law of the original plaintiff.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 517; Dec. Dig. ⊂⊃148; Improvements, Cent. Dig. § 4; Dec. Dig. ⊂⊃4.]

Before Fraser, J., Laurens, February, 1884.

The opinion fully states the case.

Mr. W. H. Martin, for plaintiff.

Messrs. Holmes & Simpson, contra.

June 26, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action by Jesse Godfrey against the defendants for "betterments," under the act of 1870, "to protect the rights of persons lawfully in possession of lands and tenements," re-enacted in the General Statutes from section 1835 to 1841, inclusive.

The complaint stated, "That heretofore, to wit, on November 18, 1879, and for several years previous to that time, he, the plaintiff, was seized and possessed of a tract of land, known as a part of the Laurens side of the Van Patton Shoals, which he had purchased, supposing at the time the title was good in fee. And still further confiding in the said title, he erected valuable improvements upon said tract of land, to wit, grist mill, cotton gin, &c., &c., and thereby enhanced the value of said land four thousand dollars.

II. "That subsequent to said purchase and the erection of said improvements, one John Fielding instituted proceedings against the plaintiff herein (Godfrey) for the recovery of the possession of said tract of land. And at the extra November term of the Court of Common Pleas for Laurens county, 1879, to wit, November 18, 1879, the said cause was heard by Mr. Justice Thomson and a jury, and a verdict was rendered by said jury for the recovery of the possession of said tract of land in favor of the said John Fielding against the plaintiff herein, and judgment was entered thereon on October 4, 1883.

III. "That thereafter the said Fielding died intestate, and his widow, Harriet W. Fielding, was duly appointed administratrix

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*of the goods and effects of said John Fielding on the day of , 18 .

IV. "That the defendants, Jesse Leatherwood and O. P. Westmoreland, are in possession of said tract of land, and claim title through the said John Fielding, as plaintiff is informed and believes." And claiming four thousand dollars as the value of the said improvements.

The defendants, Jesse Leatherwood and O. P. Westmoreland, demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action. Judge Fraser sustained the demurrer and dismissed the complaint as to the defendants before the court, but added to the order a provision allowing the complaint to stand for whatever relief as against the heirs-at-law of the deceased John Fielding or the land mentioned, to which Jesse Godfrey may show himself entitled. Both parties appealed—the defendants, because the judge did not dismiss the complaint out and out, but added to the order a provision allowing the complaint to stand for whatever relief, as against the heirs-at-law of the deceased John Fielding or the land, which Jesse Godfrey may show himself entitled to.

The plaintiff appeals upon the following grounds:

1. "Because his honor erred in sustaining the oral demurrer and dismissing the complaint, when the motion was based on the ground that the verdict was the final judgment, and not the entry of judgment thereon.

2. "Because his honor erred in sustaining the oral demurrer and dismissing the complaint as to Harriet W. Fielding, as administratrix, when she had not appeared by attorney or otherwise in the cause, and she being the widow and an heir of the said John Fielding, deceased.

3. "Because his honor erred in sustaining the oral demurrer and dismissing the complaint as to Jesse Leatherwood and O. P. Westmoreland, when they are in possession of the land and betterments erected by the plaintiff, claiming title to the same through and under the said John Fielding, deceased, the plaintiff in the original action for the recovery of the land.

4. "Because his honor erred in sustaining the oral demurrer, and dismissing the complaint as to all the defendants, when they

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*are proper parties for an ultimate determination of these proceedings.

5. "Because his honor erred in sustaining the oral demurrer and dismissing the complaint on the ground that the heirs at law of the said Fielding, deceased, were the only parties defendant in these proceedings, and not allowing the plaintiff leave to amend his complaint, and make the heirs at law of the said John Fielding parties defendant."

The statements of the complaint must be taken as true so far as they are clearly made. It is not precisely set forth when Fielding, the plaintiff in the action for the land, died or the land was sold. It must have been after the verdict, for upon any other supposition the verdict could not have been rendered; and it must have been before the formal judgment was entered, for on that day process was issued against his administratrix. Taking all the statements of the complaint to be true, we think the plaintiff failed in several particulars, to show himself entitled to recover. The land having been recovered from him, there was no authority for his action for the value of improvements but the special statute upon the subject; and in order to entitle him to the

benefit of that, it was necessary for him to conform to its provisions. Kennedy v. Reames, 15 S. C., 552.

The statute, among other things, provides that "after final judgment in an action to recover lands and tenements, &c. * * * the defendant in such action shall, within forty-eight hours after such judgment, or during the term of the court in which the same shall be rendered, file a complaint against such plaintiff for so much money as the lands and tenements are so made better, in the office of the clerk of the court, which shall be sufficient notice to the defendant in such complaint to appear and defend against the same. * * * The court on the entry of such action shall stay all proceedings upon the judgment obtained in the prior action," &c. The nature of the proceeding as a cross-action, as well as the whole tenor of the act, shows that in the assertion of the claim great promptness is required. It will be observed that action is authorized only against the plaintiff in the land action; no express authority is given to substitute his heirs in his place. No provision is made for

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impleading purchasers, who have come *into possession under the plaintiff or his personal representative. The case of "the plaintiff" being still in court, no new summons is necessary, but the complaint may be filed at once against him. It is assumed that the defendant is still in possession, as the proceedings therein are to "be stayed" until the question of improvements is decided, and if decided for the defendant, there is a lien upon the land for the amount recovered.

But it is urged that all these provisions, indicating the necessity for prompt action, must yield to those words in the act, "after final judgment," which it is insisted can only mean the entry of the formal judgment in the clerk's office, and fixes the time at which the cross-action must be commenced, without regard to the condition of things or of the parties at that time. We cannot accept this view. The verdict for the land had been rendered nearly four years before the formal entry in the clerk's office of the judgment thereon. In the meantime the verdict had been acted on as the final determination of the contest as to the land. The plaintiff had recovered the land and sold it. The defendant had yielded the possession, and, being out, instituted these proceedings as an original action against the administratrix of the plaintiff who recovered the land, and the purchasers from him, basing his right to recover solely upon the ground that he commenced his action upon the very day on which the formal judgment was entered in the clerk's office, years after the verdict had been rendered which finally determined the rights of the parties.

It seems to us that the interpretation sought to be given to the words "final judgment," would not be in accord with the spirit of the act, but would defeat the manifest intention of the legislature. It is out of our power to amend the law, even if it were considered desirable. We must take it as we find it. The question is not as to the proper meaning of the words taken separately and as applicable to all cases, but as to the proper construction of the act taken as a whole: whether as used in the act the words "final judgment" must be taken in their strict technical sense, or as intended to express the idea of a final determination of the rights of the parties as to the land. We are obliged to adopt the latter as the only construction which makes all the parts of the act consistent, and gives proper effect to the words

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*"rendered" and "obtained," which cannot be correctly said to express the simple "entry" in the clerk's office of the formal judgment. The act contemplated the verdict as the final judgment as to the rights of the parties to the land, or assumed that such formal judgment would be promptly entered. Its framers could not have supposed that the right to the cross action for improvements only arose upon the entry of judgment in the clerk's office, which might be never done, or delayed for years.

In reference to this same act, the title of which is, "To protect the rights of persons lawfully in possession," this court has held that the word "final in the phrase 'final judgment' should not be construed technically as 'relating to the end,' 'ultimate,' 'last,' &c., but taking the whole provision together, we cannot doubt that the words were intended to apply to the Circuit and not to the Supreme Court." Garrison v. Dougherty, 18 S. C., 488.

The plaintiff failed to make his claim for betterments at the proper time and in the proper manner, and the act does not afford either the authority or machinery for enabling him to do so now either as against the purchasers in possession or the administratrix or the heirs of John Fielding, deceased.

The judgment of this court is that the judgment of the Circuit Court, in so far as it sustained the demurrer, be affirmed; and that in so far as it retained the complaint as against the heirs at law of John Fielding, deceased, it be reversed and the complaint dismissed.

21 S. C. 318

INFORMATION against OLIVER. SAME against SAME. SAME against SAME. SAME against SAME.

(April Term, 1884.)

[1. *Municipal Corporations* ⇐639.]

Where, in an information in the City Court of Charleston for doing business without the prescribed license, it substantially appeared that the proceeding was in the name of the State, the objection that there was no plaintiff was properly overruled.

[Ed. Note.—Cited in Information against Jager, 29 S. C. 441, 7 S. E. 605.

For other cases, see Municipal Corporations, Cent. Dig. § 1406; Dec. Dig. ⇐639.]

[2. *Trial* ⇐76.]

The proper time to object to evidence is when it is offered.

[Ed. Note.—Cited in Brasington v. South Bound R. Co., 62 S. C. 329, 40 S. E. 665, 89 Am. St. Rep. 905.

For other cases, see Trial, Cent. Dig. §§ 172, 183–190, 237; Dec. Dig. ⇐76.]

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[3. *Evidence* ⇐32.]

*An ordinance of the City Council of Charleston may, without proof, be brought to the attention of the municipal courts of that city.

[Ed. Note.—Cited in City Council of Charleston v. Ashley Phosphate Co., 34 S. C. 551, 13 S. E. 845; State v. Williams, 35 S. C. 354, 14 S. E. 819.

For other cases, see Evidence, Cent. Dig. § 42; Dec. Dig. ⇐32.]

[4. *Licenses* ⇐42.]

Under information for carrying on a business without the license required by a city ordinance, the prosecuting attorney proved that defendant had carried on such business, but did not prove that defendant had no license. *Held*, That defendant was properly convicted, the burden of proof as to the license being on him.

[Ed. Note.—Cited in State v. Chavis, 34 S. C. 135, 13 S. E. 317.

For other cases, see Licenses, Cent. Dig. § 91; Dec. Dig. ⇐42.]

[5. *Constitutional Law* ⇐26, 87, 287; *Licenses* ⇐7.]

An act of the Legislature authorizing a municipal corporation to impose a license tax upon business occupations does not violate sections 12, 14, or 41, of article I., nor section 33 of article II. of the constitution of this state.

[Ed. Note.—Cited in Information against Jager, 29 S. C. 443, 7 S. E. 605; Thomas v. Town of Moultrieville, 52 S. C. 185, 29 S. E. 647; Hill v. City Council of Abbeville, 59 S. C. 426, 38 S. E. 11; Cowart v. City Council of Greenville, 67 S. C. 44, 45 S. E. 122.

For other cases, see Constitutional Law, Cent. Dig. §§ 30, 159, 831; Dec. Dig. ⇐26, 87, 287; Licenses, Cent. Dig. § 13; Dec. Dig. ⇐7.]

[This case is also cited in Information against Jager, 29 S. C. 446, 7 S. E. 605, without specific application, and in Fairly v. Wappoo Mills, 44 S. C. 255, 22 S. E. 108, 29 L. R. A. 215, as to facts.]

Before Pringle, Recorder, Charleston, July, 1883.

The opinion fully states the four cases.

Mr. W. M. Thomas, for appellant.

Mr. Geo. D. Bryan, contra.

June 26, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. These were informations in the City Court of Charleston for alleged violations of ordinances of the city, two for carrying on the business of publishing a newspaper and the other two for carrying on the business of a job hand printer, without having paid the license required therefor. The cases involving the same points were heard together, and will be so considered, what is said in one being understood as applying to all the cases.

The report of the recorder was follows:

"State of South Carolina, County of Charleston, City of Charleston. } In the City Court.

"At a stated term of the City Court of the city of Charleston, for the city of Charleston, begun and holden on the first Monday of September, in the year of our Lord one thousand eight hundred and eighty-two, Geo. D. Bryan, corporation counsel for the city of Charleston, comes into court here, and upon his oath of office, gives said court to understand and be informed, that W. J. Oliver, late of the city of Charles-

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ton, state aforesaid, on the 28th *day of February, in the year of our Lord one thousand eight hundred and eighty-two, and on divers other days in said year at Charleston, in said state of South Carolina, and within the jurisdiction of this court, was the publisher of a newspaper worked by hand, and unlawfully did carry on the business of publishing a newspaper worked by hand without having paid the license tax therefor, imposed by the ordinance of the city of Charleston, entitled 'An ordinance to regulate licenses for the year 1882,' ratified the 27th day of December, A. D. 1881, as in that behalf required by the said ordinance, contrary to the said ordinance, and against the peace and dignity of the state of South Carolina.

"G. D. Bryan,

"Corporation Counsel City of Charleston."

Indorsed:

"The State of South Carolina, Charleston County, City of Charleston. } In the City Court.

"On hearing the above information, and on motion of G. D. Bryan, corporation counsel,

"It is ordered, That the same be filed and the case fixed for trial on the first Monday of November, A. D. 1882, at 10 o'clock a. m., and that a copy of said information and this order be forthwith served upon the said W. J. Oliver. October 14, 1882, W. Alston Pringle, recorder, * * * The case was finally fixed for trial on July 2, 1883, and was tried before a jury empannelled and sworn according to law. The corporation counsel, in proving his case to the jury without objection, read the following sections of

an ordinance, entitled 'An ordinance to regulate licenses for the year 1882':

"Section 1. Be it ordained by the mayor and aldermen of the city of Charleston, in city council assembled, That every person, firm, company, or corporation engaged in, or intending to engage in, any trade, business, or profession hereinafter mentioned, shall obtain, on or before the 20th day of January, A. D. 1882, a license therefore, in the manner hereinafter prescribed. Any person, firm, company, or corporation, commencing business after the said 20th day of January, A. D. 1882, shall obtain a license therefor before entering upon such trade, business, or profession.

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*"Sec. 3. If any person or persons shall exercise or carry on any trade, business, or profession, for the exercising, carrying on, or doing of which a license is required by this ordinance, without taking out such license as in that behalf required, he, she, or they shall, besides being liable to the payment for the license, be subject to a penalty equal to fifty per cent. of the amount required to be paid for the license, to be sued for and collected in this city court, or any other court of competent jurisdiction, or to imprisonment not exceeding thirty days, as may be adjudged by the recorder or court trying the case.

"Sec. 11. Class 54. Papers worked by hand, $25.

"The corporation counsel examined O. R. Levy and Sol Blank, who testified as to the defendant publishing the newspaper called the 'Charleston Mercury,' and put in evidence copies of the said newspaper (of dates August 3, 1882, September 13, 1882, December 11, 1882, November 9, 1882, and August 12, 1882,) in all of which the name of W. J. Oliver was published and appeared as editor and manager. No evidence for the defendant. I therefore charged the jury that this was a question of fact, which remained with them to determine. That if from the evidence they found that the defendant did publish a newspaper worked by hand without a license, they would find him guilty, otherwise not guilty. The jury found a verdict of guilty.

"On the 7th of July, 1883, the defendant, through his counsel, moved for arrest of judgment and for a new trial, both of which were refused and the defendant sentenced 'to pay the sum of thirty-seven dollars and fifty cents, or thirty days in jail—county jail of Charleston, &c.

"(signed) W. Alston Pringle,
"Recorder."

From this sentence the defendant appealed to this court upon the following grounds: "1. There was no plaintiff. 2. Because the city ordinance was not proved. 3. Because the defendant was not proved 'not to have paid' for a license, or to have received none. 4. Because this license law is unconstitutional as in violation of article 1, sections 12 and 14, of the state constitution. 5. Because the information being lodged in 1883 and the of-

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fences *alleged in 1882, another remedy was provided by the city ordinances. 6. Because the defendant having already been tried by a jury for these offences, and verdicts rendered, he cannot be tried a second time. Exceptions five and six were properly abandoned in the argument here.

First. It is claimed that there was no plaintiff. This objection goes more to the form than the substance. The proceeding was in the City Court of Charleston in a case arising under an ordinance of the City Council. In such case the City Council and the recorder have the right to regulate the practice under section 2131 of the General Statutes, which provides as follows: "It shall be lawful for the City Council and the said recorder to prescribe, and from time to time to regulate, the practice of the said court, and of the attorneys therein, conformably to this chapter, and as nearly as may be to the forms and rules used in the Circuit Courts of this state, and the proceedings shall be the same substantially in like cases, except in cases for the violation of ordinances when imprisonment is imposed in addition to, or in the alternative of, a fine, in which cases the prosecution shall be in the form of an information on the official oath of the corporation counsel." In accordance with the above provision this was an "information on the official oath of the corporation counsel."

An information is the declaration of the charge or offence against any one at the suit of the king, filed by a public officer, without the intervention of a grand jury. State v. Starling, 15 Rich., 132. Although the title of the information was not endorsed on the information, there can be no doubt that it was in the name of the state. The information both commences and ends in the name of the state, and sets forth that the offence charged was "against the peace and dignity of the state of South Carolina." It has been held with reference to a writ of venire, which must issue in the name of the state, that "if it anywhere appears in the writ that it issued in the name of the state, there is a sufficient compliance with the constitutional requirement; and surely the mere location of the words upon the paper can have no special virtue. Nor can the addition in the caption of the words 'county of Spartanburg' im-

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pair the validity of the *mandate, for they may well be regarded as mere surplusage." State v. Hill, 19 S. C., 441; State v. Gilreath, Ibid, 603.

Second. The point is made that the city ordinance was not proved. In presenting the case to the jury, it was read without objection. The proper time to make objection is when evidence is offered. Burris v. Whitner,

3 S. C., 510. Besides, this proceeding was in the City Court of Charleston, and in that court it was no more necessary to offer proof of a public ordinance, under the seal of the city council, than in the courts of the state to prove a public act of the legislature. Municipal ordinances are private laws when brought before the superior judiciary of a state, but not when brought before a city court. 1 Whart. L. Evid., § 293.

Third. Objection is made that it was not shown affirmatively that the defendant had not paid for a license, or had not in fact received one. There is no complaint as to the charge of the recorder. Upon the proof that the defendant had been engaged in the business as alleged, and nothing being offered by the defendant by way of defence, the recorder submitted the case to the jury with the remark "that it was a question of fact for them to determine; that if from the evidence they found that the defendant had published a newspaper, worked by hand, without a license, they would find him guilty; otherwise, not guilty." Under this charge, the jury found that he had published the paper without a license; and his motion for a new trial was refused. It is simply a question as to the sufficiency of proof upon a point of fact, which, as often ruled here, this court in a law case has no right to consider.

It is urged, however, that it appears that there was no proof whatever upon one of the main allegations of the information, and therefore the conviction must necessarily have been illegal. Can it be properly said that there was no proof in view of the presumption allowable from the character of the fact itself and the conduct of the defendant? It will be observed that the allegation is negative in form, that there was no regular issue in the case, that the defendant did not formally plead to the information, made no denial, and offered no proof. The information contained two allegations: that the

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defendant had carried on the *business, and that he had not paid the license tax. The first was proved, and the defendant did not prove that he had paid the tax and taken a license.

Under these circumstances, upon whom was the onus of making the proof upon the subject? Was it on the state to prove that the defendant had not paid the tax, or upon the defendant, if the fact were so, to prove that he had paid it? The general rule certainly is, that he who affirms must prove, and that one is not required to prove a negative. It is true there are certain exceptions to this rule, in which the proposition, though negative in its terms, must be proved by the party who states it, and notably in that class of cases in which the plaintiff grounds his right to recover upon a negative allegation, where of course the establishment of this negative is an essential element in his case. But even in this class of cases, Mr. Greenleaf says, "it is obvious that plenary proof on the part of the affirmant can hardly be expected, and therefore it is considered sufficient if he offer such evidence as, in the absence of counter-testimony, would afford ground for presuming that the allegation is true," &c.

But even this exception does not embrace that precise class of cases to which this belongs. "But when the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any person, except those who are duly licensed therefor: as for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it without the least inconvenience; whereas if proof of the negative were required, the inconvenience would be very great." 1 Green. Evid., § 79. Among the many cases cited in the margin to sustain the proposition is one from our own state, that of State v. Geuing, 1 McCord, 574, where the precise point was held that "on an indictment for retailing spirituous liquors without license, the state need not prove that the defendant had not a license, as the defendant must prove he had one," &c.

Fourth. This exception raises the question that the act of the General Assembly, under which the license ordinance of the City

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*Council was passed, is in violation of section 12, article I., of the state constitution, which declares that "no person shall be prevented from acquiring, holding, and transmitting property," &c. Also of section 14 of the same article, which declares that "no person shall be deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land," &c. Also of section 41 of the same article, which declares that "the enumeration of rights in this constitution shall not be construed to impair others retained by the people, and all powers not herein delegated remain with the people," &c. And also of section 33, article II., which declares that "all taxes upon property, real or personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax," &c.

This certainly opens a very wide field. These are all important provisions of the constitution, but every point now made has been already considered and decided by this court, and we think it could result in no good to open the argument and renew the discussion. It concerns the interest of all that the law and its interpretation should be settled. In the case of State v. Hayne, 4 S. C., 403 (1872), after full and careful con-

sideration. it was decided that "a tax on professions or avocations is not forbidden by the constitution of this state either in terms or by implication; and that for the non-payment of a tax on business, a penalty may be imposed to be recovered by an indictment as for a misdemeanor."

In the case of State v. Columbia, 6 S. C., 1 (1874), it was held that the legislature is not forbidden by the constitution from empowering municipal corporations to enforce taxes on business and avocations and to fix a different rate for each distinct class of persons subject to the tax. That whatever in this regard the state herself could do, she might authorize a municipal corporation to do within its limits. In this case, no doubt has been suggested that the act of the legislature, if constitutional, does not fully authorize the ordinance of the City Council, under which these proceedings were instituted.

Then followed the case of Charleston v. Oliver, 16 S. C., 50 (1881), which being against this same defendant, recognized and

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*followed the cases of Hayne and the City of Columbia, above referred to, in the doctrines therein announced. The court said: "The general question of the power of the legislature to impose a license tax has been conclusively settled in the case of State v. Hayne, 4 S. C., 403, where most of the constitutional objections raised in this case were considered and disposed of. This case was followed by that of State v. Columbia, 6 S. C., 1, in which it was held that the legislature could empower a municipal corporation to impose a license tax on persons, following particular callings, or pursuing particular occupations, within the corporate limits of such municipality. So that we consider that many of the constitutional questions raised by the appellant in these cases have already been adjudicated, and it is only necessary for us to refer to the cases in which these questions were determined."

It is true that it was held in that case that the act of the legislature, under the supposed authority of which the ordinance then under consideration was passed, did not authorize the municipality to impose a license tax on occupations, and upon that ground alone the judgment was set aside. But since that time the act of 1881 (17 Stat., 582) has been passed, which is free from the constitutional objection that prevailed in that case, and which by its terms undoubtedly authorizes the City Council to pass such an ordinance. By authority of this latter act the ordinances of 1882 and 1883 imposing a license tax were passed, and the penalties now claimed in the information were incurred for alleged defaults subsequently made. We cannot see that any of the constitutional objections made can avail the defendant in refusing to pay the license tax imposed by the city authorities.

The judgment of this court is that the judgment of the recorder of the City Court be affirmed, and that the same judgment be regarded as entered in each of the three other cases stated in the caption herein.

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21 S. C. *327

*WILSON & CO. v. DEAN.

(April Term, 1884.)

[1. *Appeal and Error* ⇐966.]

During the reading of a commission it was discovered that the cross interrogatories had not been propounded, whereupon, on objection made by defendant and sustained, the Circuit judge, on plaintiff's motion, withdrew the case from the jury and ordered a continuance. *Held*, that such order was within the judge's discretion, and that his discretion was properly exercised.

[Ed. Note.—Cited in Lowndes v. Miller, 25 S. C. 123; Trustees of Wadsworthville Poor School v. Orr, 33 S. C. 275, 11 S. E. 830; Latimer v. Latimer, 42 S. C. 209, 20 S. E. 159; Booth v. Langley Mfg. Co., 51 S. C. 416, 29 S. E. 205.

For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. ⇐966.]

[2. *Assignments* ⇐78.]

An assignment of a note carries with it all the securities which the assignor holds for its payment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 145; Dec. Dig. ⇐78.]

[3. *Guaranty* ⇐4.]

Defendant agreed to sell fertilizers for plaintiffs on a credit, guaranteeing the securities to the extent of his commissions, and afterwards collected in part these securities. *Held*, that the agreement was not strictly a guaranty, and that plaintiffs' action on this agreement should be regarded as an action for money had and received, in which they would be entitled to recover all moneys received by the defendant until fully paid the amount due to them from these securities.

[Ed. Note.—Cited in Carroll County Savings Bank v. Strother, 28 S. C. 515, 6 S. E. 313.

For other cases, see Guaranty, Cent. Dig. §§ 3–6; Dec. Dig. ⇐4.]

[4. *Guaranty* ⇐70.]

If an action on a guaranty, the plaintiffs might be required to show that they had used due diligence to collect the notes, before resort could be had to the guarantor; but however regarded, the fault and laches of plaintiffs in returning the notes to defendant for collection were pertinent to the issue, and, if sustained, a good defence; and there being some evidence upon these matters, they should have been submitted to the jury.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 78; Dec. Dig. ⇐70.]

[This case is also cited in Agnew v. Adams, 24 S. C. 89, without specific application.]

Before Hudson, J., Spartanburg, October, 1883.

This was an action by R. T. Wilson & Co. against Alvin H. Dean, commenced September 2, 1880. The opinion fully states the case.

Mr. J. S. R. Thomson, for appellant.

After the jury is charged, a case cannot be withdrawn, but plaintiff may take a non-

suit. Defendant was not liable as guarantor of the uncollected notes. 2 Dan. Neg. Inst., § 1753; 17 S. C., 4; Abb. Tr. Evid., 474; 1 Wait's Act. & Def., 584; 3 McCord, 236; 2 Pars. Bills & N., 140; Brandt Sur., §§ 83, 84; 1 Hill, 59. The note and guaranty are separable, and the promise to guarantee did not amount to a guaranty that could be sued upon, but if it did, the guaranty did not

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necessarily pass under *the assignment. 22 Barb., 516; 26 Wend., 425. The liability of the plaintiffs for not forwarding the notes for collection in proper time was a proper defence, and the judge should have allowed the jury to consider the same in making up their verdict. 2 Dan. Neg. Inst., § 1753. Under his contract, defendant could not be held liable to pay plaintiffs more money or cotton than he actually received on the notes put in his hands for collection. All of these matters his honor took away from the jury.

Mr. M. F. Ansel, contra.

The matter complained of in the first and second exception was within the discretion of the Circuit judge. The guaranty passed with the assignment of the notes. 10 Rich. Eq., 585; 5 S. C., 346; 14 S. C., 66, 142. Defendant, as agent of plaintiffs, was bound to exercise good faith in taking the notes, and to collect all that was possible. Plaintiffs had nothing to do with them after they were turned over to defendant.

June 27, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The defendant was appointed by the Atlantic and Virginia Fertilizer Company their agent for the sale of fertilizers at Vernonsville, South Carolina. The terms of the agreement, under which he was so acting, are to be gathered from a letter of the company to the defendant, setting forth the terms proposed, and his reply thereto, agreeing to such terms, with a modification therein stated. According to these terms, the defendant was to sell the fertilizers furnished him by the company on a commission of $6 per ton, he guaranteeing the notes taken therefor to the extent of his commissions only, after allowing certain specified expenses, which notes were to be turned over to the company. In pursuance of this agreement seventy-six tons of fertilizers were sent to the defendant by the company, amounting, at the price at which the article was to be sold, to the sum of $5,320, and the defendant forwarded to the company notes to the amount of $5,120.12, which were received by them.

This agreement seems to have been entered into on February 26, 1877, but at what time the notes were forwarded to the company does not appear, though it must have been

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some time prior to *November 9, 1877, for on that day the plaintiffs, to whom the company had previously transferred the notes, took from the defendant a receipt in the following words: "Received by express from R. T. Wilson & Co., of New York, for collection, sundry notes, bonds, liens, and accounts, amounting in the aggregate to fifty-one hundred and twenty 12-100 dollars, and we agree to act as agents and trustees for the said R. T. Wilson & Co., in collecting the same, and bind ourselves to send forward to the said R. T. Wilson & Co., at New York, all cotton and money received in settlement of the same, as fast as the same comes into our possession, without retaining any portion for our commissions and services until they are fully paid off."

This action was commenced on September 2, 1880, to recover an alleged balance due on the notes thus entrusted to defendant for collection. During the progress of the trial the testimony of a witness for the plaintiffs, which had been taken by commission, was being read, when it was discovered that the commissioners had failed to propound the cross interrogatories to the witness, whereupon the defendant objected to the commission, which objection was sustained. The plaintiffs then moved to withdraw the case from the jury and continue the case, which motion was granted and the defendant excepted. The defendant then agreed that, subject to his exception, the testimony by commission might be received, and the trial proceed.

The plaintiffs offered testimony showing the amount of fertilizers delivered to the defendant for sale, and that in November, 1879, a partial settlement was made with the defendant by plaintiffs' agent, in which, after allowing him credit for the cotton delivered, and certain expenses, together with his commissions and the amount of uncollected notes then estimated to be on hand, left the defendant indebted to the plaintiffs in the sum of $469.85, which subsequently he paid before this action was commenced. The plaintiffs then closed, and the defendant made a motion for a non-suit, on the ground that plaintiffs had proved no cause of action against the defendant, which motion was refused.

The testimony on the part of the defendant was to the effect that in June or July, 1879,

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he had a settlement in full of his *guano transactions with the plaintiffs, who took the notes on hand, but subsequently returned them to defendant, begging him to collect them if possible; that defendant could not collect them because they were sent to him too late in the season; that the notes on hand, uncollected (which were produced at the trial), amounted to $741.40, upon which assignments to the plaintiffs by the Atlantic and Virginia Fertilizer Company were indorsed; that none of said notes have any guaranty of defendant indorsed upon them; that defendant had paid out for plaintiffs

sundry expenses specified; that "all money or cotton received have been turned over to principals;" that defendant never guaranteed the notes; that at the time of the partial settlement made with plaintiffs' agent, defendant did not have with him the uncollected notes, and the amount ($623.60) then set down as the amount of the uncollected notes was only an estimate, the correct amount, as shown by the notes produced at the trial, being, as stated above, $741.40; that defendant had written to the attorney for the plaintiffs, asking whether the notes should be put in suit, who replied that he would let him know, but never did so, and that the notes were never sued. In addition to this testimony from the defendant himself he also offered the evidence of another witness to the effect that the notes could have been collected, if they had been on hand early in the season.

"The defendant requested his honor to charge that if through the fault of the plaintiffs, and without fault of the defendant, the $741.40 of notes on hand were not collected, then Dean's rights are the same as though the notes were collected, and the money in plaintiffs' hands. His honor said that if the facts warranted it, this proposition of law was correct, but it was difficult to apply such proposition to the testimony in this case, and charged that the liability of the plaintiffs for not forwarding the notes for collection in proper time could not come in in this action. He charged that if the notes were transferred by the Atlantic and Virginia Fertilizer Company, the guarantee of the notes by Dean followed such transfer; that if the transfer was made, and the defendant had not paid to the plaintiffs, or their assignor, the amount of the notes taken by him, to the amount of his commissions ($456), then the jury might find a verdict for the plaintiffs

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for $456; *that if there was a settlement with A. H. Dean and plaintiffs at the time when Mr. Ansel was present, and the amount between them was settled, except the $623 of notes still on hand, and Dean failed to collect and return said notes then, under his guarantee, Dean is now responsible to the plaintiffs for $456, the amount of his commissions."

The jury returned a verdict in favor of the plaintiffs for $456, and the defendant moved for a new trial upon the ground that the verdict was excessive, and was contrary to the testimony and the charge of the presiding judge. The motion was refused, and judgment being entered on the verdict, defendant appeals, alleging that the Circuit judge erred in the following particulars: "1. In allowing the plaintiffs the right to withdraw the case from the jury after they were charged with the case. 2. In not granting a non-suit herein. 3. In charging that if the notes were transferred by the Atlantic and Virginia Fertilizer company, then the guarantee of the notes by Dean followed the transfer. 4. In charging that if such transfer was made, and the defendant had not paid to the plaintiffs, or their assignor, the amount of the notes taken by him to the amount of his commissions ($456), then the jury might find a verdict for the plaintiffs for $456. 5. In charging that if there was a settlement with A. H. Dean and plaintiffs at the time when Mr. Ansel was present, and the amount between them was settled, except the $623 of notes still on hand, and Dean failed to collect and return said notes, then, under his guarantee, Dean is now responsible to the plaintiffs for $456, the amount of his commissions. 6. In ruling that the defendant's request to charge was not applicable to the testimony in this case. 7. In charging that the liability of the plaintiffs for not forwarding the notes for collection in proper time could not come in in this action. 8. In refusing to charge that if through fault of the plaintiffs, and without fault of the defendant, the $741 of notes on hand were not collected, then Dean's rights are the same as though the notes were collected and the money in plaintiffs' hands. 9. In refusing a new trial."

The first ground of appeal presents a question of practice which we think is conclusively settled adversely to the appellant by the case of Cook v. Cottrell, 4 Strob., 61. In

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that case the *action was on a foreign judgment, and after the trial had been commenced it was discovered that there was a defect in the judge's certificate authenticating the record, whereupon the plaintiff moved a continuance of the case in order that the certificate might be amended, which motion was granted, notwithstanding the defendant insisted upon his right to a non-suit. On appeal the court held that this was a matter within the discretion of the Circuit Court, saying, amongst other things, that "without a discretion over the whole subject, to be carefully exercised by the court, trials might be made the means of defeating justice instead of dispensing it, and the court itself become an instrument to entrap the unwary or reward the contrivances of the dishonest. It must be supposed that discretion was properly exercised on the circuit; the circumstances which have been dwelt on here show no reason for controlling it." The appeal was therefore dismissed. The present case is much stronger than the one cited. There the defect complained of might have been discovered before the trial, while here it could not have been, as no one had a right to open the commission until it was published by the order of the court, and there was no reason to suppose that the commissioners had neglected to perform their duty. It is quite clear that the whole matter was within the discretion of the Circuit judge, and it is

equally clear that his discretion was properly exercised.

The second, third, fourth, and fifth grounds of appeal present substantially the same questions, and will be considered together. There is no doubt of the legal proposition that the assignment of a note or bond carries with it all the securities which the assignor holds for its payment. (See the cases cited by the counsel for the plaintiffs.) When, therefore, the notes in question were transferred to the plaintiffs by the Fertilizer Company, any security which it then held for the payment of such notes, enured to the benefit of the plaintiffs.

We think, however, that the true nature and effect of the agreement between the company and the defendant was not that the latter should, in the strict sense of the term, guarantee the payment of the notes. That was the proposition in the letter of the company to the defendant, but in his reply he modified that proposition in these words:

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"It is, however, understood that I *only guarantee to the extent of my commissions on all the sales I make. In other words, I am not to lose any more than my commissions on the sales for the season amount to." The real agreement, then, between the company and the defendant was that the latter was to sell the fertilizers furnished him by the former, on the terms agreed upon, collect the notes taken and forward proceeds to the company, retaining nothing for his commissions until the company had received the full amount of the sales, less the commissions and certain specified expenses. This, too, is the proper construction and effect of the receipt given by defendant to the plaintiffs on November 9, 1877, set out above.

If, therefore, the defendant had failed to collect a single dollar on the notes, we do not see what cause of action the plaintiffs could have against him, unless, perhaps, they were able to show that the failure to collect was the result of the defendant's default; and the only penalty the defendant would incur would be the loss of his commissions. It seems to us, therefore, that it is a mistake to regard this as an action on the guaranty of defendant, but that it should rather be regarded as an action for money had and received by the defendant for the use of the plaintiffs. Under the view which we have taken of the effect of the agreement between the parties, the defendant had no right to retain a single dollar for his commissions until he had fully paid and satisfied the plaintiffs the amount due to them. Whatever amount he may thus have retained was not his money, but was the money of the plaintiffs, received by him to their use, and for that he would be liable.

The sixth, seventh, and eighth grounds of appeal, involving the same principles, will be considered together. If the action could be regarded as an action on defendant's guaranty of the notes, to the extent of the amount of his commissions, then it seems to us clear, under the legal principles regulating the law of guaranty, that the question whether the failure to collect the notes was the result of the fault or laches of the plaintiffs, was quite pertinent to the issue; in fact, if the action was based upon the guaranty, the plaintiffs might have been required to show, affirmatively, that they used due diligence to collect the notes before resort could be had to the guarantor. But even re-

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garding the action as we do, *as not based upon the guaranty, as it is called, but as an action for money had and received, still the question whether the failure to collect the notes was due to the negligence of the plaintiffs in returning them to the defendant in time to enable him to collect them was an important one, and should have been left to the jury, as there was testimony on the part of the defendant tending to show that the notes could have been collected if they had been sent to the defendant earlier in the season.

The defendant had a pecuniary interest in collecting the whole amount of the notes, for upon his doing so depended his compensation. If, therefore, he was prevented from collecting the notes by the fault of the plaintiffs, and thereby lost his time and service, the extent to which he was thus a loser would certainly be good defence to the action of the plaintiffs for money received by him to their use. We think, therefore, that the Circuit judge erred in refusing to charge as requested, and instructing the jury that the question whether the plaintiffs were in fault in not forwarding the notes for collection in proper time could not be considered in this action.

The remaining ground of appeal has been so often ruled upon by this court that it requires no further notice.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

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21 S. C. 334

DILLING, BAKER & CO. v. FOSTER.

(April Term, 1884.)

[1. *Execution* ⇨393.]

Copy order to appear before referee served upon defendant in supplementary proceedings had not the seal of court to the clerk's certificate. *Held*, that this furnished no ground for dismissing the proceedings, nor, after appearance and examination, could defendant object to the service.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1146; Dec. Dig. ⇨393.]

[2. *Execution* ⟸355.]

Levy upon goods was released by plaintiff because the goods had been previously mortgaged and the condition of the mortgage was broken. *Held*, that the levy was properly disposed of, and therefore the execution was not satisfied.

[Ed. Note.—Cited in Thompson v. Brown, 56 S. C. 310, 33 S. E. 454.

For other cases, see Execution, Cent. Dig. § 1080; Dec. Dig. ⟸355.]

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[3. *Execution* ⟸406.]

*On the hearing of the referee's report in supplementary proceedings, the judge may appoint a receiver, without specific notice having been given that such appointment would then be applied for.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1164; Dec. Dig. ⟸406.]

[4. *Appeal and Error* ⟸909.]

A receiver having been appointed in supplementary proceedings, this court will assume, in the absence of all testimony upon the point, that the Circuit judge did his duty and ascertained that no other supplementary proceedings were then pending against this defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. ⟸909.]

[5. *Execution* ⟸407.]

The examination in supplementary proceedings having disclosed sufficient property in the debtor's hands, subject to levy and sale, to satisfy the judgment, a receiver might nevertheless, under the present practice, be appointed; and when appointed, he should be the receiver of all the defendant's property.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1160; Dec. Dig. ⟸407.]

[6. *Receivers* ⟸51.]

It is the usual and better practice to require bonds from such receivers, but it is not essential.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 86; Dec. Dig. ⟸51.]

[7. *Execution* ⟸415.]

Section 321 of the code does not authorize a fee to plaintiff's attorney, and the "fixed sum as costs" therein provided for must be fixed by the judge, and not by the clerk of court.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1194; Dec. Dig. ⟸415.]

[8. *Appeal and Error* ⟸9; *Costs* ⟸215.]

Taxation of costs can be corrected only by motion, but an order of the judge directing an erroneous taxation, and a taxation thereunder, may be brought up by exception, and the error corrected.

[Ed. Note.—Cited in Dauntless Mfg. Co. v. Davis, 24 S. C. 539, 542; Cooke v. Poole, 26 S. C. 326, 2 S. E. 609; Crocker v. Collins, 44 S. C. 502, 22 S. E. 719; Burgess v. Crumpton, 93 S. C. 563, 77 S. E. 356.

For other cases, see Appeal and Error, Cent. Dig. § 25; Dec. Dig. ⟸9; Costs, Cent. Dig. § 797; Dec. Dig. ⟸215.]

[9. *Execution* ⟸393.]

The mortgagee of the judgment debtor was not a necessary party to the proceedings, as the order did not interfere with the mortgaged property.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1146; Dec. Dig. ⟸393.]

[10. *Receivers* ⟸47.]

After paying the debts, the receiver should return to the debtor all property remaining in his hands, but it was not error of law to omit such a direction from the order appointing the receiver.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 72; Dec. Dig. ⟸47.]

[11. *Receivers* ⟸130.]

A receiver should not be authorized to sell choses in action, unless they represent "desperate debts." Rule 70 of the Circuit Court.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 225, 226; Dec. Dig. ⟸130.]

Before Wallace, J., Spartanburg, December, 1883.

The opinion fully states the case.

Mr. J. S. R. Thomson, for appellant.

Messrs. Carson & Bomar, contra.

June 27, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. On July 7, 1883, the plaintiffs obtained judgment against the defendant for the sum, including costs, of $86.75, and issued execution therefor. The sheriff, on July 16, 1883, endorsed upon this

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execution a levy "upon a lot *of merchandise, &c., a list of which is attached within." By written endorsement on the execution the plaintiffs' attorneys released this levy upon the ground that the property was claimed by another person, and then the sheriff, on July 20, 1883, made a return of nulla bona upon the execution.

Upon the usual affidavit, Judge Wallace, at chambers, made an order requiring the defendant to appear before a referee named, on July 25, 1883, or on such other days as he might appoint, to be examined touching his property, and directed the referee to report the testimony and his conclusions of fact. He also directed a copy of the order to be served on the defendant, and that in the meantime, and until the further order of the judge in the premises, that the defendant be enjoined from disposing of his property. The copy of this order served upon the defendant was not certified under the seal of the court. At a reference held on August 2, 1883, the defendant made a motion to dismiss the proceedings, because of the want of the seal to the copy of the order served upon the defendant. The motion was refused, and the examination of the defendant was taken at length, all of which is set out in the "Case."

The facts as reported by the referee, so far as the questions involved in this case are concerned, are substantially as follows: That the stock of goods, wares, and merchandise, to the estimated value of about $600, which had been levied upon by the sheriff, and the levy subsequently released, were covered by a mortgage to one Dreyer, dated February 8, 1883, given to secure a note for $500, payable February 9, 1883; that the merchandise levied upon, after it was released from the levy, was not returned di-

rectly to the defendant, but was taken charge of by the mortgagee Dreyer, who placed the defendant in charge of it to sell as his agent; that the goods levied upon were nearly sufficient to pay off both Dreyer's mortgage and the judgment in favor of the plaintiffs; that the defendant was the owner and in possession of property, consisting of choses in action to the amount of $917, a considerable portion of which would not be due until November 1, 1883, and a portion not due for two years, and other personal property of the estimated value of $112, besides a crop of growing cotton, twenty-five acres, the value of which was not estimated.

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*On hearing the report of the referee, the judge ordered that a receiver be appointed of all the property of the defendant set forth in the report, "with power and authority to sell the same, including the proceeds of the crop above named, or so much thereof as may be necessary to satisfy the judgment in the above stated case, with interest thereon, and all the costs and disbursements of this action: * * * that the receiver above named have leave to bring action for the recovery of property of the defendant in execution in the hands of any other person; * * * that the defendant, W. C. Foster, deliver and turn over all of the said property to the said receiver immediately upon the service of this order, and that from the proceeds of said sale the said receiver shall pay all the costs of this action, including the costs of proceedings supplementary to judgment and ———dollars fee for attorneys of plaintiffs, to be taxed by the clerk of court, together with the judgment and interest thereon and disbursements." After this order the clerk, without holding any reference or taking any testimony, made a taxation of costs, in which, amongst other items, was the following: "Judgment-creditor, under section 321 of code (fixed sum), $15.00."

The defendant appeals upon sixteen grounds set out in the record, but which need not be repeated here, as several of them involve the same questions. We will therefore proceed to consider the various questions which we understand to be raised by the grounds of appeal.

The first is whether there was error in refusing to dismiss the proceedings upon the ground that the copy of the order requiring the defendant to appear before the referee and answer touching his property had no seal to the clerk's certificate. It is very clear that this defect in the copy served furnished no ground for dismissing the proceedings. It could, at most, only avail the defendant on a motion to set aside the service of the order as not a true copy of the original, or as not duly authenticated, so as to require a new service. But as the defendant appeared and was fully examined, and as the object of the service was to give the defendant notice, it is now too late to make even that objection.

The second, eighth, and ninth grounds are based upon the proposition that the execu-

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tion was satisfied by the levy on the *stock of goods. It is quite true that a levy is prima facie satisfaction to the extent of the value of the property levied upon, but when it is shown that the levy has not produced satisfaction, and has been otherwise disposed of, the presumption of satisfaction is rebutted. May v. Hancock [1 Bailey, 299] 1 Rice Dig., 303; Peay v. Fleming, 2 Hill Ch., 99; McElwee v. Jeffreys, 7 S. C., 228. Here the levy had been properly disposed of, by being released upon the ground that the property levied upon belonged to another person, inasmuch as it was covered by the mortgage in favor of Dreyer, the condition of which had been broken, whereby the legal title had become vested in the mortgagee. Reese v. Lyon, 20 S. C., 17, and cases there cited.

The third, tenth, and sixteenth exceptions raise the question as to the right to appoint a receiver of all the property of the defendant. The position of the appellant seems to be, first, that a receiver could not be appointed without notice of a motion to that effect. We do not understand that defendant claims that he had no notice of the hearing before Judge Wallace of the report of the referee and the exception thereto: but simply that he had no notice that upon such hearing the appointment of a receiver would be asked for. It seems to us that the terms of the statute prescribing the course of proceeding in such cases, was sufficient notice that an application for a receiver would be made, as that was one of the legitimate, if not necessary, steps to be taken, and, therefore, no specific notice that a receiver would be applied for was necessary.

Secondly, the appellant contends that the judge could not appoint a receiver without first ascertaining whether any other supplementary proceedings were pending. Section 318 of the code prescribes that before the appointment of a receiver, "the judge shall ascertain, if practicable, by the oath of the party, or otherwise, whether any other supplementary proceedings are pending against the absent debtor." The object of this provision is to prevent the appointment of two receivers for the same property, and although it does not, affirmatively, appear that inquiry was made as to whether any other proceedings were pending against the debtor in this case, yet neither does the contrary appear, and in the absence of any evidence

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to the contrary we must presume *that the judge did his duty, and did ascertain (whether by the oath of the debtor, "or otherwise," is immaterial) that no other proceedings were pending at the time.

Thirdly, the appellant contends that the

examination of the judgment debtor disclosed sufficient property, subject to levy and sale, to pay the plaintiff's judgment, and therefore no receiver should have been appointed, or at least all of the property of the judgment debtor should not have been turned over to him. It is true that there are authorities cited by appellant which would seem to support this view, but these cases are based upon the analogy of proceedings in a creditor's bill, for which supplementary proceedings are to some extent a substitute, but they are not subject to all the rules governing the chancery practice under a creditor's bill. Hence, while under that practice, where property was found subject to levy and sale under execution, the court of chancery would, at one time, have granted an order suspending the proceedings until the creditor could proceed to sell under his execution, this was because of the fact that equity and law were administered by different tribunals, and as the powers of the court of equity were only invoked, in aid of the law court, such powers would not be exercised where such aid was not necessary. But since the same court now possesses the powers of both of the former courts, the former practice is inapplicable, and there is now no reason why property subject to levy and sale may not be reached under supplementary proceedings. Heroy v. Gibson, 10 Bosw., 591; Todd v. Crooke, 4 Sandf., 694; 1 Code Rep., N. S., 324.

As to the objection that a receiver should not be appointed for all of the property, but only for so much thereof as may be necessary to pay the debt, we can only say that we know of no authority for such a proceeding, which would be somewhat anomalous in character, and involve unnecessary expense and delay, for it is difficult to understand how the court could, in advance and without an inquiry on the point, ascertain how much would be necessary; in fact, the only certain means of ascertaining it would be by a sale.

The fourth exception assigns as error the failure to require the receiver to give bond. The statute does not require that a bond

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*shall be exacted of the receiver, and although it is the usual and far better practice to require a bond, yet it is not essential. High Rec., §§ 118, et seq. We cannot, therefore, say that there was any error of law in failing to require the receiver to give bond.

The fifth, sixth, and twelfth exceptions raise the question as to allowing a fee of $15 to the attorneys for the plaintiffs. Section 321 of the code provides: "The judge may allow to the judgment creditor, or to any party so examined, whether a party to the action or not, witness fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, as costs." It will be observed that under this provision, "the judge may allow * * * a fixed sum * * * as costs." And the allowance is "to the judgment creditor, or to any party so examined" —not as a fee, but as costs. We see no authority under this section for the allowance of any fee to the attorneys for plaintiffs; and even if it could be so construed, the sum must be a sum fixed by the judge, and not by the clerk, for the judge having heard the case, has better means as well as better capacity to determine the amount which should be allowed, than the clerk, and this is the express provision of the statute, doubtless for the reason above indicated. We think, therefore, that the judge erred in allowing a fee to the attorneys for the plaintiffs in an amount to be fixed by the clerk. The order appealed from should be modified in this respect.

It is true, as held in Bradley v. Rodelsperger, 6 S. C., 291, that where it is desired to review a taxation of costs by the clerk, the proper practice is by motion, in the court below, to correct such taxation, and the appeal should be from the decision on such motion; but where, as in this case, the clerk has undertaken to carry out an erroneous order of a Circuit judge, in reference to the taxation of costs, such erroneous order may be appealed from, and the taxation thereby corrected.

We are not able to perceive the relevancy of the seventh exception,[1] but as matter of fact, the referee did find that the levy was made subject to Dreyer's mortgage, and the Circuit judge does not controvert such finding, so that we do not see upon what this exception rests.

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*The eleventh exception complains that the costs of the referee and of the plaintiffs were erroneously taxed. No specific errors are pointed out either in the exception or the argument, and the exception is too general to require notice. But in any event, under the case of Bradley v. Rodelsperger, supra, we could not inquire into the correctness of the taxation of costs, there having been no motion below to correct such taxation.

The thirteenth exception claims that there could be no order disposing of the judgment debtor's property without making Dreyer a party. As the order does not purport to interfere in any way with the property covered by Dreyer's mortgage, we are unable to perceive what interest he could possibly have in the matter.

The fourteenth exception assigns it as error that the order appealed from contains no provision for the return of such property as may not be necessary for the payment of plaintiffs' debt and costs. The receiver being but "the hand of the court," we must assume that the proper disposition of what property may remain, after satisfying the claim of plaintiffs, will be made, and we cannot say

[1] "In not holding that the sheriff's levy was subject to Dreyer's mortgage."

that there was any error of law in failing to incorporate such a provision in the order.

The fifteenth exception alleges error in ordering the receiver to sell the property mentioned in the order. The point of this exception, as developed in the argument, seems to be that there was error in ordering a sale of all of the property mentioned in the order, embracing choses in action, as well as other personal property. Rule 70 of the Circuit Court, in reference to the powers of receivers, clearly indicates that a receiver should not be authorized to sell choses in action, unless they represent "desperate debts;" but that his duties, in respect to that class of property, are to sue for and collect the same, or "to compromise and settle such as are unsafe and of a doubtful character." We think, therefore, that the terms of the order appealed from, which are broad enough to authorize the receiver to sell any or all of the choses in action, should be modified in this respect, so as not to authorize the sale of any of the choses in action, except those which represent "desperate debts."

The judgment of this court is that the or-

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der appealed from be *modified according to the views herein announced, and that in all other respects it be affirmed.

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21 S. C. 342

FINCH v. FINCH.

(April Term, 1884.)

[1. *New Trial* ⇐52.]

A motion for a new trial was made upon the conjecture that the jury had reached a verdict by each juror putting down a certain amount, and by then adding these amounts together and dividing their sum by twelve. *Held*, that the motion was properly refused.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 104; Dec. Dig. ⇐52.]

[2. *New Trial* ⇐2.]

A Circuit judge has the power to grant a new trial nisi in cases sounding in damages, as well as in actions on contracts.

[Ed. Note.—Cited in Stuckey v. Atlantic Coast Line R. Co., 57 S. C. 401, 35 S. E. 550; Hall v. Northwestern R. R. Co., 81 S. C. 533, 62 S. E. 848.

For other cases, see New Trial, Cent Dig. §§ 4, 5; Dec. Dig. ⇐2.]

[3. *Libel and Slander* ⇐29.]

In an action for slander the trial judge committed no error in charging the jury "that if one should repeat a slanderous charge concerning another, saying at the same time, 'I do not believe it to be true,' he would nevertheless become a publisher of a slander, and liable to an action therefor, though the damages in such a case might be light."

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 105; Dec. Dig. ⇐29.]

[4. *Libel and Slander* ⇐56.]

In charging the jury that "the fact that words are spoken in passion will not excuse a malicious slanderer from liability," the trial judge committed no error. Passion, suddenly excited by mutual recrimination, might mitigate, but it cannot, in all cases, excuse.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 154; Dec. Dig. ⇐56.]

[5. *Libel and Slander* ⇐57.]

If defendant undertakes to justify the slander and fails because the justification is unsupported by the evidence, it may be considered as a circumstance of aggravation and of continued malice, and may be properly considered by the jury in estimating damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 157; Dec. Dig. ⇐57.]

[6. *Trial* ⇐255.]

It may be that, under section 186 of the code, defendant may introduce evidence to show his belief in the truth of the charge made, in mitigation of damages, and that evidence introduced for that purpose, even if it failed to sustain the charge, would not aggravate the offense, but no such point was raised in this case by any request to charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627–641; Dec. Dig. ⇐255.]

[7. *Libel and Slander* ⇐100.]

In an action of slander it is sufficient if the words be proved substantially as laid; it is not necessary to prove the words exactly as alleged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 263; Dec. Dig. ⇐100.]

[8. *Libel and Slander* ⇐124.]

A charge to the jury "that passion does not justify slander, but might be taken into consideration in mitigation," was as favorable to the defendant as the law allows.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 365–370, 372, 373; Dec. Dig. ⇐124.]

Before Hudson, J., Spartanburg, November, 1883.

This was an action by Ellen E. Finch against Benjamin Finch, commenced September 13, 1881. The opinion states the case.

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*Messrs. Bobo & Carlisle, for appellant.

Messrs. J. S. R. Thomson and G. W. Nicholls, contra.

July 1, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, respondent, brought the action below against the defendant, appellant, for slander, and recovered a verdict for $4,666.66. The alleged slanderous words imputed a want of chastity to the plaintiff. The defendant, in his answer, denied the words as alleged, but admitted that he did say, after being charged himself with crime by the plaintiff, "I reckon you must be a whore yourself"; and he further stated, by way of mitigation, "that the charge as thus admitted was true, as defendant was informed and believed, and that the words spoken were spoken in the belief of their truth and in self-vindication, and not from any motives of malice towards the plaintiff."

A new trial was moved by defendant upon two grounds: 1. Because the jurors reached their verdict by each juror putting down a

certain sum and then dividing by twelve. 2. Because the damages were excessive. The motion was granted unless the plaintiff would within forty days enter a remittitur of so much of the verdict as exceeded $2,500. The remittitur was entered within the time, and the defendant appealed upon several exceptions, which will be considered seriatim:

1. "Because his honor, the Circuit judge, erred in not granting a new trial on the ground that the jurors reached their verdict in the way stated above."

The Circuit judge had no evidence whatever before him that the verdict was reached as alleged; nor do we see how, in the face of Sheppard v. Lark, 2 Bail., 576, and State v. Tindall, 10 Rich., 212, he could have entertained the motion.

2. "Because his honor erred in not granting a new trial unconditionally, the damages being excessive." This exception is based upon the position that new trials nisi for excessive damages can be granted only in cases where the circuit judge has the means of ascertaining the exact amount which should be allowed, as in suits on notes and other

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contracts, and it is con*tended that the case before the court was not of that character. This principle may be correct in a general sense, but the difficulty is in its application. Who is to say when the Circuit judge is unable to fix the amount of damages but the judge himself? No doubt in a given case, when this inability existed, the new trial, if granted, would be granted unconditionally; but whether the judge is unable to fix that amount is a matter for him; and if he grants it nisi, instead of unconditionally, we must assume that he had evidence before him sufficient to control his judgment.

True, in cases sounding in damages, where the damages are more or less dependent upon the opinion of witnesses, the rule by which the damages are to be measured is not as accurate as in some other cases; but even in such cases, we see no reason why the Circuit judge should not be as competent to determine the true amount as the jury—or at least there is no such insuperable difficulty in the way as to require us to say that in no such case shall the Circuit judge grant a new trial nisi. The Circuit judge certainly has the power to grant a new trial for excessive damages, and the practice has long prevailed of granting new trials nisi. Parker v. Walker, 12 Rich., 138; Warren v. Lagrone, 12 S. C., 45; Nettles v. Harrison, 2 McCord, 230. The power to determine that damages found in a given case are excessive involves the further power of saying what proportion of said damages would not be excessive, and consequently of fixing the amount which should have been found.

3. "Because his honor erred in charging: (1) That if one repeats a slanderous charge, saying at the same time, 'I don't believe it,' he is guilty of slander. (2) In charging that words spoken in sudden heat and passion is no justification. (3) In charging that if the defendant undertakes to justify the slander and fails because the justification is unsupported by the evidence, it may be considered as a circumstance of aggravation, and of continued and express malice, and may be properly considered by the jury in estimating the damages."

As to the first specification above, we do not find that the Circuit judge charged in the broad terms as therein stated. The language of the charge was as follows: "So jealous is the law of the good name and reputation of the citizen that even if one

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*should repeat a slanderous charge concerning another, saying at the same time, 'I do not believe it to be true,' he nevertheless would thus become a publisher of a slander, and liable to an action therefor, though the damages in such a case might be light." We see nothing objectionable in this.

Nor was there error in that portion of the charge which has given rise to the second specification above, i. e., in charging "that words spoken in sudden heat and passion is no justification." Here again the exception is broader than the charge. What the judge said was this, "The fact that words are spoken in passion will not excuse a malicious slanderer from liability." There was certainly no error in this. The essence of slander is malice, and where that appears, whether deliberate or under the cover of passion, the case is actionable; and whether this malice is present or not, is a question for the jury. Passion suddenly excited by mutual recrimination might mitigate, but it cannot excuse, as matter of law, in all cases.

Third specification, that his honor erred in charging "that if the defendant undertakes to justify the slander and fails because the justification is unsupported by the evidence, it may be considered as a circumstance of aggravation, and of continued malice, and may be properly considered by the jury in estimating damages." There can be no doubt about the correctness of this proposition as a general rule. See the recent case of Burckhalter v. Coward, 16 S. C., 435. It may be that since the adoption of the code, with its 186th section of force, which permits the defendant, in actions like this, to allege in his answer both the truth of the matter charged as defamatory, and also any mitigating circumstances, to reduce the amount of damages, and whether he proves the justification or not, allows him to give in evidence the mitigating circumstances, that evidence tending to show that the defendant had reason to believe the truth of the charge made might be introduced, not as justification, but in mitigation, and in such case, when really relied on for that purpose, such

evidence, though it failed to support the charge, would not aggravate the offence. But there was no request made by the defendant as to this distinction. If the defendant's answer or plea was subject to the

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application of such a principle, he *should have called the attention of the judge to it by a direct request. In the absence of such request, the Circuit judge laid down the general proposition in which, as we have said, there was no error, and that is the only matter before us.

4. Exception fourth, "in refusing to charge as requested: (1) That the jury must be satisfied that the defamatory words alleged in the complaint to have been used by the defendant have been proved exactly as alleged. (2) If the jury are satisfied from the whole testimony that the plaintiff and defendant were engaged in a sudden quarrel, and that each published defamatory matter against the other whilst under the influence of angry feelings, then the verdict shall be for the defendant. (3) If the jury believe that the language used by the defendant was provoked by the language or conduct of the plaintiff, and was the result of sudden heat and passion, the verdict ought to be for the defendant."

The refusal to charge specification one is sustained by Kyzer v. Grubbs, 2 McCord, 307, and Morgan v. Livingston, 2 Rich., 580. In the latter case, O'Neall, J., in delivering the opinion of the court, said: "The first ground of appeal is that the words were not proved on the trial as laid in the declaration. The rule is now well settled that if the words be proved substantially as laid, it will be sufficient." This applies here.

The other two exceptions raise the same objection. As to these his honor charged that passion does not justify slander, but might be taken into consideration in mitigation. This, we think, was as favorable to the defendant as the law allowed.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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21 S. C. 346

MAYBIN v. MOORMAN.

(April Term, 1884.)

[*Partnership* ⇐67.]

A partner of a mercantile firm, who was also its salaried book-keeper, drew $1,000 from the firm and purchased in his own name ten shares of bank stock, charging himself with this amount on the books, which were open to the inspection of the other partners. This partner died and the firm proving insolvent, the other

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partners sought *to have this bank stock declared partnership assets. *Held*, that the stock was not the property of the firm, but of the individual estate of the deceased partner; especially so, as at the time of his purchase his salary to a large amount was due and unpaid.

[Ed. Note.—Cited in Boozer v. Webb, 25 S. C. 82, 88, 89.

For other cases, see Partnership, Cent. Dig. § 97; Dec. Dig. ⇐67.]

Before Wallace, J., Newberry, November, 1882.

The opinion fully states the case. The Circuit decree, omitting its statement of the facts, was as follows:

First, as to the bar of the statute. The money was withdrawn on June 29, 1871. Mr. Moorman died October 5, 1873. This action was commenced in May, 1878. If the statute commenced to run on June 29, 1871, more than six years and nine months elapsed before the commencement of the action, and it would be barred. But if the statute began to run on October 5, 1873, the date of the death of Robert Moorman, and the date, therefore, of the dissolution of the partnership, only four years and seven months elapsed from that date to the commencement of this action, and it would not be barred.

One partner cannot sue another at law, and because he has no right of action the statute of limitations does not run against what does not exist. At law they were one person. In equity, where their accounts must be settled, each partner is considered as holding for all others, and never, while the partnership lasts, as against any other. Hence, as to partnership assets the statute cannot begin to run during the partnership. When the partnership is dissolved the joint tenancy is ended, and the statute attaches to their subsequent transactions as it does to the transactions of others who do not sustain partnership relations. Montgomery v. Montgomery, Rich. Eq. Cas., 64. According to this rule the action is not barred by the statute.

The next question, did the circumstances of this case have the effect to make the bank stock the private property of Robert Moorman? is not settled by any case in our own reports to which I have been referred. In the case of McCauly v. McFarlane, 2 DeSaus., 239, the court refused to decree restitution of money taken out of one firm and expended for stock put in another, the goods purchased being undistinguishable from the goods purchased with other funds.

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When capital is put into a partnership *by agreement among the partners, each has an interest in it proportioned by the terms of agreement. For one partner to take out a part and apply to his private use without the consent of the other partners would be applying the property of others to his private use. And if by so doing the property thus taken became the private property of the individual partner, the partnership assets

might be suddenly transferred from primary liability to firm creditors to primary liability for the individual debts of the partner. It would seem, therefore, consonant to reason and justice that when one partner takes to his own use and benefit assets of the firm, restitution should be decreed, unless intervening equities, as in our case of McCauly v. McFarlane, supra, prevent.

The decisions in many of the other states are to the same effect. The rule laid down in Wait's Actions and Defences, 119, and in support of which a large number of cases from different states are cited, is as follows: "So one of the partners cannot use the partnership property or funds to operate for his own private benefit, or purchase with them property in his own name; but he would be required to account to the firm, not only for the funds and property, but also for the profits."

It may be added, that as each partner is the agent of the firm within the scope of the partnership, if he purchases property with the funds of the principal, the property is the principal's. In this case the bank stock, in which the funds of the partnership were invested, still stands upon the books of the bank just as it was entered. There have been no transfers, and there is no difficulty about its identification.

It is but just that I should add that the master finds, and it was outspoken by counsel at the hearing, that there is no intentional wrong-doing intended, even to be suggested by this proceeding. The partners were life-long, intimate friends, with absolute confidence in the perfect integrity of each other. Three of them are dead, and the parties to this action, with unimpaired confidence in and affection for those who have died, simply desire that the legal right to the bank stock may be settled for the benefit of creditors.

It is adjudged and decreed, that the bank stock of the Newberry Bank purchased by

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Robert Moorman with funds of the *partnership between himself and A. G. Maybin and Reuben S. and Pettus W. Chick, and still standing on the books of the bank in the name of Robert Moorman, together with the dividends thereon, is the property of the late firm, and that A. G. Maybin, as survivor, is entitled to recover the possession of it. It is ordered, that plaintiff have leave to apply at the foot of this decree for such further orders as may be necessary to carry it into effect. It is further ordered, that the costs be paid out of the proceeds of the bank stock.

From this decree defendant appealed upon the following grounds: Because his honor erred in holding, 1. That the bank stock described in the pleadings is the property of the firm of R. Moorman & Co.; whereas, it is submitted, it belongs to the separate estate of Robert Moorman. 2. That the plaintiff's right of action therefor was not barred by the statute of limitations when he commenced this action; whereas, it is submitted, whether the bank stock was or was not in equity the property of the said firm and liable for its debts, the plaintiff's right of action therefor was so barred.

Messrs. Suber & Caldwell, for appellant.
Mr. Y. J. Pope, contra.

July 1, 1884. The opinion of the Court was delivered by

Mr. Chief Justice SIMPSON. A mercantile firm, consisting of the plaintiff, Albert G. Maybin, Reuben S. Chick, Pettus W. Chick, and R. Moorman, was formed in 1869, in Newberry county. The business was a general grocery, and continued until some time in 1873, when, Mr. Moorman having died, it was wound up. The two Chicks also died some time after Mr. Moorman. The partnership proved insolvent, and the surviving partners, consisting at that time of Maybin and the two Chicks, had to contribute from their private estate to the payment of the outstanding debts against the firm. During the existence of the partnership, to wit, on June 29, 1871, Mr. Moorman, who was the active business manager of the concern, and especially of the financial department and book-

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keeping, being a subscriber for ten *shares in the bank of Newberry, charged himself with $1,000, drawn from the firm and used by him in paying for this stock, which stock has been since standing on the books of the bank as the individual property of Moorman, the dividends thereon having been received by him up to his death in 1873, and paid to his executor since up to 1878, the subsequent dividends still remaining in the bank.

Under this state of facts, the plaintiff, as survivor, instituted the action below in May, 1878, against the executor of R. Moorman, in which he prayed that the stock and dividends accrued since July 1, 1878, be adjudged the property of the firm, and be turned over to the plaintiff as survivor thereof. In other words, the action, though presenting some of the features of an equity proceeding, is in substance an action for the recovery of personal property, and must therefore be governed by the law as applicable to such actions, and especially the right of action must stand or fall upon the question of title, legal or equitable, in the plaintiff. The defendant, appellant, in his answer, claims title, and further pleads the statute of limitations.

The case was referred to the master, who reported the above facts, and the additional facts that in October, 1873, after the death of Mr. Moorman, the private accounts of the partners stood as follows: Robert Moorman, $3,368.10, subject to a credit for services unpaid $3,600, leaving to his credit $231.90;

Albert G. Maybin, $4,178.50, less credit for services $4,000, leaving him indebted $198.05; R. S. Chick's account, $237.29, and Pettus Chick's, $2,335.27. The $1,000 drawn out by Mr. Moorman was included in his account of indebtedness above. After the dissolution of the firm, and after applying all available assets to the debts, there was still a balance of indebtedness outstanding of $9,959.35, to which the surviving partners contributed out of their private estate as follows: A. G. Maybin, $4,490.15; P. W. Chick, $2,245.07, and R. S. Chick, $2,245.07, leaving still a balance of $979.36 unpaid. It further appeared in evidence that A. G. Maybin's bank stock, and also that of P. W. Chick, each for $1,000, was paid out of the firm funds at the same time and in the same way as that of R. Moorman's.

Upon these facts, the master held as

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matter of law, first, that *the ten shares in the bank of Newberry having been purchased with partnership assets, and not having been accounted for by the deceased partner, belonged to the partnership; and, second, that the statute did not begin to run until the death of Moorman, October, 1873, and the plaintiff having commenced his action within six years thereafter, the action was not barred. Upon exceptions, the Circuit judge sustained the master as to both of these principles of law, and gave leave to the plaintiff to apply for such orders as might be necessary to obtain the stock, with costs to be paid out of the proceeds of said stock.

The main question involved in the appeal is as to the title to the stock. Has the plaintiff such title, either legal or equitable, as would authorize a recovery on his part? This is a very different question, it will be observed, from the accountability of the estate of Moorman for the money which he drew out and used in purchase of the stock. That question might be raised in a different proceeding, but it is not involved here. Is the title of this stock in the plaintiff as survivor of the partnership? It is conceded that the stock was taken by Mr. Moorman as an individual and in his own name. It was so entered when the subscription was made, and it has so continued ever since, the dividends being paid to him during his life, and to his executor since his death up to 1878. It is clear, therefore, that as to the legal title the plaintiff has no standing. In fact the recovery is not urged upon that ground, but it is contended that, Mr. Moorman having used partnership funds in the purchase of this stock, the partnership has an equitable title which may be enforced by the proceeding below, and the effort is to bring the case under the operation of the principle which allows trust funds to be followed into the property in which it may be invested in violation of the trust.

This principle is a correct principle, and has been long established, but does it apply here? Was Mr. Moorman a trustee in the sense of this principle, and was it a violation of his duty as one of the partners to draw from the firm assets the sum which he did, and appropriate it to his own use in the purchase of this stock? This is the turning point of the case. There is no doubt that each partner can bind the firm within the

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scope of the *partnership. By the partnership itself they hold each other out to the world as worthy of confidence. This is necessary to the success of enterprises involving associated capital, and in the absence of fraud or conspiracy they can each draw from the common till for their own and individual purposes, charging themselves at the same time with the amount so drawn. They can pay their individual debts by giving credit to their creditor on a claim due by him to the concern when bona fide done. "One of several copartners can discharge his individual debts to a third person by releasing or giving a receipt to such person for a debt due by him to the firm." Survivors of Halls, Kirkpatrick & Co. v. Coe, Green & Randolph, 4 McCord, 137.

There is no allegation or intimation, springing either from the testimony or presented in the argument, of fraud or conspiracy on the part of Mr. Moorman; on the contrary, this is especially disclaimed on all hands, and it is apparent that there was no concealment of the transaction by Mr. Moorman from his partners. He drew the money from the till and promptly charged himself with the amount. It is true he kept the books, but they were open to the inspection of the other members of the firm, and if they failed to become acquainted with this fact, this was due as much to their own negligence and inattention as to any default of duty on the part of Mr. Moorman.

In the absence of concealment of the transaction, and of all purpose secretly and improperly to appropriate a portion of partnership assets to his own use, and in the presence of the fact that he charged himself upon the books with the amount drawn out, we think, under the law applicable to partnerships and the facts of this case, he had the right to do so, and having done so, he became a debtor to the concern for said amount; that the stock purchased became his individual property, and is not subject to the equitable claim of the plaintiff. This would be the law independent of the fact that Mr. Moorman was a salaried employé of the concern, with his salary as salary unpaid at the time; but with this fact appearing, there is still greater reason why the transaction should be unimpeachable.

Under the view which we have taken of the case above, it is unnecessary to discuss the question of the statute of limitations

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*raised in the appeal. We think the judgment of the Circuit Court, that the bank stock in question, with the unpaid dividends thereon, is the property of the late firm of R. Moorman & Co., was error, and therefore on that ground said judgment should be reversed.

The judgment of this court is that the judgment of the Circuit Court be reversed.

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21 S. C. 353

STATE v. BUTLER.

(April Term, 1884.)

[1. *Embezzlement* ⇐26.]

An indictment charged that the defendant, being secretary of a certain society, received the sum of $20, which he took possession of and held for the use of said society as such secretary, and that he did fraudulently and feloniously steal, take, and carry away, and convert to his own use, the said sum of money, whereby he committed a breach of trust with fraudulent intent, and by force of the statute in such case made and provided was guilty of the crime of grand larceny, contrary to the form, &c. *Held*, that the indictment was sufficient under the statute that declares breach of trust with fraudulent intent to be larceny.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 37, 38; Dec. Dig. ⇐26.]

[2. *Embezzlement* ⇐2.]

This statute did not create any new offence, but only extended the crime of larceny at common law to cases in which the property stolen was in the legal possession of the accused at the time of its conversion.

[Ed. Note.—Cited in State v. Posey, 88 S. C. 318, 70 S. E. 612.

For other cases, see Embezzlement, Cent. Dig. § 2; Dec. Dig. ⇐2.]

[3. *Estoppel* ⇐64.]

One who has acted as secretary of a society cannot deny the existence of such society when prosecuted for a fraudulent breach of his trust.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 154; Dec. Dig. ⇐64.]

[4. *Embezzlement* ⇐5.]

To constitute breach of trust a criminal offence, there must be a fraudulent intent. Therefore the Circuit judge erred in refusing to charge the jury, when so requested, "that the mere fact of not paying over the money by the defendant was not sufficient evidence in itself to convict him of a breach of trust with fraudulent intent."

[Ed. Note.—Cited in Murray v. Aiken Mining & Porcelain Co., 37 S. C. 487, 16 S. E. 143; State v. Davenport, 38 S. C. 353, 17 S. E. 37.

For other cases, see Embezzlement, Cent. Dig. § 3; Dec. Dig. ⇐5.]

Before Fraser, J., Spartanburg, March, 1884.

The indictment in this case was against Howard Butler under the statute which declares breach of trust with fraudulent intent to be larceny. The opinion states the case.

Mr. J. S. R. Thomson, for appellant.

Mr. Solicitor Duncan, contra.

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*May 6, 1884. The following order of the Court was passed by

Mr. Chief Justice SIMPSON. It is ordered that the judgment of the Circuit Court in this case be reversed, and that the case be remanded for a new trial. The reasons for this judgment will be given in the opinion hereafter to be filed. Let the remittitur be sent down immediately.

July 1, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The defendant was indicted for an alleged breach of trust. He was tried and convicted at a Court of Sessions for Spartanburg county in 1884. The indictment contained two counts, in each of which it was alleged substantially that, being the secretary of the "Star Banner Lodge of the Independent Order of the Knights of Wise Men," he received the sum of twenty-three dollars, which he took possession of and held for the use of the said order as said secretary; and that he did fraudulently and feloniously steal, take, and carry away, and convert to his own use, the said sum of money, whereby he committed a breach of trust with fraudulent intent, and by force of the statute in such case made and provided was guilty of the crime of grand larceny, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said state.

The questions involved in the appeal are, first, as to the sufficiency of the indictment, i. e., whether grand larceny can be charged in an indictment under the breach of trust act; second, whether the defendant by acting as secretary was estopped from denying the incorporation of the order; and, third, whether it was error on the part of the Circuit judge to refuse to charge as requested, "that the mere fact of not paying over the money by the defendant was not sufficient evidence in itself to convict him of a breach of trust with fraudulent intent."

We think the indictment was sufficient. The act on the subject of breach of trust makes the offence larceny in general terms, and we think when it placed it under the general head of larceny, it partakes of all the incidents thereto, and is governed by the law applicable to larceny as one of the classes of crime whether statutory or common law. Indeed, when the nature and purpose

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of *the act is considered, such must have been the intention of the legislature. Larceny at common law is defined to be, the taking and carrying away the personal goods of another with felonious intent. Under this general definition, before a party could commit the crime, it was necessary that the prop-

erty should be in the actual or constructive possession of the owner, or of some one else than the thief. Consequently, it was held at common law that where a party was in the legal custody of the property of another, he could not commit larceny upon it, although he should fraudulently appropriate it to his own use, for the reason that he could not take it from the other, being already in legal possession himself.

The object of the breach of trust act, as we understand it, was not to create any new offence in its nature and essence, but simply to remove the technical difficulty in the way of conviction, suggested above. The larceny which the act denounces is the same in all of its features as common law larceny. It is not simply the non-payment of a debt, but it is the appropriation of the property of another to the use of the accused, with the intent to make it his own, and to destroy the title of the true owner, under circumstances which would make it larceny at common law, except for the fact that he had obtained possession in the first instance in some legal way. In morals there is no difference between a theft committed upon property over which one has a charge or custody, and property in the possession of another. The act recognizes this fact, and it simply strips from the former class the defence of legal possession which it had before the act, and declares it to be larceny. When so declared, it must be governed in every respect by the laws applicable to the general crime of larceny, one of which is the division into grand and petit.

Upon the second question, the Circuit judge charged, that if the jury, from the testimony, came to the conclusion that the defendant acted as the secretary of the order named, it would be too late for him to say now that there was no such society, but it was a question for the jury whether the defendant was the secretary of such society. This was in accordance with the case of State v. Sellers, 7 Rich., 368, where it was held that an officer who had assumed the duties of an office could

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not himself dispute *the validity of his own appointment, even when proceeded against criminaliter.

As to the last exception, we think the defendant was entitled to the distinct charge requested, the refusal to charge which forms the third ground of appeal. The object of the breach of trust act, as we have said, was not to make criminal the failure to pay a debt. This often happens from misfortune, or from other causes far removed from fraud or crime; and the mere fact of non-payment affords no ground whatever upon which to base a charge of larceny or breach of trust. To constitute this offence as to property, there must be an appropriation thereof, accompanied with a fraudulent purpose to destroy the right of the true owner. This is not a necessary inference from mere non-payment, and the defendant was entitled to have it declared to the jury as matter of law, that failure to pay, in itself, did not constitute the offence charged.

Let this opinion be filed with the judgment heretofore pronounced reversing the judgment of the Circuit Court.

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21 S. C. 356

HILL v. PERRIN.

(April Term, 1884.)

[1. *Limitation of Actions* ⇐15.]

The bar of the statute of limitations being pleaded by defendant, plaintiff offered to prove by parol that defendant, in consideration of forbearance, had agreed that if the amount was not paid before six years after the maturity of the account, he would not plead the statute. *Held*, that the Circuit judge committed no error in excluding the parol testimony offered.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 62–65; Dec. Dig. ⇐15.]

[2. *Limitation of Actions* ⇐146.]

A parol promise not to plead the statute cannot operate as a waiver, or as an agreement, or by way of estoppel, to subvert the declared policy of the statute. Code, § 131.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 594; Dec. Dig. ⇐146.]

Before Hudson, J., Abbeville, February, 1884.

Action by A. M. Hill against L. W. Perrin, administrator of Joel S. Perrin. The judgment was for defendant, and plaintiff appealed upon his exception to the judge's ruling at the trial, as stated in the opinion of this court. The opinion states the case.

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*Mr. Eugene B. Gary, for appellant, compared section 131 of the code of procedure with the 4th section of the statute of frauds (Gen. Stat., § 2019), and cited 4 Min. Inst., 506; 16 S. C., 213; Big. Est., 533, 534, 440, 441; 3 Hill, 54; 3 S. C., 298; 13 Id., 37; Wood Lim., § 76.

Mr. T. P. Cothran, contra, cited Code, § 131; 2 Abb., 277; Wood Lim., 80, 209, § 84; 1 Add. Cont., § 410; 7 Bing., 163; Big. Est. (2d edit.), 437, 439; 9 How. Pr., 550; 31 Barb., 169; 29 Me., 50; 26 Conn., 324; 42 N. Y., 443.

July 1, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The action below was commenced in November, 1883, upon an account contracted by the defendant's intestate between January, 1874, and July, 1875. The defendant relied on the statute of limitations. This was resisted, on the ground that the defendant, in consideration of forbearance, had agreed that, in case the amount was not paid before six years after the maturity of the account, he would

not plead the statute, and parol testimony was offered to prove this verbal agreement. This was objected to by the defendant, on the ground that no such evidence could be offered unless in writing. The judge ruled that no acknowledgment or promise tending to establish a new or continuing contract was admissible unless the same were contained in some writing signed by the defendant or his intestate, and he excluded the testimony offered. Was this error? is the only question raised in the appeal.

The code, section 131, provides in terms "that no acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take a case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby." The ruling of the Circuit judge was not only in accordance with this provision of the code, but was almost in the precise language thereof, and unless there is force in the ingenious argument of the appellant, in which he attempted to apply the doctrine of estoppel to the case, said ruling must be affirmed. So that the real question is, can the doctrine of estoppel be made to apply?

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*It is very clear that it was the intention of the legislature, in the section of the code referred to, to declare in absolute terms that no verbal promise or acknowledgment should revive or continue a contract otherwise subject to the statute of limitations. This, in fact, is the positive and emphatic declaration of the act, and there can be no question as to its meaning. It is equally clear, therefore, that if the doctrine contended for by the appellant is admissible upon the ground stated, this would be equivalent to expunging this section from the code; because if a verbal promise to pay a debt and not to plead the statute estops a debtor from denying that the promise was in writing, then the very mischief which the section was intended to prevent, the possibility of a renewal or continuance of contracts by verbal promises, would be revived in a new form, and the section of the code referred to would be rendered nugatory, thereby defeating the declared public policy on that subject.

In Hodgdon v. Chase, 29 Me., 50, it was held that a parol promise founded upon a valuable consideration made by defendant to waive the statute of limitations and to take no advantage of the same would not preclude him from setting up the statute as a defence. See also the cases of Shapley v. Abbott, 42 N. Y., 443; also 22 N. Y., 249. In this last case the decision was put upon the broad ground of public policy, and it was held that the agreement to waive the benefit of the statute of exemptions could not operate in any way, either as a waiver, or as an agreement by way of estoppel, for the reason that it would subvert the policy of the law. In Shapley v. Abbott, supra, it was held that the same reason would apply in that case.

The policy of the statute requiring that every promise or acknowledgment to take a case out of the statute shall be in writing signed by the party to be charged, is to prevent frauds and perjuries, and it is the duty of the courts so to administer the law as to uphold this policy. If a parol promise not to plead the statute is to be held operative, either as a waiver or as an agreement, or by way of estoppel, to subvert the statutes, then all the mischief will be let in which it was the policy of the law to shut out. It will be observed that the language of the section above referred to does not stop sim-

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ply at verbal promises to pay *a debt barred, or about to be barred, by the statute, but it includes every and all verbal promises intended to defeat the statute, and therefore includes a promise not to plead the statute, as well as a promise in terms to pay a debt, and renders both inoperative.

We see no error in the rulings excepted to. It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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21 S. C. 359

WARDLAW v. ERSKINE.

(April Term, 1884.)

[*Equity* ⟸405.]

Parties to a cause are entitled to notice of a reference to be held by the master, and of the filing of his report, notwithstanding the reference involves only the examination of records in the case for the purpose of ascertaining the indebtedness of such parties.

[Ed. Note.—Cited in Gee v. Humphries, 49 S. C. 256, 27 S. E. 101.

For other cases, see Equity, Cent. Dig. § 882; Dec. Dig. ⟸405.]

Before Kershaw, J., Anderson, October, 1883.

The opinion states the case.

Messrs. Moore & Wardlaw, for appellants.
Messrs. Scudday & Simpson, contra.

July 3, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In August, 1870, a bill was filed for the partition of the real estate of H. H. Wardlaw, late of Anderson county, among his children, twelve in number, and a son and daughter of a deceased son, H. C. Wardlaw, his heirs-at-law.

Upon the return of certain commissioners appointed to make the partition, all the parties interested having been made parties, Judge Orr, presiding, ordered the report of the commissioners to be accepted and filed,

and that the land be assigned and conveyed to seven of the children, upon their entering into bond to the clerk of the court in the penalty of $7,000, conditioned for the payment of $3,500, twelve months after date with interest payable annually, &c., "and

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when said bond was settled, for the *benefit of the other heirs of Hutson C. Wardlaw, the interest of the assignees and donees in said land to be credited with their respective interests in said land, the clerk to hold the purchase money when collected, subject to the further order of the court."

In October, 1871, Judge Orr seems to have granted a further order, "that it be referred to A. O. Norris, Esq., special referee, to investigate and report what portion of the real estate of H. H. Wardlaw will be required in aid of the personal estate to pay debts." No proceeding was taken under this order and the case seems to have dropped from the docket.

Matters remained in this condition until February, 1883, when the respondents, through their attorneys, gave notice to J. B. Moore, plaintiffs' attorney in the original case, of a motion to restore the case to the calendar and refer to the master to examine the records and report what amount is due the heirs of the said H. C. Wardlaw, deceased. To this motion no objection was made, except that said heirs be required to give security for costs before proceeding further with the case. Upon hearing this motion, Judge Wallace ordered the case restored to the calendar, and that it be referred to the master to examine the records and report what sum is due to the children of H. C. Wardlaw, deceased, provided that security for the sum of fifty dollars to cover costs be given, on or before the day fixed for the reference. The master, under this order, examined the records in the case and reported the sum due to the children of H. C. Wardlaw. This examination and report was made without notice to plaintiffs' attorney, Mr. Moore.

At the October term of the court this report, by order of Judge Kershaw, was confirmed, with an order that the amount reported as in the hands of the clerk, after paying the costs, be applied to the payment of the interest of J. B. Wardlaw and F. C. Sanders, the two children of H. C. Wardlaw, deceased, and that the bond given by the assignees of the land be turned over to Messrs. Scudday & Simpson for collection, so as to secure the balance that may be due said children. This order was resisted by Moore & Wardlaw on the ground that they had no notice of the time and place of the reference, or of the filing of the report of the referee, and that therefore they had been deprived of all op-

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portunity to *except to said report; and upon these grounds they have appealed, with two other exceptions not necessary to be considered, as they are founded upon facts not appearing in the case, or ruled upon by the Circuit judge.

The sole question in the case is, was it error on the part of the Circuit judge to grant the order appealed from, notwithstanding the fact that plaintiffs' attorneys had not been informed of the time of the reference and were without notice of the filing of the report? Inasmuch as the master has no special court days for the consideration of matters referred to him, of which parties interested may take notice, as a general rule it would seem to be proper and necessary that he should notify said parties of the time and place of the reference which he intends to hold. This is certainly the practice, and it is necessary, otherwise references would be ex parte, and the rights of those interested might be determined without their knowledge. 3 Wait Prac., 284, 294, 295. We do not know that any special harm has been done in this case, but we can see no reason why it should be made an exception from the general rule above referred to.

It is true that no objection was interposed to the reference except that the heirs of H. C. Wardlaw should give security for the costs, but that did not necessarily waive the privilege of being present when the reference was held, or of notice of the report when filed. It is true, too, that the order of reference confined the referee to an examination of the records in the original case, and his duty was somewhat ministerial in its character, but yet it involved the indebtedness of the assignees of the land under the bond which they had given, and they were entitled to be heard as to the amount due thereon. We think the appellants should have had notice of the reference. See the case of Wright v. Herlong, 16 S. C., 620.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and the case be remanded for such further proceeding as may be necessary.

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21 S. C. *362

***In re CONANT'S CLAIMS.**

(April Term, 1884.)

[1. *Counties* ⊂=205; *Judges* ⊂=27.]

On appeal to the Circuit Court from an order by the Board of County Commissioners refusing to audit certain claims presented against the county, an order was passed by the Circuit judge at chambers, and without notice to the board or its attorney, directing the board to audit these claims. *Held*, that the order of the Circuit judge was invalid, because made out of court and without notice.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 328–334; Dec. Dig. ⊂=205; Judges, Cent. Dig. § 110; Dec. Dig. ⊂=27.]

[2. *Mandamus* ⟸101.]

Semble. Mandamus is the proper proceeding to require a Board of County Commissioners to audit claims against the county.

[Ed. Note.—Cited in Jennings v. Abbeville County, 24 S. C. 550.

For other cases, see Mandamus, Cent. Dig. §§ 211–216; Dec. Dig. ⟸101.]

[3. *Motions* ⟸57.]

Even if there had been a written agreement that the matter should be informally presented to the judge for his decision, it would not have been proper for one of the parties to obtain a decision at chambers without notice to the other party and in his absence.

[Ed. Note.—For other cases, see Motions, Cent. Dig. §§ 68–71; Dec. Dig. ⟸57.]

Before Pressley, J., Beaufort, March, 1883.

The opinion states the case.

Mr. William Elliott, for appellant.

Mr. W. J. Verdier, contra.

July 3, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This is certainly a novel proceeding. One John Conant being the owner, as alleged, of certain papers called warrants, drawn upon the treasurer of the county of Beaufort, in the year 1876, by L. S. Langley, then the auditor of said county of Beaufort, and alleged to have been given to other parties for services rendered in making the assessment of property for taxation in that year, applied for a writ of mandamus to require the treasurer of said county to pay said warrants, amounting in the aggregate to $995. This court refused the mandamus, on the ground that the claim had not been examined and approved by the county commissioners, as required by section 23 of the act of 1875, 15 Stat., 993. See State ex relatione Conant v. Fuller, 18 S. C., 246.

Thereupon the said Conant, on December 28, 1882, applied to the then board of county

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commissioners for Beaufort county to *audit said claim; but they declined, on the grounds that the claims had not been presented in the year in which they were given (1876); that they had been previously refused audit by the board, and that, after the lapse of more than six years, they had not now the power or right to audit them as debts of the county, especially after the passage of the act of 1882 (General Statutes, § 623, and note, § 7), which declares "that all claims against a county not presented in the fiscal year in which they were contracted, or the next thereafter, shall be forever barred," &c.

From this refusal of the county commissioners to audit his claims, the said Conant gave them notice of appeal, on March 26, 1883, to "the Circuit Court." It seems that at the time the notice of appeal was accepted, the attorney for the appellant, Conant, considered that there was a verbal understanding that he might present the matter "informally to the judge." At all events, the case was not docketed in the Circuit Court, nor heard during the term; but after the adjournment sine die, the matter was presented to Judge Pressley at chambers, entirely ex parte, in the absence of the attorney for the commissioners, who had no notice whatever of the time or place of hearing. Under these circumstances, Judge Pressley heard the appeal and made the following order: "It is ordered that the judgment of the county commissioners made in above matter on the 28th day of December, 1882, be overruled, and the case remanded to the county commissioners, with instruction to audit the claims of the appellant referred to, if they should be found to be proper claims, and to pay the same, if there be funds in the treasury applicable to the judgment thereof," &c.

From this order the county commissioners appeal to this court upon the following exceptions: "1. Because the notice of appeal from the decision of the county commissioners was not served within the time prescribed by law. 2. Because said appeal from the decision of the county commissioners was not docketed upon the proper calendar of the Court of Common Pleas. 3. Because said appeal was heard and determined by his honor at chambers, and not in court, and the county commissioners had no opportunity of being heard. 4. Because his honor erred in holding that the present board of county

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commissioners had the power to *audit said claims. 5. Because his honor erred in overruling the refusal of the county commissioners to audit said claims on December 28, 1882, when said county commissioners had previously refused to audit said claims, from which refusal no appeal had been taken."

We cannot consider this as a consent proceeding. The very fact that it is here shows that it is not. The county commissioners have appealed, and the questions made must be decided according to the strict rights of the parties, without regard to any alleged stipulations which were not committed to writing. From the view we take, it will not be necessary to consider any of the grounds of appeal, except the third, which complains that the appeal from the decision of the county commissioners was heard and determined at chambers, and the county commissioners had no opportunity to be heard. This, of course, must be conclusive against the validity of the order below, as no judgment rendered out of court, and in the absence of the party interested, can be valid and binding, unless it be in one of those special cases allowed to be heard at chambers.

If this is to be regarded as a proceeding against the board of county commissioners to make them, according to what is alleged to be their plain duty, enter upon and audit

the warrants under the circumstances stated, we are at a loss to perceive how that question can be made, except by regular mandamus. Moses Mand., 104; State, ex rel. Marshall, v. Starling, 13 S. C., 266. If it is to be regarded as really an action by Conant against the county of Beaufort for the recovery at law of a debt, serving the county commissioners only as a means of making the county defendant in the action, then it was certainly necessary that the party most deeply interested should have had notice of the time and place of trial. But, in either case, the first appeal of Conant being to "the Circuit Court," and not to a judge at chambers, there was no authority whatever to hear the case at chambers, and without notice to the attorney representing the county.

Even if the stipulations to the full extent and in the terms claimed had been in writing, and therefore binding, we fail to see that they went so far, in express terms, as to allow one of the parties, without the presence

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of any one representing the com*missioners or the county, to take the decision of a Circuit judge at chambers. Such a stipulation would not be presumed from what was said, for, as it seems to us, it would not have been in accordance with their duty to the county nor consistent with their own acts in refusing to audit, and in appealing from the order requiring them to do so. See Grierson v. Harmon, and Werts v. Spearman, 16 S. C., 618, where it is ruled that "a judge at chambers can only hear such cases as are provided for by statute, and there is no provision for hearing such a case at chambers. Notwithstanding the verdict of the jury, the parties had a right to have a hearing by the court upon the merits, and such hearing could not be had at chambers—certainly not without the consent of all the parties."

The judgment of this court is that the judgment below be reversed.

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21 S. C. 365

WITHERS v. JENKINS.

(April Term, 1884.)

[*Homestead* ⇐2.]

A trustee named in a deed executed in 1867 declined to accept and the land remained in the possession of the grantor, who received the rents and profits from 1868 to 1870, when the property reverted to the grantor; afterwards, judgment was rendered against him for such rents and profits, and against an execution thereon he claimed a homestead exemption. *Held*, that he received the rents and profits as acting trustee under the deed, and that therefore the obligation arose at the date of the deed, which being prior to the adoption of the constitution of 1868, the claim of homestead could not be allowed.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 2; Dec. Dig. ⇐2.]

Before Kershaw, J., Richland, October, 1882.

After stating the facts, which appear in the opinion of this court, the Circuit decree continued as follows:

The homestead act, as it now exists, declares the homestead "exempt to the head of every family residing in this state from attachment, levy, or sale on any mesne or final process issued from any court upon any judgment obtained upon any right of action arising subsequent to the ratification of the con-

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stitution of the *state of South Carolina." This is merely an amplification of the language of the constitution as amended in 1880, which declares that "the General Assembly shall enact such laws as will exempt from attachment and sale under any mesne or final process issued from any court to the head of any family residing in this state a homestead," &c. 17 Stat., 320, 513.

Language could not be broader or more comprehensive than this in regard to judgments founded on the class of action specified. If the right of action arose subsequent to the constitution, whatever its nature, it cannot be enforced against the homestead. The question, then, (having regard only to the act,) is narrowed down to this, did the right of action arise subsequent to the ratification of the constitution? It will not be denied that it arose here after the death of Mary Jenkins, the elder, in August, 1868, and consequently subsequent to the ratification of the constitution.

But it is argued that the right of action arose under, and by virtue of, rights conferred by the deed of trust made by Samuel Jenkins in 1867; that that deed was a contract, whose full scope and effect is not to be impeded by the constitution of 1868, or any legislation thereunder, since no state may pass any law which impairs the obligation of a contract. If the action in which this judgment was rendered were founded upon the deed as the cause of action, there is little room to question the soundness of the propositions thus insisted upon. If, for instance, the deed contained covenants of warranty, and an action were brought directly upon the covenant, and a recovery had, the right of homestead could not, probably, be claimed against the judgment, though the breach, and therefore "the right of action," arose after the ratification of the constitution. This would be for the reason that the ground for the action would be the contract made before the constitution, whose obligation was sought to be enforced. The right to demand the performance of the covenants would have been vested by the contract, and could not be impaired by subsequent legislation.

The action in which the judgment here was rendered was originally brought by the plaintiff and his wife, setting forth the deed and demanding protection and enforcement of her rights in the land therein conveyed,

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which was then as now, in possession of *the defendant, who was receiving the rents and profits thereof. Jenkins denied the execution of the deed, and contested all the rights claimed thereunder. Plaintiff's wife died, and a supplemental complaint was served by leave of court on the part of the plaintiff, still insisting upon the deed and the supposed rights of the plaintiff thereunder, and upon the death of his child another supplemental complaint was served, wherein plaintiff still insisted upon the deed, and claimed his rights under it.

The issues of fact presented and decided were: (1) Was the deed duly executed and delivered by the defendant? (2) Was the marriage of plaintiff and his wife lawfully contracted, so that he had become entitled, in respect of her property, as her husband? The questions of law were: (1) What estate did Mary Withers take in the property under the deed? (2) What estate did her husband take after the death of his wife and child? In other words, what were the obligations of the defendant to the plaintiff under the deed? It will be seen, therefore, that this was an action upon the deed to set it up, and to have the court construe it, and to enforce the obligation thereof against the defendant. Under this action the court construed the deed, and rendered a judgment in favor of the plaintiff for rents and profits due him under the contract or deed thus construed.

The obligation of a contract consists in "the powers and efficacy of the law which applies to and enforces performance of the contract or the payment of an equivalent for non-performance." (Per Trimble, J. [Ogden v. Saunders], 12 Wheat., 318 [6 L. Ed. 606].) The court decreed the payment of an equivalent for the non-performance of his contract by defendant, and he cannot set up a right of exemption created by legislation subsequent to the contract to defeat the obligation of it, here sought to be enforced.

It is therefore ordered and adjudged, that the rule be made absolute, and that the said sheriff, Samuel W. Rowan, proceed to enforce the execution aforesaid against the property of the defendant, according to its exigency, without regard to the claim of homestead therein, until the said property be exhausted, or satisfaction of plaintiff's judgment be made, and that he return said execution within thirty days from notice of

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this order, and failing *to do so, that he be attached as for a contempt for not obeying the order and process of the court.

From this decree defendant appealed, raising the question considered by this court.

Mr. Preston L. Melton, for appellant.

Messrs. J. D. Pope and F. W. Fickling, contra.

July 7, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. On November 6, 1867, the defendant, appellant, executed a trust deed, by which he conveyed to one Francis Lopez, in trust, the tract of land levied on in this case by the sheriff of Richland county, and in reference to which the question of homestead raised in the appeal arises. This deed conveyed the property in trust for the use of Mary Jenkins, the wife of the appellant for life, and at her death for the sole and separate use of Mary Jenkins, his daughter, and the lawful heirs of her body. Francis Lopez, the trustee named in the deed, declined the trust, and the property remained in the possession of the appellant.

In August, 1868, Mary Jenkins, the wife, died, leaving Mary Jenkins, the daughter, residing with her father, the appellant. In January, 1869, Mary Jenkins, the daughter, intermarried with Withers, the respondent. In April, 1869, Withers and Mary, his wife, filed a bill against Lopez, the trustee, and the defendant, Samuel Jenkins, the latter of whom was in possession, claiming that Mary, upon the death of her mother, became entitled to the use and benefit of the land. Before this cause came to a hearing Mary died, in November, 1869, leaving an infant son surviving her, who became entitled to the estate per formam doni, as the heir of the body of Mary. This son died in March, 1870, leaving his father surviving. The original bill was then revived by Withers, by supplemental complaint against the appellant, in which Withers claimed to be tenant by the curtesy. It was adjudged by this court on appeal that he was not entitled to the curtesy. 14 S. C., 598. The Circuit Court, how-

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ever, *had allowed him rents and profits which had accrued during the life of his wife and son. It was also determined that the real estate had reverted to the appellant, Jenkins, the fee conditional estate having terminated by the death of his grandson.

Subsequently, the amount of the rents and profits were ascertained by report of a referee, and leave was granted Withers to enter up judgment and issue execution thereon with costs. Under this execution, the land was levied upon, when the defendant claimed the homestead; whereupon the sheriff declined to sell, and the proceeding below was a rule against the sheriff to show cause why he had not sold. The Circuit judge held that the cause of action upon which the judgment had been rendered arose upon the trust deed of Jenkins, which was executed before the adoption of the constitution in 1868, and therefore that Jenkins could not claim the benefit of the homestead provisions found in the constitution of 1868, or of the homestead acts subsequently pass-

ed. Was this error? is the question in the case.

It appears that at the time of the reference, when the amount of the rents and profits were ascertained, and also when the judgment thereon was entered, Jenkins was unmarried, having neither wife nor child, nor was he the head of a family. He has subsequently, however, and before the attempted enforcement of the execution herein, intermarried with his present wife, and now interposes his claim for the homestead.

The first point to be considered is, whether the judgment in question was based upon an obligation assumed by the appellant before the adoption of the constitution of 1868? If it was, of course there is an end of the case, under Gunn v. Barry, 15 Wall., 610 [21 L. Ed. 212], and the decisions of our own state, as no homestead can be claimed upon a liability contracted previous to the creation of the homestead exemption provided for in the constitution of 1868. It has been urged very earnestly by appellant's counsel that defendant's liability did not arise under the trust deed, which it is admitted was executed previous to 1868, but that it arose out of a trespass in appellant by refusing to yield possession of the land, which trespass occurred in August, 1868, when his wife died, and continued to March, 1870, when the infant of his daughter died, and which, being after

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the adoption of the *constitution of 1868, his right of homestead attached as against this liability.

On the other hand, it is urged that Lopez, the trustee named in the trust deed, having declined the trust, and the appellant having continued to hold the property conveyed by him in the deed, held it as trustee, under the principle that a trust will not be allowed to fail for the want of a trustee, the party in possession with knowledge of the trust being regarded and held in equity as trustee de facto. This principle is a well-established principle in the administration of equity, and we can see no reason why it should not apply to the facts of this case. There is no doubt as to the facts: that the appellant did execute the trust deed; that Lopez was named therein as the trustee; that he declined to accept, and that the appellant being in possession, remained in possession, with full knowledge that Lopez had thus declined. He remained in possession during the life of his wife, during the life of his daughter, and her son, and still continues in possession, now holding it as his own by reversion.

During the time of this holding he was no trespasser, but he was rightfully in possession, and in law was holding for the benefit of the cestui que trust. He possibly might have abandoned the property without incurring any liability thereby, but this he did not do, and not having done so, he cannot evade the responsibility of his situation. True, he denied the validity of his deed, but that question has been adjudicated against him, and it reacts to the beginning of his possession. Suppose that Lopez had accepted the trust, and had taken possession in 1867 under the deed, could he have shielded his property by claim of homestead against a liability arising upon failure to account for the rents and profits received by him as such trustee since 1868?

The case of De La Howe v. Harper, 5 S. C., 472, is conclusive of this question, we think. In that case it was held "that the homestead exemption under the constitution of 1868 cannot be allowed against a judgment for a devastavit committed by the defendant as administrator where the administration bond was given before the constitution was adopted; and it makes no difference that the devastavit, as well as the judgment, was after its adoption." The only difference

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between that case and this, *had Lopez accepted the trust, would be the fact that in De La Howe v. Harper the trustee had given bond for the faithful discharge of his trust, whereas in this the liability existed without bond. This fact, however, can make no difference as to the principle which should govern this liability. The principle is the same in each case. The relation of the parties, that of trustee and cestui que trust, is the basis of the liability in each case, and that begins at the time this relation is established.

Now, in our opinion, Jenkins, upon the refusal of Lopez to accept the trust, having continued to hold the property with a knowledge of all the facts, became in reality the trustee, standing in the shoes of Lopez, and subject to just such responsibility as he would have been subject to had he accepted. With these views, we see no error in the decree of the Circuit judge.

The other questions raised in the argument of the respondent are not involved in the case. No ruling was made upon them below, and inasmuch as the decree of the Circuit judge can be sustained upon the ground upon which he based it, these additional questions are not properly before us. They have not therefore been considered.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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21 S. C. 371

McSWEEN v. McCOWN.

(April Term, 1884.)

[1. *Equity* ⟸399.]

The right given to parties by section 2210 of the general statutes to examine witnesses before the clerk of court does not limit the power of the Circuit judge to order a reference to take testimony.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 864; Dec. Dig. ⟸399.]

[2. *Reference* ⟸16.]

A reference to take testimony which is to be reported to the court is not a reference for trial, and therefore is not governed by section 293 of the code.

[Ed. Note.—Cited in Ferguson v. Harrison, 34 S. C. 174, 13 S. E. 332.

For other cases, see Reference, Cent. Dig. § 31; Dec. Dig. ⟸16.]

[3. *Reference* ⟸26.]

In equity causes it is within the judge's discretion to require the testimony to be taken by a referee and reported to the court.

[Ed. Note.—Cited in Farmers' Mutual Ins. Ass'n v. Berry, 53 S. C. 131, 31 S. E. 53; Williams v. Newton, 84 S. C. 102, 65 S. E. 959.

For other cases, see Reference, Cent. Dig. § 43; Dec. Dig. ⟸26.]

[4. *Equity* ⟸336.]

It may be better in some cases to have the testimony given orally before the judge, but the mode of taking evidence in equity causes is a matter to be determined by the presiding judge.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 674–678; Dec. Dig. ⟸336.]

Before Pressley, J., Darlington, October, 1883.

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*This was an action by John McSween, as survivor of Keith & McSween, against Samuel O. McCown, Carrie B. McCown, and her children, and was commenced April 27, 1882. The opinion states the case.

Messrs. Dargan & Dargan, for appellants.

Messrs. Boyd & Nettles and E. K. Dargan, contra.

July 7, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This action was brought to vacate and set aside a deed for alleged fraud in its intent and purpose. The case was called for trial at the October term of the court for Darlington in 1882. A continuance was moved by the defendants, which was granted by consent. At the October term, 1883, the case was again called for trial. The defence again asked a continuance; counsel for the plaintiff did not press for trial, but moved a reference to take testimony, on the ground that the witnesses were old and feeble and that delay in hearing the case might be prolonged. This motion was earnestly resisted by the defendants. The presiding judge, however, overruled defendants' objection and ordered the reference, saying, "that after a cause had been so long on the docket he had a right to refer it to a referee." The defendants declining to name a referee, on motion of plaintiff's counsel, the judge passed the following order: "Ordered, that it be referred to G. W. Brown, Esq., as referee, to take and report the testimony in the cause." From this order the defendant, Carrie B. McCown, in her own behalf, and as guardian ad litem for the infant defendants, has appealed, in which the legal right of the Circuit judge to pass the above order is questioned and denied. This, in fact, is the only question in the case.

The appellant contends that under section 2210 of the general statutes, plaintiff, by application to the clerk of the court, could have accomplished their purpose in securing the testimony and preparing for the trial as easily and as certainly as by the reference; in fact, that this was the only legal mode of effecting such a result, as it was prescribed by statute, and no doubt intended to meet

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just *such cases. It is true that this section does provide a mode to the end suggested, but this is a privilege allowed to parties, and in no way restricts or affects the powers of the presiding judge in such matters. It is a mode prescribed by which parties on their own motion, and independent of any action of the court, may have their witnesses examined in advance and preparatory to the final hearing, but it does not limit the power of the judge in the exercise of his discretion as to the conduct of the cause before him.

The appellant further contends that the power of the judge as to references is found in section 293 of the code, which does not confer the power exercised here. The section referred to is found in the chapter of the code entitled, "trial by referee," and it specifies the conditions under which the court may order a trial by referees (chap. 5). These conditions are, where the case involves the examination of a long account, or the taking of an account is necessary for the information of the court, or where some question of fact, other than such as arises upon the face of the pleadings, becomes important. It may be admitted that neither of these conditions is present here, and if the court below in the absence of all of these conditions had ordered the case to a referee for trial, there would be much force in appellant's position.

It will be observed, however, that Judge Pressley has not ordered a trial by Mr. Brown, the referee. He has simply ordered that the testimony be taken and reported. The referee under this order is not authorized to report inferences or conclusions drawn from the facts, or the facts themselves; he is simply authorized to report the evidence itself. He is not empowered to exercise any of the functions of a trial judge, as to weighing and sifting the testimony, but is merely to hear the evidence and report it to the court as given before him. When thus understood, it will be seen that the order was not in violation of the section referred to.

As this power exercised by the Circuit judge is not found in the provisions of the code, the next inquiry is, does it exist, and if so, from whence is it derived? While the rules of evidence have generally been the same in equity as at law, yet the manner of taking it has always been different. The ob-

ject of the law is to enable the jury to find
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their verdict, and for this purpose it is *essential that the evidence as a general rule in jury trials should be taken viva voce and before the jury, so that conflicting testimony may be weighed and sifted. But this was not deemed essential in equity causes tried by the judge, and the practice prevailed in England in equity causes of having the testimony taken in writing, before an officer of the court, or some one charged with that duty. See Gres. Eq. Evid., 379, et seq.

This practice, descending from the English courts, prevailed in this state before the abolition of our old Court of Equity, and the consolidation of the two jurisdictions into the Court of Common Pleas, and it was ordinary practice exercised without question by the chancellors of this state when the equity courts existed to have the testimony taken at their discretion by the commissioner. We do not see that the fact that the two jurisdictions have been combined and vested in one court, should require any alteration in the mode of the examination of witnesses as to the rights of parties claiming under the one or the other, and we know of no rule of law, statute or otherwise, which demands a change in this respect, or which negatives the right of a presiding judge in an equity cause at his discretion to have the testimony taken and reported to him by a referee.

No doubt it would be better in most cases that the witnesses should be before the judge, especially where the individual credibility of the witnesses becomes important. In such cases the oral examination and cross examination of the witnesses in the presence of the judge might lead to a different conclusion than the mere hearing of written testimony taken out of court. But whether the one mode or the other should be adopted in a special case, seems to be a matter for the presiding judge. This has been the practice in this state too long to be disturbed now.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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21 S. C. *375

*NORTON v. BRADHAM.

Ex parte STONE & CO.

(April Term, 1884.)

[1. *Constitutional Law* ⇐23; *Homestead* ⇐7.]
Where the debt was contracted prior to the constitutional amendment of 1880, the question of homestead must be determined by the provisions of the constitution as originally adopted.

[Ed. Note.—Cited in Carolina Nat. Bank v. Senn, 25 S. C. 580; Trimmier v. Winsmith, 41 S. C. 115, 19 S. E. 283; Ex parte Goldsmith, 68 S. C. 537, 47 S. E. 984.

For other cases, see Constitutional Law, Cent. Dig. §§ 20, 499; Dec. Dig. ⇐23; Homestead, Cent. Dig. § 9; Dec. Dig. ⇐7.]

[2. *Homestead* ⇐3.]
Section 20 of article I. of the constitution, directing a homestead exemption, is the mere general declaration of a right, which is subsequently defined and limited in section 32 of article II.

[Ed. Note.—Cited in Ex parte Goldsmith, 68 S. C. 536, 47 S. E. 984.

For other cases, see Homestead, Cent. Dig. §§ 4, 5; Dec. Dig. ⇐3.]

[3. *Homestead* ⇐3.]
The legislature cannot change the character, amount, or beneficiaries of the exemptions provided for in section 32 of article II., the matter of exemptions having been fully occupied by that section.

[Ed. Note.—Cited in State v. Parler, 52 S. C. 218, 29 S. E. 651.

For other cases, see Homestead, Cent. Dig. §§ 4, 5; Dec. Dig. ⇐3.]

[4. *Homestead* ⇐3.]
A constitutional provision or statute exempting a homestead from levy and sale is not in derogation of common law, but is remedial in character, and should be so construed as to suppress the mischief and advance the remedy. A dictum in Garaty v. Du Bose, 5 S. C., 500, disputed.

[Ed. Note.—Cited in Rookard v. Atlanta & C. A. L. R. Co., 89 S. C. 376, 71 S. E. 992.

For other cases, see Homestead, Cent. Dig. §§ 4, 5; Dec. Dig. ⇐3.]

[5. *Homestead* ⇐58.]
The object of the constitution was to secure a homestead to the family; the right of homestead was not limited to property owned by the head of the family, nor secured only against his debts.

[Ed. Note.—Cited in McClenaghan v. McEachers, 47 S. C. 449, 25 S. E. 296.

For other cases, see Homestead, Cent. Dig. § 86; Dec. Dig. ⇐58.]

[6. *Constitutional Law* ⇐15.]
Besides, in using the words "to secure the full enjoyment of said homestead to the person entitled thereto, or to the head of any family," the constitution shows that this exemption was for the benefit of some persons other than the heads of families. In a written constitution, force and effect must be given, if possible, to every clause.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. ⇐15.]

[7. *Homestead* ⇐3.]
Therefore, the legislature had full power to enact the act of 1874 (15 Stat., 589), which extends to a wife, living with her husband who owns no property, the protection of a homestead exemption as against her own debts.

[Ed. Note.—Cited in Carolina Nat. Bank v. Senn, 25 S. C. 581; Harrell v. Kea, 37 S. C. 377, 16 S. E. 42.

For other cases, see Homestead, Cent. Dig. § 4; Dec. Dig. ⇐3.]

[8. *Constitutional Law* ⇐12.]
The terms of a constitutional amendment cannot control this court in giving construction to the provisions of the constitution as they originally stood.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. ⇐12.]

[9. *Homestead* ⇐185.]
Where land was sold under partition proceedings, and a judgment creditor of one of the parties sought to enforce his lien against his debtor's share of the proceeds, it was an application to secure payment of the debt by the use of final process, and as against such process a

debtor, in proper cases, is entitled to a homestead exemption.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 354; Dec. Dig. ⟸185.]

[10. *Homestead* ⟸76.]
The proceeds of the sale for partition should be regarded as land, and as such the subject of a homestead exemption.

[Ed. Note.—Cited in Major v. Hunt, 64 S. C. 101, 41 S. E. 816.

For other cases, see Homestead, Dec. Dig. ⟸76.]

[11. *Homestead* ⟸191.]
The debtor was not prevented from the assertion of her claim of homestead against the judgment by failing to claim it in the partition proceedings. Ex parte Strobel, 2 S. C., 309, recognized and followed.

[Ed. Note.—Cited in Ex parte Carraway, 28 S. C. 256, 5 S. E. 597; McMaster v. Arthur, 33 S. C. 515, 12 S. E. 308.

For other cases, see Homestead, Cent. Dig. § 362; Dec. Dig. ⟸191.]

[This case is also cited in McClenaghan v. McEachern, 56 S. C. 350, 354, 34 S. E. 627, and distinguished as to facts.]

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*Before Pressley, J., Orangeburg, October, 1882.

The opinion states the facts of the case. The Circuit decree was as follows:

Mary D. Norton had an interest in some land sold by proceedings in partition in this court, which ordered her share to be paid to her. O. M. Stone & Co. have a judgment against her on a debt older than the constitutional amendment of 1880, which allowed homestead to a married woman out of her separate estate. She is a married woman, but claims homestead on the ground that her husband has no land in which he can claim homestead. They resided on the land, the proceeds of which are now in court, until it was sold for partition.

She is entitled to homestead out of said proceeds, if the act of 1874 on that subject be constitutional. On that point I consider myself bound by the decision of the Appeal Court, which settles that the homestead exemption, before the late amendment of the constitution, could not be extended to personal property, other than was provided for in the constitution of 1868. It follows that it could not be extended to persons, not within the terms of said constitution, and a married woman, while her husband is living, is not the head of a family. She, therefore, cannot claim homestead against any debt contracted by her before the constitutional amendment of 1880.

It is ordered and adjudged, that the rule in this case be made absolute, and that the master of the court, out of the share of Mary D. Norton in said proceeds, do pay to O. M. Stone & Co., or their attorney, the amount of their judgment entered on November 11, 1882, with interest and costs, and the costs of the proceedings herein.

To this decree appellants excepted, and gave notice of appeal to the Supreme Court upon the following grounds:

1. Because the Circuit judge erred in holding that because the Supreme Court of this state has decided that the homestead exemption, before the late amendment to the constitution, could not be extended to other personal property than that named in article II., section 32, of the constitution of 1868, that,

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therefore, *such exemption could not be extended to a married woman whilst her husband is living, she having a separate real estate, and her husband having no real property in which the family homestead could be claimed.

2. Because the Circuit judge erred in holding that a married woman, who has a separate real estate, her husband having no real estate, cannot claim homestead against any debt contracted by her before the constitutional amendment of 1880.

3. Because the Circuit judge erred in not holding that appellant is entitled to her homestead exemption, under the act of 1874 on this subject, the debt of respondents being subsequent to said act, the same not being in violation of any of the provisions of the constitution of 1868.

4. Because the Circuit judge erred in not allowing the claim of homestead set up by appellant.

Mr. James F. Izlar, for appellant.

Mr. Mortimer Glover, contra.

July 22, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The appellant being entitled to an undivided moiety of a certain tract of land in Orangeburg county, instituted proceedings against A. H. Bradham and others for partition of the same. It appearing from the return of the commissioners in partition, as well as from evidence taken by the master, that the land could not be divided without manifest injury to the rights of the parties, a sale was ordered, at which the sum of six hundred and thirty dollars was realized, and the object of this proceeding was to subject the portion of that sum to which Mrs. Norton is entitled to the payment of a certain judgment obtained against her by the respondents for the sum of $240.29, besides costs, on November 11, 1881, upon a debt contracted August 20, 1879. The appellant resisted this application, upon the ground that her half of the proceeds of the sale of said land was exempt under the homestead laws.

It appeared in evidence that Mrs. Norton was a married woman, living with her hus-

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band on said tract of land up to the time *of the sale, and that he had no real estate in which a homestead exemption could be

claimed. The Circuit judge held that she was not entitled to the exemption, inasmuch as she was not the head of a family, and the constitution secures the exemption only to the head of a family; that the act of 1874 (15 Stat., 589) by which the legislature undertook to extend such exemption to a woman having a separate estate "married to the head of a family who has not of his own sufficient property to constitute a homestead," was without constitutional authority, and therefore null and void; and accordingly he ordered that the judgment of respondents be paid out of the proceeds of the sale to which Mrs. Norton was entitled. From this judgment Mrs. Norton appeals on the several grounds set out in the record, which need not be repeated here.

The debt upon which the judgment in favor of respondents was recovered, having been contracted prior to the constitutional amendment of 1880, it is quite clear that the question made by this appeal must be determined by the law as it stood previous to the adoption of that amendment. Gunn v. Barry, 15 Wall. 610 [21 L. Ed. 212]; Cochran v. Darcy, 5 S. C., 125. Indeed, this proposition does not seem to be contested by the counsel for appellant. The fundamental inquiry, therefore, in the case is, whether the act of 1874, cited above, is in violation of the provisions of the constitution as they stood prior to 1880.

There are two provisions in the constitution in reference to the homestead exemption, article I., § 20, which declares that "a reasonable amount of property, as a homestead, shall be exempted from seizure or sale for the payment of any debts or liabilities, except for the payment of such obligations as are provided for in this constitution;" and article II., § 32, which declares that, "the family homestead of the head of each family, residing in this state, such homestead consisting of dwelling house, out-buildings, and lands appurtenant, not to exceed the value of one thousand dollars, and yearly product thereof, shall be exempt from attachment, levy, or sale on any mesne or final process issued from any court. To secure the full enjoyment of said homestead exemption to the person entitled thereto, or to the head of any family, the personal property of such person, of the following character

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(*) * * * not to exceed in value in the aggregate the sum of five hundred dollars, shall be subject to like exemption as said homestead, and there shall be exempt, in addition thereto, all necessary wearing apparel." Then follows the provision as to the character of debts, as to which such exemptions cannot be claimed, and the section concludes in these words: "It shall be the duty of the general assembly, at their first session, to enforce the provisions of this section by suitable legislation."

It will be observed that these two provisions are placed in different articles, one in the article designated "declaration of rights," while the other is in the article designated "legislative department." As might have been expected, therefore, the former is confined to a simple declaration of the general right of exemption, and its concluding words manifestly point to some other provision of the constitution where the general right thus declared is to be specifically defined and qualified. The latter, however, is specific in its terms, and declares to the law-making power what shall be the specific character and qualifications of the right which had been previously declared in general terms. We think, therefore, that in considering the question of the limits of legislative power upon this subject, it would be erroneous to confine our attention to the provisions of article I., § 20, but, on the contrary, that section should be regarded as a mere general declaration of a right which is subsequently defined and limited by the provisions of article II., § 32.

If the framers of the constitution had contented themselves simply with the insertion of section 20 of article I., then, clearly, the legislature would have had the power to enact any law upon the subject, not inconsistent with the general right thus guaranteed. They could have fixed the amount and character of property to be exempted and designated the persons entitled to claim such exemption, as well as the mode of proceeding by which such claim should be asserted. But when the people in their sovereign capacity, acting through a convention, went on and by section 32 of article II., prescribed what should be the nature and character of the homestead and personal property exempted, describing what it should be, the particular kind of property, its amount and value, and to whose benefit it should enure,

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all these matters were *placed beyond the domain of legislative power and nothing was left for the general assembly to do, except what was prescribed in the last clause of the section—pass the laws necessary and suitable "to enforce the provisions of this section." Hence, whenever the legislature undertakes to interpolate other provisions than those prescribed in that section, instead of simply confining themselves, as directed by the organic law, to the enactment of laws suitable for carrying into effect the provisions there prescribed, they are invading a province already fully occupied by the constitution, and transcending the limitation placed upon their powers by that instrument.

Accordingly, as was held in Duncan v. Barnett, 11 S. C., 333 [32 Am. Rep. 476] the legislature had no power to add to the list of articles mentioned in the constitution as exempt from levy and sale, because the supreme law of the land having already specif-

ically designated the articles that should be so exempt, it was beyond the competency of the legislature to disturb or change the provisions which the people in their sovereign capacity had seen fit to make upon this subject. Hence, if a proper construction of the provisions of section 32 of article II., of the constitution, leads to the conclusion that the exemption thereby secured was intended only for the benefit of the head of the family, then the analogy, relied upon by the Circuit judge, between this case and Duncan v. Barnett, supra, would be complete. For if the constitution designates the person to whose benefit the exemption shall enure, then the legislature would have no more power to extend such exemption to a person other than the one so designated, than to extend the exemption so as to cover other property than that specifically designated in the constitution.

The inquiry then is, whether the constitutional provision confines the exemption provided for to the head of the family. Notwithstanding the remarks made by Moses, C. J., in Garaty v. Du Bose, 5 S. C., at page 500, that "statutes exempting property from liability to debts are in derogation of the common law, and not entitled to such a liberal construction as would extend them to those who are not in the spirit or letter of the policy of their enactment," we are not prepared to assent to the doctrine that a statute or constitutional provision exempting

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the homestead from levy and *sale under execution, is in derogation of the common law; for that remark was a mere obiter dictum, and not necessary to any point decided in the case. Lands were not liable at common law to levy and sale for debt, and have only been made so by statute. We are, therefore, rather inclined to regard such legislation as remedial in its character, and to be construed according to the rules applicable in the construction of that class of legislation. One of these rules is, that such legislation must be so construed as to suppress the mischief and advance the remedy.

Now the manifest object of the homestead law is to prevent the mischief which would ensue from having a family "sold out of house and home," and the remedy provided is to exempt the family homestead from liability to sale for debt. The object was to secure to the family, an institution which lies at the very foundation of a state, a shelter—a home. Accordingly, we find that it has been held in several cases in this state that the object of the protection afforded by the homestead clause of the constitution was the family, the head of the family standing as its representative. In re Kennedy, 2 S. C., 227; Bradley v. Rodelsperger, 3 S. C., 227; Moore v. Parker, 13 S. C., 490. Looking at the constitutional provision now under consideration in this light, it would seem to be a matter of small importance whether the head of the family or any other member of the family was the legal owner of the family homestead. That is the thing exempted, and if the sale of it would deprive the family of its home, the mischief which it was designed to prevent would ensue, whether it was sold for the debt of the head of the family or for the debt of some other member of the family to whom such family homestead legally belonged.

Now let us examine the language of the section and see whether it is capable of the construction which we have indicated. The language is—not that the family homestead belonging to the head of each family shall be exempt—but the language is, "the family homestead of the head of each family." Does the word "of" necessarily imply ownership in the head of the family, or may not the language used in the constitution be properly employed to designate a homestead, which though actually owned by the wife, is yet "the family homestead of the head of the

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family," the hus*band, in the sense that it is the place of his residence, of his home, and that of his family? We think it may, and that it should be so construed in order to carry into full effect the manifest object of the provision of the constitution. Again, it will be observed that the language is—not that the homestead shall be exempt from levy and sale for the debts of the head of the family—but it is, simply, that it "shall be exempt from attachment, levy, or sale on any mesne or final process issued from any court."

Still further, it will be noticed that the section proceeds in the following language: "To secure the full enjoyment of *said* homestead exemption *to the person entitled thereto, or* to the head of any family, the personal property of *such person*," of a specified character shall be likewise exempt. Now, the words italicized by us in the language of the section just quoted, seem to us, necessarily, to imply that the exemption provided for is not to the head of the family only, otherwise the words, "to the person entitled thereto or to the head of any family," would be rendered nugatory. This would be in violation of the rule laid down in Cooley on Cons. Lim., at page 58, "that effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory." In the next paragraph this eminent author proceeds to say: "This rule is especially applicable to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the

powers delegated, leaving as little as possible to implication. It is scarcely conceivable that a case can arise where a court would be justifiable in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together."

Under this rule we are bound to give such a construction to this constitutional provision as will give some force and effect to

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*the words, "to secure the full enjoyment of said homestead exemption to the person entitled thereto, or to the head of any family," which cannot be done by supposing that the object was to confer this benefit upon the head of the family only, but which may be done by supposing that the object was to confer this benefit not only upon the head of the family, but also upon some person other than the head of the family. We think, therefore, that the section of the constitution under consideration may well be construed so as to extend the exemption therein provided to a wife living with a husband who owns no property out of which a homestead could be claimed, upon the family homestead owned by her, which may well be designated as the family homestead of the head of the family, the husband, in the sense that it is his place of residence and that of the family of which he is the head—that it is the home of himself and family. We are of opinion, therefore, that the legislature, so far from transcending its powers in enacting the statute of 1874, above cited, was simply carrying out the mandate of the constitution which required the enactment of suitable legislation to enforce the provisions of section 32 of article II., of the constitution.

The argument that the subsequent adoption of the constitutional amendment of 1880, embodying similar provisions to those contained in the act of 1874, is an indication that without such amendment the act would be unauthorized, does not address itself to our minds with much force. As a matter of fact, it is well known to those acquainted with the history of that amendment, that the prime object of it was to extend the articles of personal property to be exempted, so as to embrace every species of that class of property, instead of being confined to the articles specifically designated in section 32 of article II., of the constitution, as well as to remove any doubts that may have been entertained as to whether a person who did not own any real estate—any homestead proper—could claim an exemption of personal property. It is not difficult to conceive of reasons for incorporating these provisions in the constitutional amendment, other than the one suggested; but even if that reason be the true one, it would not be controlling upon this court when called upon to construe the provisions of the constitution as they originally stood.

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*Holding, as we do, that the act of 1874 was not in conflict with any constitutional provision, the question argued by appellant's counsel, as to whether a married woman living with her husband may not be considered as the head of the family, under the circumstances presented by this case, in the sense of these terms as used in the constitution, does not arise, and need not, therefore, be considered.

The other objections urged by respondents' counsel in his argument, to the allowance of the exemption claimed by the appellant, cannot be maintained. It is true that the land was sold, not under execution, but under proceedings for partition, but the judgment creditor is manifestly seeking to subject this property to the payment of his debt by the use of the final process of the court, and this is what the constitution designed to prohibit.

It is also true that the property which the appellant is claiming to have exempted is now in the form of money, and that personal property of that class was not exempt under the provisions of section 32 of article II., of the constitution, as was held in Duncan v. Barnett, supra, and Union Bank v. Northrop, 19 S. C., 473; but it seems to us that it would be a perversion of the spirit and object of the homestead law to apply the doctrine of those decisions to this case. The property was land, and it was converted into money, not for the purpose of changing its character, but solely for the purpose of effecting a division, and the law will, in this case, as it does in many other cases, regard the property, when so converted, still as land.

The objection based upon the ground that appellant made no claim of homestead in the proceedings for partition, is disposed of by the case of Ex parte Strobel, 2 S. C., 309.

The judgment of this court is that the judgment of the Circuit Court be reversed.

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21 S. C. *385

*PREGNALL & BROTHER v. MILLER & KELLY.

(April Term, 1884.)

[1. *Fraudulent Conveyances* ⇐139.]

Where a vendor retains possession of personal property sold to the vendee upon the consideration of a pre-existing debt, in a contest between vendee and a subsequent purchaser the character of such possession is a question of fact which should be submitted to the jury with the burden on vendee of proving good faith, and therefore the Circuit judge erred in charging the jury that a retention of possession in such case was per se fraudulent, as a general

rule, and that the only exception was where possession is retained under a contract of hiring.—Cases reviewed.

[Ed. Note.—Cited in McPherson v. McPherson, 21 S. C. 272; Werts v. Spearman, 22 S. C. 218, 219; Trustees v. Bryson, 34 S. C. 416, 13 S. E. 619.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 441; Dec. Dig. ⟸139.]

[2. *Fraudulent Conveyances* ⟸139.]

Title to personal property changes when it is sold on a credit with possession given, or when sold for cash and left with vendor for vendee's convenience and under his control; therefore it was error to charge that payment of purchase money and delivery of property were both necessary to a change of title.

[Ed. Note.—Cited in Harris v. McCaslan, 31 S. C. 426, 10 S. E. 104; State v. Small, 82 S. C. 95, 63 S. E. 4.

For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 439–442; Dec. Dig. ⟸139.]

Before Witherspoon, J., Charleston, November, 1883.

This was an action by Samuel J. Pregnall & Brother against Miller & Kelly. The opinion states the case. The exceptions were as follows:

1. His honor erred in charging that "that there must be a delivery of the article in order to complete the sale; there must be a payment on the one side and a delivery on the other. You will determine whether there was a delivery or not."

2. His honor being requested by appellants to charge that "if the evidence satisfies the jury that the company had already sold the engine to plaintiffs and nothing further remained for the company to do at the time of the alleged sale to defendants, then the property in the engine had already vested in plaintiffs at the time of such alleged sale to defendants, although the engine had not been removed," erred in not charging as requested, and in qualifying the charge by saying: "I so charge you if the sale to plaintiffs was complete prior to the sale to the other parties."

3. His honor erred in charging, in this case, without explanation or qualification, that "where a party sells a piece of property and remains in possession of it, the law presumes that the sale was fraudulent. That is a presmption of law. If he leaves

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*the property in the visible possession of the vendor, the law presumes that it is left there under some secret understanding between the seller and the buyer. That is the presumption of law."

4. His honor erred in charging that "if the jury find from the evidence that Pregnall & Brother agreed to buy, and did buy, this engine from the Marine and River Phosphate Company, the consideration being a preëxisting debt, and the engine was thereafter left in the possession of the Marine and River Phosphate Company, the jury are instructed that such sale to plaintiffs is null and void, and fraudulent in law, against creditors and purchasers from the company, and the plaintiffs cannot recover."

5. His honor erred in charging that "if the jury find from the evidence that Pregnall & Brother agreed to buy, or did buy, this engine from the Marine and River Phosphate Company, the consideration being a preëxisting debt due Pregnall & Brother, and the engine was thereafter left in the possession of the Marine and River Phosphate Company, from whom thereafter Miller & Kelly bought such engine and took possession thereof without notice of plaintiffs' claim, then the jury are instructed that such prior sale to plaintiffs is null and void, and the latter sale to Miller & Kelly is good and valid, and plaintiffs cannot recover."

6. His honor erred in not submitting it as a question of fact to the jury, whether, under all the circumstances of the case, the sale to Pregnall & Brother was "null and void and fraudulent," and in "instructing" the jury that the "plaintiffs cannot recover," if they find from the evidence that the consideration of the sale to plaintiffs was a preëxisting debt, and the engine was thereafter left in the possession of the Marine and River Phosphate Company, and defendants afterwards bought without notice of the prior sale to plaintiffs—"that in such case such prior sale to plaintiffs was null and void and fraudulent, and the latter sale to Miller & Kelly was good and valid, and plaintiffs cannot recover."

7. His honor erred in holding the rule of law in this state to be: "That where the two concurrent precedent facts exist, to wit, the sale to pay a preëxisting debt, and the debtor thereafter remaining in possession,

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the law presumes a corrupt agreement *between the parties, not to be rebutted by evidence, and holds the transaction fraudulent per se."

8. His honor erred in holding that "the only exception" to what he holds, as above stated, to be the rule of law in this state, is "where there is a bona fide contract for hire between vendor and vendee;" and that it is "only evidenec of hiring that is to be weighed by the jury upon the question of fraudulent sale between debtor and creditor."

9. His honor erred in holding that under the authorities in this state, the Circuit judge was not at liberty to disturb the verdict of the jury, and order a new trial, inasmuch as "there was no evidence as to a contract of hiring in the present case."

Messrs. Hayne & Ficken, for appellants.

The sale to Pregnall & Brother was complete, and title to the engine passed to them from the company prior to the alleged sale to Miller & Kelly. 1 Benj. Sales, §§ 315, 318, 319; 2 Hill Ch., 632. The company did not

have such possession as authorized the legal presumption of a corrupt agreement, and attached to the transaction a character and penalty of fraud. The question should have been submitted to the jury. 1 Hill, 16; 1 Bail., 568; 9 Rich., 407; 10 Rich. Eq., 253; 19 S. C., 478; 2 Hill Ch., 636. In this case the proof showed that the possession after sale was not for the company's benefit. Rice Ch., 300; McMull. Eq., 32; 10 Rich., 72. The result of above decisions is, that the legal conclusion of fraud applies only where the property remains in the possession of the debtor for his own use, profit, or pecuniary advantage. See, too, 2 T. R., 587; 1 Benj. Sales, § 736; 20 How., 460; 2 Strob. Eq., 120. The defendants were not purchasers for valuable consideration, an antecedent indebtedness being the consideration of the purchase. 6 S. C., 159; 10 Paige, 180; 20 Johns., 637; 83 Pa. St., 372; 5 S. C., 90. The judge having erred as to the evidence he was at liberty to consider, his refusal of a new trial was error of law. 14 S. C., 432; 19 Ill., 580.

Messrs. Bryan & Bryan, contra.

The judge correctly charged that in this

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case a sale is not com*plete without delivery when it is for a preëxisting debt and the vendor remained in possession. 2 Mill Con. R., 126; 4 McCord, 306; 1 Hill, 24; 2 Hill Ch., 637; Rice Ch., 300; McMull. Eq., 30; 2 Rich. Eq., 96; 10 Rich., 73. In the case of a subsequent hiring, the vendor does not retain possession as vendor, but under the contract of hiring. 2 Kent., 520, 522; 1 Cranch, 309; 16 Am. Dec., 687. Defendants are not only creditors, but also bona fide purchasers for value. Benj. Sales, 785; 9 Am. Dec., 119; 17 Mass., 110; 7 Am. Dec., 34; 1 DeSaus., 144; 3 Strob. Eq., 134; 13 Rich. Eq., 248; 10 Rich., 332. Any other rule than that charged by the Circuit judge would be a premium upon fraud, and a fraud which would be incapable of proof.

July 26, 1884. The opinion of the Court was delivered by

Mr. Chief Justice SIMPSON. On August 11, 1883, the appellants purchased from the Marine and River Phosphate Company a steam engine, with about 9,627 pounds of iron, then on a certain dredge boat lying in Ashley River, at the wharf of the said company, the consideration of the purchase being a preëxisting debt upon which the said purchase was credited. The appellants at once removed the iron from the dredge boat, but left the engine thereon, for their convenience and at their risk. After this, i. e., about August 27, the respondents, claiming to have purchased the plant of this Marine and River Phosphate Company, located at their works, and including the said engine, took possession of the same. This purchase was made after August 11, the time of appellants' purchase, and was also made in payment of a pre-existing debt due by said company to respondents. Under these circumstances the action below was brought by appellants against respondents for the recovery of the engine, the sole issue in the case being ownership.

The Circuit judge laid down the following legal propositions, in substance, for the government of the jury. That to complete a sale of personal property, there must be a payment of the purchase money on the one side, and a delivery of the article on the other. That in such sale where the vendor continues in possession after the sale as visible owner, the sale is to be considered fraudu-

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*lent and void against creditors. That in such sale, where the consideration is a preexistent debt, and property is left in the possession of the vendor, the sale is null and void; and in this case if they find that the appellants agreed to buy, and did buy the engine, leaving it in the possession of the company, from whom thereafter the respondents bought, taking possession without notice of plaintiffs' claim, then the jury are instructed that such prior sale to appellants is null and void, and the latter sale to respondents is good and valid, and the plaintiffs cannot recover.

Under this charge the jury found for the defendants. A new trial was moved, but was refused, the Circuit judge holding that a sale of personal property in payment of a preexisting debt, the vendor retaining possession required the application of fraud as a legal conclusion, and therefore the verdict, being in accordance with the law, could not be disturbed; and further, as there was but one exception to this rule, to wit, where the vendor remained in possession under a contract of hiring (Pringle v. Rhame, 10 Rich., 75 [67 Am. Dec. 569]), of which there being no evidence in this case, the verdict was not obnoxious to the objection that it should have been left to the jury as a matter of fact to determine the character of the possession, and especially whether any benefit or advantage accrued to the debtor, as the price of the preference given to the creditor.

The appeal involves the correctness of these different rulings and holdings. The main questions to be considered are, 1st. Whether, as held by the Circuit judge, the retention of possession by a vendor of personal property after a sale on consideration of a pre-existing debt is per se fraudulent as a general rule? 2. If so, whether the only exception thereto is, where the possession is retained upon a new contract of hiring as in Pringle v. Rhame?

The leading English cases upon this subject are Twyne's Case, 3 Co., 80, and the case of Edwards v. Harben, 2 T. R., 587. These cases seemed to favor the principle that the

mere fact of the vendor retaining possession after sale will of itself, in every such case, render such sale invalid. But this doctrine to its full extent has never been followed in all of the American courts. In Massachusetts it is held that such retention is only

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prima facie *evidence of fraud, and may be explained by testimony; in other words, that the character of such possession is a question of fact. So in New Hampshire, Connecticut, New York, North Carolina, Georgia, Mississippi, Texas, Wisconsin, Arkansas, Ohio, and Tennessee. See 1 Chit. Cont. (11th edit.), 571, 572, note, and cases there cited. In some of the other states a contrary doctrine is held. In our state, previous to Smith v. Henry, 1 Hill, 16, the cases seemed to hold that retention of possession was a badge of fraud, not conclusive, but prima facie; but if the testimony proved that the sale was founded upon a valuable consideration, the sale could not be impeached except by positive fraud, want of bona fides. Terry v. Belcher, 1 Bail., 568; Garrett v. Rhame, 9 Rich., 407 [67 Am. Dec. 557]; Guignard v. Aldrich, 10 Rich. Eq., 253.

In Smith v. Henry, however, a distinction was drawn between a sale where a present consideration was advanced, and a sale upon a pre-existing debt; the former being left under the principle suggested above, and the latter held fraudulent as a conclusive presumption of law, the retention of possession being regarded in law as the inducement to the sale, and the cause of the preference given to the particular creditor. In this case Chancellor Harper attempted to reconcile the conflict which seemed to exist in the previous cases, by a close examination of the principle upon which it had been held in some of them, and especially the English cases, supra, that retention of possession after sale was per se fraudulent. He said that this was not, as some seemed to suppose, because the debtor being left in possession, he thereby obtained a credit upon the faith of property which he was not entitled to, misleading subsequent creditors. Nor was it because his antecedent creditors were lulled into a false security. But it was because the debtor had obtained some benefit to himself as the price of the preference given, evidenced by his retaining possession, and using it as his own. Such being the principle of these decisions, it was urged that it did not apply necessarily to a sale where the consideration was valuable, and paid down at the time, because there could be no necessary inference in such case that the sale was for the benefit of the debtor, although he retained possession thereafter. Where, however, the sale was in consideration of a pre-exist-

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ing debt ex*tinguished thereby, and yet the debtor retained possession, the inference that the debtor had stipulated for some benefit or advantage to himself was so irresistible, that in such cases such possession was held per se evidence of fraud. Hence the distinction which he drew in that case, between sales upon a present consideration advanced at the time, and sales in payment of a pre-existing debt, holding the latter invalid upon the mere fact of retention of possession by the debtor, and the former open to explanation.

Thus stood the law in this state until Jones & Briggs v. Blake and wife, 2 Hill Ch., 636, followed by Pringle v. Rhame, 10 Rich., 74 [67 Am. Dec. 569] in which the court modified the stringent rule laid down in Smith v. Henry, as to a sale upon a pre-existing debt, with possession retained under a contract of hire. Upon examination of this case, however, it will be seen that this modification was not based simply on the ground that possession was retained by virtue of a contract of hiring, but because the fact of hiring showed that such retention was not the price of a preference which the vendee had obtained over other creditors, but was a bona fide possession obtained by the debtor, independent of the sale, and having no necessary connection therewith. Such being the fact, in applying Jones & Briggs v. Blake and wife, and Pringle v. Rhame, we must not confine ourselves to their facts, but we must look to the principle upon which they were decided. Guided by this principle, we cannot say that the only exception to Smith v. Henry is a case of hiring; on the contrary, in every case where possession is retained, if it is not retained as a benefit to the debtor, but under an independent and subsequent bona fide contract, it is open to explanation.

This seems to be the law of this state, and now since Jones & Briggs v. Blake and wife, and Pringle v. Rhame, whether the consideration be the payment of a pre-existing debt or a present consideration, the cases stand on the same platform, i. e., the character of the possession becomes a question of fact and must be submitted to the jury, with the onus upon the vendee. Such being our conclusion as to the principle applicable to the question involved here, we think the Circuit judge was in error in holding that retention of possession after sale upon a pre-exist-

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ing debt *was conclusive per se of fraud, as a general rule, there being but one exception, i. e., where the possession is founded upon a contract of hiring. We think the character of the possession in this case should have been submitted to the jury in accordance with the views herein above, the invalidity of the sale being dependent upon the fact whether the retention of possession of the vendor was for his benefit or the price of a preference given to the vendee.

We think, too, that that portion of the charge of the judge in which he held that to complete a sale, both payment of purchase

money and delivery of property were necessary, was erroneous. Change of title takes place when the bargain is struck, and may pass before payment and before actual delivery; where property is sold on a credit with possession given, or where it is sold for cash and yet left with the vendor for vendee's convenience, and subject to his control, title changes and the sale is complete.

It is not necessary to consider the other questions discussed by the counsel.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and the case be remanded.

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BROWNLEE v. MARTIN.

(April Term, 1884.)

[1. *Mortgages* ⇐37.]

The rule that a parol agreement is merged in a subsequent written agreement on the same subject, and that the terms of such agreement cannot, in the absence of fraud, mistake, or ambiguity, be varied or contradicted by parol testimony of a previous understanding, does not apply where a deed absolute on its face was executed merely as a security for a debt, and such a deed cannot be converted into an absolute conveyance by any subsequent written agreement, unless such agreement was based upon a sufficient consideration and is shown by the mortgagee to have been fairly made, without undue influence on his part.

[Ed. Note.—Cited in Tant v. Guess, 37 S. C. 498, 16 S. E. 472; Hall v. Hall, 41 S. C. 167, 19 S. E. 305, 44 Am. St. Rep. 696; Welborn v. Dixon, 70 S. C. 114, 49 S. E. 232; Surasky v. Weintraub, 90 S. C. 532, 534, 73 S. E. 1029; Leland v. Morrison, 92 S. C. 511, 512, 75 S. E. 889, Ann. Cas. 1914B, 349; Bryan v. Boyd, 100 S. C. 401, 84 S. E. 993.

For other cases, see Mortgages, Cent. Dig. § 98; Dec. Dig. ⇐37.]

[2. *Evidence* ⇐441.]

But where there are no allegations in the pleadings of an agreement different from that which was executed in writing, the Circuit judge correctly ruled that the written paper must be considered as containing all the terms of the agreement between the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723–1763, 1765–1845, 2030–2047; Dec. Dig. ⇐441.]

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[3. *Appeal and Error* ⇐837.]

*The correctness of a charge will be considered with reference to the case made, and not as an abstract proposition.

[Ed. Note.—Cited in Wallace v. Columbia & C. R. Co., 37 S. C. 343, 16 S. E. 35.

For other cases, see Appeal and Error, Cent. Dig. §§ 3262–3272, 3274–3277, 3289; Dec. Dig. ⇐837.]

[4. *Appeal and Error* ⇐232.]

Where an agreement in terms declared that "this paper is not a mortgage, but a contract for a conditional sale," and the defendant in her answer designated it as "a contract for a conditional sale," her exception to the charge of the judge, that "the paper was a conditional sale," cannot be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1426, 1430, 1431; Dec. Dig. ⇐232.]

[5. *Equity* ⇐378, 381; Jury ⇐13.]

In action for the recovery of real property, the defendant set up as a defence that plaintiff had agreed to convey to her this land, and also another tract, upon payment of a stated amount, and had subsequently taken such other tract in full payment of the amount so stipulated. *Held*, that this defence raised an equitable issue which should have been decided by the judge himself; and this issue having been left to the jury, and judgment having been entered upon their verdict, the judgment was reversed and a new trial ordered.

[Ed. Note.—Cited in Mitchell v. Hamilton, 98 S. C. 293, 82 S. E. 427.

For other cases, see Equity, Cent. Dig. §§ 795, 813; Dec. Dig. ⇐378, 381; Jury, Cent. Dig. § 59; Dec. Dig. ⇐13.]

Mr. Justice McGowan concurred in the result.

Before Kershaw, J., Abbeville, October, 1883.

This action was commenced January 6, 1882. The opinion fully states the case.

[For subsequent opinion, see 28 S. C. 364, 6 S. E. 148.]

Messrs. Perrin & Cothran and E. B. Gary, for appellants.

The general denial of the answer put in issue every fact which went to make up the title claimed by plaintiff. 17 S. C., 287; 11 Id., 521; 12 How., 147; 11 Rich. Eq., 582. This issue being made, the court was bound to admit parol testimony as to the truth of the allegation. The original deed is shown to have been a mortgage, and therefore it must always remain such. McMull. Eq., 1. It may be shown by parol to have been intended as a mortgage, and its character as such cannot be changed, except by sale of the equity of redemption bona fide and for valuable consideration. The subsequent agreement for a conditional sale is therefore void. 3 Rich. Eq., 153; 11 Rich. Eq., 582; 12 How., 147; 3 J. J. Marsh., 355; 2 Cow., 324; 7 Johns. Ch., 40.

Mr. W. H. Parker, contra.

The contract between the parties here was not a mortgage, but a conditional sale. Jones Mort., §§ 258, 261–263, 272; Herm. Mort., § 155; 18 Cal., 118; 80 Ill., 190; 9

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Ga., 151; 45 Id., *628; 5 Mylne & C., 304; 2 Edw. Ch., 144. The essentials of a mortgage are wanting. There was no loan. Jones Mort., §§ 264–269, 275, 325; 19 Wend., 520; Herm. Mort., 143, 150, 155, 169. Here, there was neither right to foreclose, nor right to redeem. Herm. Mort., § 149; 7 Cr., 218; Jones Mort., § 259. No personal obligation by Mrs. Martin to repay the money. Hill Real Prop., 555; Jones Mort., 331, 332; 19 S. C., 126. Mrs. Martin was not the grantor. In a mortgage, the defeasance must be in favor of the grantor. Jones Mort., §§ 241, 268; 14 Pick., 479; Herm. Mort., § 158; 2 Edw. Ch., 138. But if the deed was a mortgage, its character has been changed by the subsequent agreement under seal. Jones Mort., § 340.

Parol evidence cannot be received to vary, contradict, or modify a written instrument. 1 Greenl. Evid., § 248; 1 DeSaus, 340; 1 McCord Ch., 505; 1 Rich. Eq., 91; 3 Id., 153; 6 S. C., 353; 18 Id., 289; 19 Id., 121; Ibid, 607; 3 Metc., 548. Besides, the evidence offered does not support any of the allegations of the answer. Code, § 171. An equitable defence cannot be made under a general denial. 4 S. C., 49; Jones Mort., § 277. But the instrument was properly construed by the court, and not referred to the jury. 3 S. C., 251; 19 Id., 124. This was an action at law, and its character could not be changed by defendants' equitable defence if pleaded. 18 S. C., 232. The judge passed upon all the facts which would raise an equitable defence.

September 9, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. This is an action to recover the possession of a certain tract of land in Abbeville county, known as the "River Place." The complaint simply alleges, in general terms, that the plaintiff has title, without setting out the sources of his title.

The answer sets up three defences. 1. A general denial of plaintiff's title. 2. That at a sale of the real estate of one Cunningham, deceased, made by his executor, under an order of the court, on December 3, 1877, the defendant, Josephine, bid off the "Home place" and the "River place" (the latter being the tract in controversy) at the sum of $1,609.75; that the said Josephine "was the principal devisee of the said J. J. Cunning-

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ham, and *thereby purchased the property at a much less sum than the plaintiff, or any one else, could have done; and that knowing this fact, and seeing that the said Josephine A. Martin could not comply with her bid, the plaintiff proposed to the said defendant to have her bid transferred to him upon certain conditions which were agreed upon, and the bid was so transferred, as by reference to the said agreement or contract for conditional sale, a copy of which is hereto appended and made a part of this answer, will more fully appear." That "by the terms of the said contract for conditional sale, plaintiff agreed to make good and sufficient title to the said premises unto the said J. A. Martin, if she, her heirs, &c., paid the plaintiff on or before December 3, 1879, the amount of the said bid, with interest. The plaintiff in the mean time received titles from the executor upon defendant Josephine A. Martin's bid. That in pursuance of said agreement in 1878 the said defendant, J. A. Martin, paid the interest on one-half of the said bid, to wit, $56, and also $15, the costs of the papers, title, deed, &c., from the executor to the plaintiff."

The third defence is stated in the answer as follows: "That on December 1, 1879, before the payment of the said amount was due, the plaintiff having found a purchaser for the Home place, upon which the defendants were then living, came to the defendant, J. A. Martin, and proposed to her that if she and her husband would move from the Home place to the River place, that he, the plaintiff, would take the Home place for the debt and give them good and sufficient title to the River place, which they did. That the plaintiff then sold the Home place for $2,000, an advance of $400 on what the bid was for both places. That the said defendant then had an opportunity of borrowing the money and paying off the whole amount, but plaintiff said to take the River place and be sure of a home, and so defendant and her husband, relying on plaintiff's agreement, moved to the River place on January 6 following, and have been there ever since. That the said defendant, J. A. Martin, has made valuable improvements on the place and cultivated and used the same as if her own property. That the said plaintiff has promised repeatedly to give the defendant, J. A. Martin, title to the said place, but has never done so."

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*The written agreement above referred to bears date January 28, 1878, and after reciting the fact that the two tracts of land above mentioned had been bid off at the sale by the defendant, Josephine, at the sum above mentioned, and that "the said Josephine Martin not being at the time ready to comply with the terms of the sale of the said land, transferred and assigned her bid or purchase to John E. Brownlee, of said state and county, to whom the said James S. Cothran (who was the executor of Cunningham) has made a conveyance of the same, dated the third day of December, in the year of our Lord one thousand eight hundred and seventy-seven," contains the following covenants: "That if the said Josephine Martin, her heirs, executors, or administrators, shall well and truly pay to the said John E. Brownlee, his executors or administrators, the said sum of sixteen hundred and nine dollars and seventy-five cents, with lawful interest from the date of the deed aforesaid, on or before the third day of December, in the year of our Lord one thousand eight hundred and seventy-nine (A. D. 1879) in full, then, and in such case, the said John E. Brownlee covenants to and with the said Josephine Martin, that he or his heirs at law or devisees, will convey the land aforesaid in fee simple, and according to the same title and interest as he has received from James S. Cothran, to the said Josephine Martin, her heirs and assigns forever." Then follows a covenant on the part of Josephine Martin, that she and her husband will not commit waste upon the said land, after which is a covenant in the following language: "It is further distinctly understood, and this is the agreement, that this paper is not a mortgage, but a contract for a conditional sale, and that if the said Jose-

phine Martin shall not pay the sum of money aforesaid, according to the agreement aforesaid, the said John E. Brownlee, his heirs and assigns, shall have and take possession of the tracts of land aforesaid on the day or thereafter on default of payment shall be made, as aforesaid, as his own absolute property in fee simple forever, under the deed made to him by James S. Cothran aforesaid."

The cause came on to be heard before Judge Kershaw and a jury, when the deed from Cothran, as executor, to the plaintiff was offered in evidence, as well as the con-

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tract above set forth. *No other testimony offered at the trial is set out in the "Case," but the judge's charge to the jury, which seems to be set out in full, contains a statement of the testimony adduced at the trial. From this statement it appears that the deed from Cothran to plaintiff, though dated December 3, 1877, was not actually executed until the 24th day of that month; that Mrs. Martin, who was residing at the Home place when the written contract above referred to was executed, continued in possession of both of the tracts of land until early in January, 1880, when she removed to the River place, and that when she moved out one Holland, to whom the plaintiff had sold the Home place for $2,000 between December 3 and the time when Mrs. Martin moved out, took possession.

The judge states that the plaintiff offered testimony tending to show that he took the bid of Mrs. Martin off her hands at her request, and without any condition or qualification whatever; that the subsequent written agreement of January 28, 1878, was made at the request of the defendant, and as a favor to her; that after the expiration of the time limited by the agreement for the payment of the money, she gave up the purchase, and that he, from kindness merely, allowed her to remove to the River place, consenting that she should remain there two years free of rent; and he instructed the jury that if they believe this testimony their verdict should be for the plaintiff.

The defendant, on the other hand, offered parol testimony tending to show that the agreement between her and the plaintiff was that he was to advance the money to pay for the land and take the title as security for such advance, and that he was to reconvey to her, upon payment of the purchase money, the written agreement above referred to being executed merely for the purpose of securing to her the right to a reconveyance when the purchase money was refunded to him, and giving to her two years within which to make such payment. This testimony was received subject to objection, and the judge ruled that it was incompetent because it tended to change the character of the written agreement, in which there was no ambiguity and nothing which seemed to require explanation; saying to the jury that, "whatever may have been the terms of the

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negotiations which preceded *this instrument, the parties thereto being competent to contract, not deceived by any fraudulent artifice or concealment, nor misled by any mistake, have themselves put in writing, under seal, with great solemnity, what they understood the contract to be. That instrument must be considered as containing the whole contract, and cannot be varied or contradicted by any verbal agreement upon the same subject which preceded it."

He therefore instructed the jury that the written agreement, taken in connection with the previous conveyance to the plaintiff, makes out an absolute title in the plaintiff, duly qualified by the terms of that paper; that such agreement was not a mortgage, but a conditional sale; that time was of the essence of the contract, and if Mrs. Martin failed to pay or tender the money at the day appointed, December 3, 1879, the title to the land became absolutely vested in the plaintiff, without qualification, unless before that time some new relations were established between the parties by a valid contract. The judge then brought to the attention of the jury the fact that the defendant claimed that there was such an additional contract, alleged by the defendant in her answer, stated above as the third defence, and he instructed the jury that if such allegations were established, and such additional contract was made before December 3, 1879, then the plaintiff could not recover; but if no such additional contract was made, or if made after December 3, 1879, when the defendant had no rights under the contract for a conditional sale, which could form the basis of a valid verbal agreement, then the verdict must be for the plaintiff.

The jury rendered a verdict for the plaintiff, and judgment being entered upon the verdict, the defendants appeal upon the following grounds: "1. Because, it is respectfully submitted, his honor erred in charging the jury that the agreement, executed January 28, 1878, taken in connection with the previous conveyance, must be considered as containing the whole contract, and cannot be varied or contradicted by any verbal agreement, upon the same subject, which preceded it. 2. Because, it is respectfully submitted, his honor erred in refusing to hold that it was competent to show that the deed of December 3, 1877, executed on 24th, absolute on its face, was in fact a security for a loan,

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*and thence a mortgage, and if so shown, that no subsequent agreement, verbal or written, not supported by valuable consideration, is competent to even change its character. 3. That his honor erred in holding that the agreement of January 28, 1878, was a conditional sale. 4. Because the defence set

up in the answer of defendant was equitable in its nature, and the judgment cannot be entered upon the verdict of the jury."

We do not think that the Circuit judge charged exactly what is imputed to him in the first ground of appeal. He did not charge that the written agreement of January 28, 1878, taken in connection with the previous conveyance, constituted the whole contract between the parties, but his charge was that the written agreement constituted the whole contract between the parties, and that such agreement, taken in connection with the previous conveyance, "makes out an absolute title in the plaintiff to the land in dispute at the date of the agreement, duly qualified by the terms of that paper." So that, strictly speaking, the point raised by this ground of appeal is not properly before us. But waiving this, we will consider whether there was any error in the charge, as we understand it, in connection with the second ground of appeal.

It is true, as contended for by the respondent, that it does not appear that there was any request by appellant to charge the proposition of law as contended for by appellant in the second ground of appeal, but this ground may well be regarded as really an exception to the ruling of the Circuit judge as to the competency of the parol testimony adduced by the appellant for the purpose of showing the understanding between the parties at the time the bid was transferred to plaintiff and the title made to him. The judge held such parol testimony incompetent, because the parties having subsequently entered into a written agreement upon the same subject, all their previous negotiations and understandings must be regarded as merged in such written agreement, and that, in the absence of fraud or mistake, or ambiguity in the terms of such written agreement, it must be regarded as containing the whole contract between the parties, and that its terms cannot be varied or contradicted by

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any parol testimony as to *any understanding between the parties which preceded the execution of such agreement.

While this is, no doubt, true as a general proposition, and well sustained by the authorities cited in respondent's argument, yet we do not think it true in a case like the one under consideration. The law looks with jealousy and suspicion upon all dealings between the mortgagee and the mortgagor, from the supposed influence which the former has over the latter. If therefore a deed, absolute on its face, is shown (as it may be shown by parol evidence) to have been executed merely as a security for a debt, and not intended as an absolute transfer of title, the terms of such agreement or understanding entered into at the time of the execution of the deed are not merged in any subsequent written agreement entered into by the parties. If it is once shown that the deed, though absolute on its face, was, at the time it was executed, only intended as a security for a debt, it will operate only as a mortgage, and it cannot be converted by any subsequent written agreement into an absolute conveyance, unless such subsequent agreement is based upon a sufficient consideration, and is shown to have been fairly made, without undue influence by the creditor; and the burden of showing this is upon the mortgagee. In other words, it must amount to a sale of the equity of redemption, fairly made, upon sufficient consideration. These views are fully supported by authority. Russell v. Southard, 12 How., 139 [13 L. Ed. 927], recognized in Lee v. Lee, 11 Rich. Eq., 582, and followed by Babcock v. Wyman, 19 How., 289 [15 L. Ed. 644]; Villa v. Rodriguez, 12 Wall., 323 [20 L. Ed. 406]; Morgan v. Shinn, 15 Wall., 105 [21 L. Ed. 87]; Peugh v. Davis, 96 U. S., 332 [24 L. Ed. 775]; Brick v. Brick, 98 U. S., 514 [25 L. Ed. 256].

But in considering the correctness of a ruling or charge of the Circuit judge, we must look at it, not as an abstract proposition, but with reference to the case as made by the pleadings and evidence. In this case the defendant, by her answer, did not set up any agreement or understanding entered into between herself and the plaintiff, at the time her bid was transferred to him, different from that contained in the written agreement of January 28, 1878, but, on the contrary, she expressly refers to and relies upon such agreement as containing the terms and conditions upon which her bid was transferred,

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and to that, therefore, she must *be confined. There was no room for parol evidence of any other agreement, for none such was set up in defendant's answer, but, on the contrary, her second defence is based solely upon the written agreement of January 28, 1878. While, therefore, we do not agree with the Circuit judge in the reason given by him for ruling the parol testimony as to a previous understanding between the plaintiff and the defendant incompetent, we think his ruling was correct, for the reason which we have indicated. It follows necessarily from this that there was no error in the charge that the written agreement of January 28, 1878, must be considered as containing all the terms of the agreement between the parties.

The next inquiry is that raised by the third ground of appeal, to wit: whether there was any error in charging the jury that the agreement of January 28, 1878, was a conditional sale. We do not see how there can be any question upon this point. The parties have expressly said in the agreement itself: "this paper is not a mortgage but a contract for a conditional sale," and the defendant herself in her answer has twice designated the paper as a contract for a conditional sale, and this ought to be conclusive.

The questions whether there was any error in that part of the charge where the jury were instructed "that time was of the essence of that contract, and if defendant, Mrs. Martin, failed to pay the price stipulated, or at least to tender the same, on or before the day fixed for the payment (December 3, 1879), the land became vested in plaintiff absolutely, without qualification, unless before that time some new relations between the parties were established in relation to the land by a valid contract;" and whether there was not a practical and substantial compliance with the terms of the contract, by the sale of the Home place to Holland, and the consequent arrangement for defendant to remove from that place to the River place, have not been raised by any exception, and are not before us for consideration. We are not, therefore, to be regarded as intimating any opinion, either one way or the other, as to these points.

The only remaining question is that presented by the fourth ground of appeal. We think that it has been settled by a series of decisions in this state, that while a judge

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may submit issues of *fact arising in a case in chancery to the jury, yet this is only for the purpose of enlightening the conscience of the judge, and the verdict of the jury in such a case is not final or controlling, and does not warrant the entry of judgment thereon. The parties are entitled to the opinion of the court itself, both upon the issues of fact and law, and the judgment to be rendered in such a case must be the result of the conclusions of the judge as well on the facts as on the law. It is error, therefore, to enter judgment upon the verdict. Flinn v. Brown, 6 S. C., 209; Gadsden v. Whaley, 9 Id., 147; Sloan v. Westfield, 11 Id., 445; C. C. & A. R. R. Co. v. Earle, 12 Id., 53. The same rule applies even when the action is commenced for the enforcement of a mere legal right, but in which defences are interposed raising equitable issues, so far as the trial and determination of such issues are concerned. Adickes v. Lowry, 12 S. C., 97.

The case now under consideration belongs to the latter class. Like Adickes v. Lowry, it was an action to recover possession of real estate, in which the plaintiff sought to enforce a mere legal right; but the defences interposed were both legal and equitable in their character. The first defence presented merely legal issues and was therefore properly triable by a jury. But the other two defences were plainly equitable in their character. So far as the second defence was concerned, the Circuit judge practically determined that by his instructions to the jury; but the third defence seems to have been left wholly to the jury, and their verdict was accepted as final and conclusive, for it does not appear that the judge ever passed upon the question of fact raised by this defence, or rendered any judgment or opinion of his own thereon, but, on the contrary, simply left it to the jury, and the judgment was entered upon their verdict. Upon this ground, therefore, the case must go back.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

Mr. Chief Justice SIMPSON concurred.

Mr. Justice McGOWAN. I concur in the result. The jury found every issue of fact

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for the plaintiff. But as the defence *involved in the alleged verbal agreement when Mrs. Martin removed to the River place, was equitable in its nature, it seems that, according to the case of Adickes v. Lowry, the Circuit judge, in the exercise of his chancery powers, should have himself determined it, and not submitted it to the jury. The record discloses no objection at the trial to that issue going to the jury along with the other questions of fact; but possibly the judge, even against the consent of the parties, should have decided it himself, and not having done so, the case must go back upon that point alone.

Judgment reversed.

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21 S. C. 403

HUGUENIN v. COURTENAY.

(April Term, 1884.)

[1. *Appeal and Error* ⇐1010.]

A finding of fact by the Circuit judge in an action for specific performance sustained, such finding not being shown to have been without evidence to support it, or manifestly against the weight of the evidence.

[Ed. Note.—Cited in Good v. Jarrard, 93 S. C. 245, 76 S. E. 698, 43 L. R. A. (N. S.) 383.

For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982, 4024; Dec. Dig. ⇐1010.]

[2. *Specific Performance* ⇐26.]

After contract for the sale of a leasehold interest in land to commence in futuro, but before the purchaser had right of entry, or was entitled to the possession and use of the property, a considerable part of the land was washed away by an ocean storm. *Held*, that the loss must fall on the vendor, who was still the owner, and that he was not entitled to a specific performance of the contract.

[Ed. Note.—Cited in Good v. Jarrard, 93 S. C. 240, 76 S. E. 698, 43 L. R. A. (N. S.) 383.

For other cases, see Specific Performance, Cent. Dig. § 59; Dec. Dig. ⇐26.]

[3. *Specific Performance* ⇐59.]

Where one agreed in July to sell his leasehold interest in land at a stated price in cash "possession to be given November 1, provided I can obtain the consent of the present lessee," the agreement was not an absolute contract of sale, but an executory agreement to be completed on November 1.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 181; Dec. Dig. ⇐59.]

Before Wallace, J., Charleston, July, 1883.

This was an action by Cornelius J. Huguenin against Wm. A. Courtenay, commenced in 1882.

The Circuit decree was as follows:

This action was brought to compel the specific performance of the following contract: "I hereby agree to sell you lot on front beach of Sullivan's Island, known as Lot No. 16, on

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a rough *plat of Moultrieville, for the consideration of $300, cash; possession to be given November 1, 1881; provided I can obtain the consent of the present lessee." This contract was made between the parties to this action in July, 1881. The defendant, the purchaser, refuses to perform because, as he alleges, he desired to build a dwelling-house on the lot, and that its suitability for this purpose was destroyed by the destruction of a large proportion of the lot by the great storm of August, 1881.

The controversy between the parties involves, first, a question of fact: to what, if any, extent had the premises been injured by the storm? It will be observed that the terms of the contract refer to "a rough plat of Moultrieville" for the description and location of lot No. 16. There was no direct proof of the dimensions of lot 16 as laid down on this plat. The statute (Gen. Stat., p. 30, § 71) provides that the lots on Sullivan's Island shall be of the dimensions of one-half acre. It may be, therefore, safe to infer that this lot was laid down according to the statutory provision, and was a half acre lot—that is, a lot of that size above high water mark. For it is impossible to conceive that in providing that the lots on Sullivan's Island shall consist of half an acre, the legislature contemplated that those lots on the front beach should include as part of their dimensions land covered twice daily with the waters of the sea.

The contract then relates to a lot of the dimensions of half an acre. There can be no doubt from the testimony that on the 1st of November, 1881—the time when, according to the contract, the delivery was to be made—lot No. 16 was of much smaller dimensions than that. Nor is there any doubt that this reduction in size had been effected by the washing away of sand and the consequent lowering of the level of the surface and the covering of the lot by the waters of the sea. And that all this was the result mainly of the action of the winds and waves during the great storm of August of that year.

As to the extent of the reduction, there is some conflict in the testimony, but I think it may be fairly gathered from a comparison of the statements of the witnesses that half, or nearly half, of the lot was under the sea. While the part of the lot remaining above high water would probably furnish space

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enough upon *which a dwelling-house and out-buildings might be built, yet the weight of the testimony is to the effect that, by its reduction in size, the value of the lot as a building site has been materially impaired, and rendered unsuitable for the purposes of the defendant. It has been made impossible for him to conform to the requirements of the statute as to the size of lots upon which dwelling-houses may be erected. Gen. Stat. supra. It must be borne in mind that that part of the lot which is covered by the sea is, for that reason, regarded by the law as destroyed as property. "The sea makes all that it covers common," hence in this case there is an actual destruction, not physical—for the land remains under the sea—but "legal and beneficial." Rol. Abr., 236; Coogan v. Parker, 2 S. C., 268 [16 Am. Rep. 659].

Notwithstanding the substantial impairment of the value and fitness of the lot, to the extent above described, as a building site, is the defendant still bound to perform his contract? The answer to this question depends upon the nature of the plaintiff's tenure at the time of the sale. If at that time the plaintiff had held a freehold estate in the land, the contract would have operated to transfer to the defendant an equitable title to the fee. In the case of Landrum v. Hatcher, 11 Rich. 54 [70 Am. Dec. 237] it was held that land bid off at sheriff's sale, after the purchaser had made his will, goes not to the devisee or legatee, but to the heir at law, to whom the sheriff's deed should be made. The decision is rested on the ground on which Lord Eldon rested his decision in Paine v. Meller, 6 Ves., 349, to wit: "That when a contract is made for the sale of land, the vendor is in equity immediately deemed a trustee for the vendee of the real estate, and the vendee is deemed the trustee for the vendor of the purchase money. Under such circumstances, the vendee is treated as the owner of the land, and it is devisable and descendible as his real estate."

The reason, probably, for the rule is, that when a contract for the sale of land is made, the transfer of a fee is contemplated by the parties. By such a contract in writing an equity in the fee can be, and is, actually transferred at the time to the vendee. The fee and the use being divisible, the fee may immediately pass, while the use, by stipulation, may remain in the vendor, or in his lessee. The land, to all intents and pur-

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poses, has become *by the sale the property of the vendee, notwithstanding the use may be temporarily the right of another.

In this case the plaintiff did not have a freehold in the lot of land which was the subject of the contract. The statute enacts: "The present owners of lots on Sullivan's Island, wherever dwelling-houses have been erected, or such citizens of the state as may hereafter build dwelling-houses upon the said island under the license granted by the pre-

ceding section, shall be taken and deemed to have, and shall enjoy, the same rights, titles, and interests as tenants from year to year in and to the lots now owned by them respectively, upon condition, nevertheless, that they shall deliver up the same when demanded by the governor of this state for the time being. * * * And the titles thereto shall be assignable, transferable, transmissible, and distributable as estates for years," &c. Gen. Stat., supra.

This statute allows no greater than a leasehold estate in Sullivan's Island lots. Such an estate consists in the use and possession of the land. 4 Kent, 85. It is personalty going to the administrator and not to the heir. No estate before entry or term commences. 1 Wash. Real Prop. (4th ed.), 439, 440, 442, 604. So at the time of the contract between the parties to this action no fee passed to the vendee, for that was in the state. No equity was acquired by the purchaser that made the land actually his. The leasehold estate, which was all that the plaintiff could have in the lot, could not at the time of the contract pass to defendant. For such an estate consists in the use and possession, and that, by the terms of the contract, was to remain in lessee of plaintiff at least until November following. At the time of the contract, the defendant acquired an equity to compel the plaintiff to deliver all he bought at a future day. Before that day the storm destroyed lot No. 16, as represented on the plat referred to in the contract, and it was no longer possible for plaintiff to deliver possession of the lot as bought and sold. The storm having put it out of the power of plaintiff to perform, the equity of defendant ended, for a Court of Equity will not undertake to compel the performance of an impossibility. 3 Mees. & W., 78.

In that case plaintiff was lawfully in pos-

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session of a residue *of a term for six years of and in a certain dwelling-house and premises, &c., and of certain furniture, &c., on the same. The plaintiff agreed to sell and the defendant to buy the lease, &c., and it was agreed that defendant should have possession on or before the 1st of January afterwards, on payment of price, &c. On the evening of the day of agreement the principal dwelling-house, &c., was destroyed by fire. Plaintiff sued for price. The defendant pleaded non-fulfilment of agreement and breach of covenant for possession. The court gave judgment for the defendant. Lord Abinger, C. B., said: "I think upon the form of the pleadings the plaintiff was certainly bound really to complete the contract, and that in the very terms stipulated for. Whereas what had taken place, the goods in a great measure being destroyed by fire, put it out of her power to do so, and I think, therefore, that the contract could not afterwards be binding on these parties." The other judges concurred, upon the ground that it was impossible for the plaintiff to complete the contract by reason of the destruction of the property, and the contract was therefore rescinded.

In this state, even after a leasehold estate commences, and the tenant is in possession, a destruction of the subject-matter of the lease by act of God or public enemy, rescinds the contract, and the parties are no longer bound. Bayly v. Lawrence, 1 Bay, 499; Ripley v. Wightman, 4 McC., 448; Coogan v. Parker, 2 S. C., 259 [16 Am. Rep. 659]. In the case of Ripley v. Wightman, supra, the following language from 6 Bacon, page 50, is cited as ground for the decision: "It seems to be extremely reasonable that if the use of a thing be entirely lost or taken away from the tenant, the rent ought to be abated or apportioned; because the title to the rent is founded on the presumption that the tenant enjoys the thing during the contract; and, therefore, if part of the land be surrounded or covered by the sea, this being the act of God, the tenant shall not suffer by it; because the tenant, without default, wants the enjoyment of part of the thing which was the consideration of his paying the rent."

It is not necessary to point out the distinction between the sale of a leasehold estate and the sale of specific personal chattels, as to the time and conditions of the transfer of the property.

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*It is ordered and adjudged that the complaint in this action be dismissed.

The plaintiff appealed to this court upon the following exceptions: 1. Because his honor erred in holding that the building of a house upon a Sullivan's Island lot of less than a half acre, would not be in conformity to the provisions of the statute regulating the tenure of such lots. 2. Because his honor erred in not holding, from the evidence, that there was sufficient of said lot left, in November, 1881, upon which the plaintiff could have erected a house such as is usually built upon Sullivan's Island lots, and which would have conformed to the said statutes in such case made and provided. 3. Because his honor erred in not holding that the plaintiff could have substantially performed his agreement to deliver the lot at the time mentioned in the contract, and that the defendant should have accepted the said lot. 4. Because his honor erred in holding that the title to the said lot did not pass to the defendant at the time the contract between the plaintiff and defendant was made, to wit, July 25, 1881.

Mr. S. Lord, jr., for appellant.

[Omitting the argument on the facts.] This was an absolute, unconditional contract of sale to be carried into execution immediately, for a price to be paid in cash, the vendor retaining possession until November.

The tenure of these lots are prescribed by statute. Gen. Stat., § 71; 7 Rich. Eq., 344. The Circuit judge was certainly wrong in resting his decree upon the ground that the law required half acre lots for buildings. Since the act of 1857 these lot owners are tenants from year to year, but with leases renewable at pleasure. Their interest is practically a fee. This leasehold estate was sold by plaintiff to defendant; it was a contract of sale, not of leasing; and the question here is one of sale, and not between landlord and tenant, as it would be if the state were suing for her annual rent of one penny. Therefore the authorities cited in the Circuit decree do not apply here. Had it been a freehold, the loss would have fallen on defendant. Sugd. Vend., Ch. V., § 2; 6 Ves., 349; 2 Hill Ch., 421; 11 Rich., 54. The

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same rule applies in the sale of chat*tels. Blackb. Sales, 147–149; Benj. Sales, §§ 311–314. The Circuit judge erred in holding that a leasehold estate could not pass at the date of the contract, because that such an estate consists in use and possession, and they were to remain in plaintiff's lessee until November. For a term of years may be created to take effect at a future day, the interest of lessee being meantime an interesse termini. 1 Wash. Real Prop., 293, 295, 296; Tayl. Land & Ten., § 15; 18 Penn. St., 60. But whatever plaintiff's interest, it was assignable, and the title to that interest passed to defendant at the date of the contract. From that time it was at his risk. Bacon v. Sampson, 3 Mees. & W., 78, is not authority on the point for which invoked. In that case title remained in the plaintiff, and no excuse was pleaded. In Massachusetts property remains in the seller after the bargain for sale, but South Carolina, following the English rule, holds that it is in the buyer.

Messrs. Bryan & Bryan, contra, cited the authorities in the Circuit decree, and also Pow. Cont., 147; 2 Bay, 276; Gen. Stat., §§ 71, 72; 5 Barb., 601; 113 Eng. C. L., 824; 107 Mass., 514; 70 Me., 288.

September 9, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiff seeks, by this action, to enforce the specific performance of a contract for the sale of a house and lot on Sullivan's Island, the terms of which are to be found in the correspondence which passed between the parties. The plaintiff, by letter dated July 25, 1881, addressed to defendant's agent, says: "I hereby agree to sell you lot on front beach, Sullivan's Island, belonging to me, and known as No. 16 in a rough plat of Moultrieville, and purchased by me from E. M. Jervey March 21, 1880, for the consideration of $300 cash; possession to be given November 1, 1881, provided I can obtain the consent of the present lessee." To this letter the defendant replied by letter of same date, confirming the negotiation made by his agent, and adding these words: "I had hoped to have got immediate possession, intending to use the small build-

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ing for *my bathing this season; but as I will not build before November, I will arrange otherwise."

The defendant in his answer admits the making of the contract as above stated, but denies the allegation of the plaintiff, that he "has always been, and still is, ready and willing to perform the agreement on his part, and, on being paid the purchase money, to convey the said lot of land to the defendant, and to let the defendant into possession thereof from the time in the agreement specified." And he also denies the further allegation, "that on or about the first day of November the plaintiff duly offered to make title to the said land to the defendant pursuant to the agreement; but the defendant then, and ever since, has refused to accept the same and to pay the purchase money." On the contrary, the defendant avers that the plaintiff "was then, has been ever since, and is now unable to make title and convey the said lot of land to the defendant pursuant to said agreement," by reason of the fact that after the making of said agreement, and before the said first day of November, the premises in question were in part destroyed by a storm in August, 1881, and so large a part of said lot covered by the sea as to render it wholly unfit for the purposes for which defendant proposed to purchase.

On the trial below two questions were raised, one of fact and the other of law. 1. Whether the lot was injured to such an extent by the storm of August, 1881, as to render it unfit for the purposes for which the defendant proposed to purchase. 2. If so, does this relieve the defendant from the liability to perform the contract? The Circuit judge answered both of these questions in the affirmative, and accordingly rendered judgment dismissing the complaint. From this judgment the plaintiff appeals upon the several grounds set out in the record, which, however, substantially raise only the two questions above stated.

The first being a question of fact, we are bound, under the well settled rule, to accept the conclusion reached by the Circuit judge, unless it is shown to be without any evidence to support it, or manifestly against the weight of the evidence. The testimony as to the extent of the injury done to the premises by the storm was certainly conflicting, and it is quite clear that we cannot say that the conclusion reached by the Circuit judge

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is with*out any evidence to support it. Nor can we say that his conclusion was manifestly against the weight of the evidence. There was conflict in the testimony and it

was for the Circuit judge to weigh it, and if the conclusion which he has reached can be supported by the testimony, we will not interfere, even though there may be other testimony in the case pointing to a different conclusion. We are not to substitute our judgment for that of the Circuit judge as to the comparative weight of the testimony, but we are simply to inquire whether manifest error has been shown. This, we think, has not been done, but, on the contrary, a review of all the testimony satisfies us that the conclusion reached by the Circuit judge may well be supported. Gary v. Burnett, 16 S. C., 632.

This brings us to the question of law involved in the case, and the answer to that depends upon the inquiry, who was the owner of the property in question at the time the destruction or injury took place; for it is quite clear that whoever was the owner at the time must bear the loss. To solve this inquiry it is necessary for us to consider the nature of the property in question. It is conceded to be a mere leasehold estate, and not an estate of freehold. Hence the practical inquiry in this case is, whether the ownership of the property in question was transferred from the plaintiff to the defendant at the date of the contract above set forth, to wit, July 25, 1881. According to the authorities, the title or estate in property of the character of that now under consideration does not pass until the leaseholder's term commences and he has taken, or is entitled to take, possession. The very nature of such an estate consists in use and possession. 4 Kent Com., 85; 1 Washb. Real Prop., Bk. 1, Ch. 10, § 1.

Now as title or estate constitutes what we understand by the term ownership, it would seem to follow that, as no title or estate passed out of the plaintiff and into the defendant at the date of the contract, inasmuch as by its terms the defendant then had no right of entry and no possession or use of the property, the ownership remained in the plaintiff, and if so, the loss must fall upon him. It is true that an estate for years may be created to commence in futuro, and that in such a case the lessee acquires what is called an interesse termini, but the title or estate, that

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is, the *ownership, must remain in the lessor, and until the title or estate of the lessee commences, the property is at the risk of the lessor, because until that time he is the owner.

In this state the doctrine has been established, that "where there is a substantial destruction of the subject-matter, out of which rent is reserved in a lease for years, by an act of God, or of public enemies, the tenant may elect to rescind, and on surrendering all benefit thereunder shall be discharged from the payment of rent." Coogan v. Parker, 2 S. C. 259 [16 Am. Rep. 659] and the cases there cited. Now if this is the rule to be applied for the relief of one whose term or estate has actually commenced, there would seem to be much stronger reason for applying the same rule for the relief of one whose term or estate has never commenced. The fact that one is a tenant and the other a purchaser can make no difference in the principle. In fact, a tenant is a purchaser of the use and possession of the demised premises for the term of his lease.

But in addition to this, we think that under a proper construction of the terms of the contract in this case it amounted to nothing more than an executory agreement for the sale of a leasehold estate, the term of which was to commence, and possession to be given, at a future day. The very fact that it contained a condition—"provided I can obtain the consent of the present lessee"—shows conclusively that neither of the parties could have regarded the contract as an absolute sale at the time. It is clear from the defendant's letter accepting the proposition to sell, that he expected and desired to obtain possession at least as early as the first of November, 1881, and if he could not do so, he would not be bound, and whether he could do so depended upon the consent of a third party, the then "present lessee" of the plaintiff; and it is, therefore, impossible to suppose that either party supposed that they were then making an absolute contract of sale. When the lease of the then lessee of the plaintiff would expire, and whether his consent had been obtained before or after the partial destruction of the premises by the storm in August, or whether such consent ever was obtained, does not appear; and certainly until such consent was obtained, it could not be said that there was any binding contract between the parties.

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*The fact that the consideration was to be paid in cash cannot affect the question, for certainly it cannot for a moment be supposed that the parties intended by the word "cash" that the consideration should be paid at the date of the contract, for at that time the condition upon which it depended had not been performed, as the consent of the "present lessee" had not then been obtained. The true construction is, that the cash was to be paid when the term commenced and when possession was to be delivered. And this is the construction placed upon it by the plaintiff himself, for in his letter to the defendant and in his complaint he only demands interest from the first of November, 1881, whereas, if the cash was to be paid at the date of the contract, he would have been entitled to interest from that time. It is true that the plaintiff in his complaint alleges that he always had been and still is ready to perform the agreement on his part, and this might be regarded as necessarily implying that he had obtained the consent of his then lessee; but this allegation is dis-

tinctly denied in the answer, and we find no testimony to sustain such allegation.

As to the first ground of appeal, which alleges error on the part of the Circuit judge in holding that the reduction of the size of the lot below one-half of an acre rendered it impossible for the defendant to conform to the requirements of the statute in that respect, we do not deem it necessary to say anything. For, even conceding that there was error in this respect, that was only one of the reasons assigned for the judgment below, and as such judgment, as we have seen, may be supported upon other grounds, such error, if it be one, becomes immaterial. We are satisfied that the plaintiff is seeking to enforce the specific performance of a contract when he himself is unable to perform his part of the agreement, and that there was, therefore, no error in the judgment dismissing the complaint.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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*DUKE v. COUNTY OF WILLIAMSBURG.

(April Term, 1884.)

[1. *Counties* ⇐213.]

Quere: What is the proper remedy of a creditor of a county?

[Ed. Note.—Cited in Jennings v. Abbeville County, 24 S. C. 545.

For other cases, see Counties, Cent. Dig. §§ 342, 343; Dec. Dig. ⇐213.]

[2. *Counties* ⇐47.]

County commissioners have no powers, except such as are conferred by the constitution, or by some statute in accordance therewith.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 55; Dec. Dig. ⇐47.]

[3. *Counties* ⇐173.]

A county of this state had no power in 1870 under the constitution and laws then of force, to execute bonds, without express authority of the legislature, for the purchase money of land bought for a poor farm; and bonds so executed were not valid obligations of the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 261; Dec. Dig. ⇐173.]

[4. *Constitutional Law* ⇐193; *Municipal Corporations* ⇐935.]

But such bonds having been subsequently recognized by a joint resolution of the legislature as a part of the past indebtedness of the county which issued them, they thereupon became valid obligations of the county.

[Ed. Note.—Cited in State ex rel. C., C. & C. R. Co. v. Whitesides, 30 S. C. 586, 9 S. E. 661, 3 L. R. A. 777.

For other cases, see Constitutional Law, Cent. Dig. § 540; Dec. Dig. ⇐193; Municipal Corporations, Cent. Dig. § 1951; Dec. Dig. ⇐935.]

[5. *Counties* ⇐183.]

And a repeal of this joint resolution could not take away from the obligee his right to enforce the contract so recognized and made valid.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 284; Dec. Dig. ⇐183.]

[This case is also cited in Jennings v. Abbeville County, 24 S. C. 545, without specific application.]

Before Fraser, J., Williamsburg, March, 1880.

This was an action by R. E. Duke as administrator of David M. Duke, deceased, against the county of Williamsburg, commenced in February, 1879. The opinion states the case.

Messrs. Barron & Haynsworth, for appellant.

Mr. John A. Kelley, contra.

September 9, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. From the allegations of the complaint, which are not denied in the answer, it appears that on or about August 22, 1870, the county commissioners of Williamsburg bought from the plaintiff's intestate a tract of land for the purpose of establishing thereon a "poor farm" for said county at and for the sum of $1,614.60; that they paid a part of the purchase money in warrants on the county treasurer, which were subsequently paid by that officer, and for the balance executed the two bonds which constitute the cause of action in this case, which were made payable on the 1st day of January, 1871, with interest from date at the rate of seven per centum per annum, but

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*if not paid at that date, then the interest was to be at the rate of ten per centum per annum; that on June 7, 1877, a payment was made on the said bonds out of the proceeds of taxes collected the year preceding to pay the past indebtedness of the county, but that the balance due on said bonds remains due and unpaid, and that the county commissioners in office at the time this action was commenced refuse to make any payment on said bonds or to recognize them as constituting a part of the past indebtedness of the county. Thereupon the plaintiff demanded judgment against the county (1) for the balance due upon said bonds; (2) for an order requiring the county commissioners to recognize the amount due upon said bonds as a part of the legal bona fide indebtedness of the county, and that the same be admitted to a participation in the distribution of the taxes collected to pay such past indebtedness.

The defendant, by its answer, set up two defences. 1. That of res adjudicata, based upon some proceedings in mandamus; but as this defence does not seem to have been considered or passed upon in the Circuit Court, and the "Case," as prepared for argument here, contains no facts upon which it could be based, no further notice need be taken of it. 2. That the bonds in question were issued without any legal authority, and therefore constituted no legal evidence of any indebtedness of the county. In the court below it seems to have been contended that even if the bonds were originally issued with-

out authority, yet they had been subsequently ratified and confirmed by subsequent legislation, which will hereinafter be more particularly noticed. The Circuit judge held that the bonds were originally issued without authority, and that the subsequent legislation relied upon did not have the effect of making them valid obligations of the county. He, therefore, rendered judgment dismissing the complaint.

From this judgment the plaintiff appeals, substantially, upon two grounds: 1. That there was error in holding that the bonds were originally issued without authority; 2. In holding that the subsequent legislation relied upon did not ratify and confirm the action of the county commissioners in issuing the bonds.

No question has been raised as to the form of proceeding in this case, and we shall not volunteer to do so. Whether a person

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*claiming to be the creditor of a county can bring his action in the usual form for the recovery of his alleged debt, except in such cases as the right of action is given by statute, or whether he should not submit his claim for audit to the county commissioners, from whose judgment, if unfavorable to him, he may appeal; and after he has thus established his claim, whether his remedy is not by mandamus to compel the county commissioners to levy a tax to pay the same, is a question upon which we prefer to reserve our judgment. See Wheeler v. County of Newberry, 18 S. C., 135.

We will, therefore, upon this occasion, confine our attention to the two questions raised by the appeal. First. Did the county commissioners have any authority to issue the bonds in question? It is quite clear that the county commissioners have no powers except such as are conferred by the constitution, or by some act of the legislature passed in accordance with the provisions of that instrument. The law which was of force at the date of these bonds, and by which, therefore, the question of their validity is to be determined, is to be found in Constitution, art. IV., sec. 19, and the act of 1868, 14 Stat., 128. The language of the section of the constitution referred to is as follows: "The qualified electors of each county shall elect three persons, for the term of two years, who shall constitute a board of county commissioners, which shall have jurisdiction over roads, highways, ferries, bridges, and in all matters relating to taxes, disbursements of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties: Provided, That in all cases there shall be the right of appeal to the state courts."

The powers thus conferred are broad and extensive, but they are not unlimited. They do not embrace the power to levy taxes, except as such power is delegated by some act of the legislature. For by section 4 of article IX of the constitution, it is declared that "no tax shall be levied, except in pursuance of a law, which shall distinctly state the object of the same, to which object such tax shall be applied;" and by section 8 of the same article it is specially provided that "the corporate authorities of counties, townships, school districts, cities, towns and

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*villages may be vested with power to assess and collect taxes for corporate purposes." Accordingly we find that it has been the uniform practice ever since the adoption of the constitution for the legislature to make special provision each year authorizing the county commissioners to levy the taxes necessary for county purposes.

Nor are the provisions of section 19, above quoted, sufficiently extensive to confer upon the county commissioners unlimited power in providing for the support of the poor, for by section 5 of article XI. the constitution provides that "the respective counties of this state shall make such provision *as may be determined by law* for all those inhabitants who, by reason of age and infirmities or misfortunes, may have a claim upon the sympathy and aid of society" (the italics being ours). Accordingly, at the first session of the general assembly after the adoption of the constitution, in the act of 1868 above cited, authority was given to the county commissioners to purchase land and erect buildings for the poor, and very soon thereafter, to wit: on February 28, 1870 (14 Stat., 369), another act was passed authorizing the county commissioners, in pursuance of the authority conferred by the said act of 1868, to provide with said buildings "sufficient tillable land to give employment to such persons, able to work, as may come upon the county for support; and said buildings and land shall be known as the Poor House and Farm of said county."

It having been thus "determined by law" the provision which the county commissioners should be authorized to make for the support of the poor, it is only necessary for us to inquire what was the extent of the authority thus conferred upon the county commissioners. For this purpose, we must look to the first, second, and third subdivisions of section 14 of the act of 1868, above cited, together with the proviso at the end of the section. The language is as follows: "The boards of county commissioners shall have power, and they are hereby authorized: 1. At any meeting thereof lawfully assembled to purchase, for the use of their respective counties, any real estate necessary for the erection of buildings and for the support of the poor of such county. 2. To fix upon and determine the site of any such buildings, and cause to be erected necessary

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buildings for Poor House, and pre*scribe the manner of erecting the same. 3. To borrow money for the use of such county, to be expended for the purchase of any real estate, or for the erection of any such buildings, and to provide for the payment thereof, with interest, by tax upon such county, within ten years from the date of such loan, in yearly instalments or otherwise: * * * Provided, that no such loan shall be created by the county commissioners until they notify the general assembly of the necessity thereof, and authority be granted by them to create said loan."

These being the terms in which the authority was vested in the county commissioners to purchase the property necessary for the establishment of a "Poor House and Farm," the practical inquiry in this case is, whether the county commissioners of Williamsburg county, in purchasing land for a Poor Farm from the plaintiff's intestate, and giving the bonds in question, complied with the terms thus prescribed; for unless they did, their action was without any legal authority, and the bonds do not constitute legal obligations of the county. It will be observed that the terms prescribed contemplate but two modes by which such a purchase could be made: first by cash and second by borrowing the money necessary to pay the price agreed upon; and a purchase on a credit in the usual form does not seem to have been contemplated or provided for. It is quite certain that they did not adopt the first mode contemplated (buying for cash), and if the mode which they did adopt can be construed as practically the second, and that they borrowed the money from their vendor with which to pay the price agreed upon, and that the bonds in question were given to secure the payment of the money so borrowed, then it is equally certain that they have failed to comply with one of the terms upon which the authority to purchase was conferred, and that, too, one of the most important, inasmuch as it is conceded that no notification of the necessity for such loan had been made to the general assembly, and no authority for the creation of such loan granted.

It is obvious that the purpose of this restriction upon the powers of the county commissioners was to prevent them from fixing upon the county a debt for the purpose indicated, unlimited in amount, until the neces-

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sity for the same had been made *to appear to the legislature, and their authority for creating such debt had been obtained. The wisdom of such a purpose is apparent, especially when the means of paying such debt—by taxation—was entirely under the control of the legislature. We agree, therefore, with the Circuit judge that the bonds in question were originally issued without legal authority, and hence did not then constitute valid obligations of the county.

The only remaining inquiry is, whether, by any subsequent legislation, these bonds have been rendered valid. The legislation relied upon for this purpose is the act of March 3, 1874 (15 Stat., 580), authorizing and directing the county commissioners of Williamsburg to levy and collect a special tax, from year to year, until a certain specified sum was collected, to be applied exclusively to the payment of the past indebtedness of said county; and a joint resolution, approved March 2, 1876 (16 Stat., 210), by which the bonds sued on in this case were in express terms recognized, and the county treasurer directed to register them, and that the same be paid, as a part of the past indebtedness of the county, as provided for by the act of 1874, above cited. Inasmuch as the only vice in the original issue of these bonds was the want of legislative sanction for such issue, it would seem to follow necessarily that this express recognition of them operated as a confirmation, and healed any infirmity there might have been in their original issue, and that they are, therefore, now valid obligations of the county, unless there is some other objection to their payment not disclosed in the present proceedings.

The respondent, however, contends that the only effect of this legislation was to entitle these bonds to their pro rata share of the fund raised by the act of 1874; and that this they have already received. We do not so regard it. The validity of these bonds depends upon the question whether they were issued by proper authority, and although such authority was wanting at the time of their issue, the subsequent recognition of them by the legislature must necessarily be regarded as a confirmation of the previously unauthorized act of the county commissioners in issuing them.

Again, the respondent contends that the joint resolution of 1876 was impliedly repealed, though he cites no act upon which

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*he relies as having such effect. We presume he alludes to the act of March 18, 1878 (16 Stat., 494), entitled "An act to adjust the past indebtedness of Williamsburg county," which makes provision other than that furnished by the act of 1874 for the payment of the past indebtedness of the county, and which, in its last section, repeals all acts and parts of acts conflicting with it. This, it is contended, necessarily repealed the act of 1874, and that the joint resolution of 1876 fell with it. Even granting this to be so, we do not see how it could affect the question under consideration. The repeal of the act of 1874 might very well take away the means provided for paying the past indebtedness

of the county and substitute therefor the means provided by the act of 1878, but it certainly could not have the effect of annulling any of such past indebtedness. So that even if the legislature had undertaken, in express terms, to repeal the joint resolution of 1876, it could have no effect in annulling any debt created or recognized by it, as such repeal would be clearly in violation of the provisions of the constitution both of this state and the United States, forbidding the passage of any law impairing the obligation of contracts. We think, therefore, that the Circuit judge erred in holding that the subsequent legislation referred to did not have the effect of making the bonds in question valid obligations of the county.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

Mr. Justice McGOWAN concurred generally, but Mr. Chief Justice SIMPSON only in the result.

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21 S. C. 420

TOMPKINS v. AUGUSTA & KNOXVILLE R. R. CO.

(April Term, 1884.)

[1. *Estoppel* ⟸3.]

In action by the heirs at law of a testator against a railroad company to enjoin the construction of its road across the lands of testator, devised to his widow, but claimed by plaintiffs as residuary devisees, the complaint alleged that the widow, now deceased, intestate, had renounced her devise and claimed dower *421 in all of her hus*band's lands. *Held*, in subsequent action between the same parties, that they could not now deny this allegation and claim as heirs at law of their mother.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 3; Dec. Dig. ⟸3.]

[2. *Evidence* ⟸474½.]

After evidence offered of facts and circumstances to show that a railroad company had entered by permission the lands of plaintiff, it was competent for defendant to ask its witness whether there "was any act of the owner indicating a dissent."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2228; Dec. Dig. ⟸474½.]

[3. *Evidence* ⟸185.]

Plaintiff could not testify as to the contents of letters written by him to the president of the defendant company, no notice having been given to defendant to produce the letters themselves. Nor did such testimony, objected to by defendant, become competent upon defendant's testifying, without objection, to such contents.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 642–660; Dec. Dig. ⟸185.]

[4. *Eminent Domain* ⟸268.]

Where a railroad company constructs its road-bed over lands of another by permission of the "owner," it is not a trespasser, and the holders of the legal title to such land cannot maintain an action for the recovery of the strip of land so occupied by the railroad company and for damages therefor.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 697, 736–740, 742; Dec. Dig. ⟸268.]

[5. *Eminent Domain* ⟸303.]

Where a railroad company made entry upon land and constructed its road-bed thereon by permission of the "owner" (which permission may be inferred from the facts and circumstances), such entry is not unlawful, and the railroad company is only liable thereafter for the value of the land so occupied and for any special damage caused by such occupation. Gen. Stat. of 1872, ch. lxiii, § 83.

[Ed. Note.—Cited in Leitzsey v. Columbia Water Power Co., 47 S. C. 484, 25 S. E. 744, 24 L. R. A. 215; Cureton v. South Bound R. Co., 59 S. C. 377, 378, 37 S. E. 914.

For other cases, see Eminent Domain, Cent. Dig. §§ 815–817; Dec. Dig. ⟸303.]

[6. *Eminent Domain* ⟸271.]

The word "owner," as used in this section of the act, means the person who has control of the land; therefore, permission given by executors, who had, under their will, a power of sale for purposes of division or of paying debts, were the owners within the meaning of this section.

[Ed. Note.—Cited in Tutt v. Port Royal & A. Ry. Co., 28 S. C. 399, 5 S. E. 831; Northwestern R. Co. v. Colclough, 89 S. C. 558, 72 S. E. 494; Colclough v. Briggs, 99 S. C. 181, 83 S. E. 36.

For other cases, see Eminent Domain, Cent. Dig. § 734; Dec. Dig. ⟸271.]

[7. *Appeal and Error* ⟸170.]

Where the constitutionality of a statute was not questioned in the Circuit Court, nor by any exception, but is raised for the first time in the arguments here submitted, it is not properly before this Court for consideration.

[Ed. Note.—Cited in Frazee v. Beattie, 26 S. C. 351, 2 S. E. 125; Bomar v. Railroad Co., 30 S. C. 455, 9 S. E. 512; Atlantic Coast Line R. Co. v. South Bound R. Co., 57 S. C. 322, 35 S. E. 553; Porter v. Charleston & S. R. Co., 63 S. C. 177, 41 S. E. 108, 90 Am. St. Rep. 670.

For other cases, see Appeal and Error, Cent. Dig. § 1037; Dec. Dig. ⟸170.]

[This case is also cited in Ex parte Bacot, 36 S. C. 131, 15 S. E. 204, 16 L. R. A. 586, without specific application.]

Before Hudson, J., Edgefield, March, 1883.

This was an action by Stephen S. Tompkins and others, who were the residuary devisees under the will of James Tompkins, their father, and were also heirs at law of their intestate mother, Huldah Tompkins, against the Augusta & Knoxville Railroad Company, commenced December 9, 1882. The case is thus reported by the Circuit judge:

In the answer to the complaint the railroad company rests its claim to the right of *422 way over the land in question upon the *acquiescence, consent, and permission of the plaintiffs, not denying that the fee in the land is vested in them. At the trial the testimony was directed mainly to this leading issue. The plaintiffs had not granted the right of way, nor had the railroad company had the same condemned under the provisions of the act of the legislature in such

case made and provided, nor had any steps been taken by the plaintiffs to recover compensation for the right of way, which the company alleges it is ready, and has always been ready, to make. The chief issue of fact, therefore, submitted to the jury was, whether the defendant company has acquired a right of way over the land of the plaintiffs by their acquiescence, consent, and permission.

The manner of acquiring rights of way is prescribed in Revised Statutes (old edition), pages 352–356, sections 75 to 86 inclusive. Under section 83 of this act the defendant has acquired its right of way, if at all. Therefore in opening my charge to the jury I proceeded to read and expound this statute in its various provisions, and especially the said last named section, and instructed the jury that if the railroad company has acquired a right of way over the lands of the plaintiffs, it is under the provisions contained in section 83 of said act, and not otherwise, as there is no evidence of a grant nor of a condemnation; nor of use and enjoyment of the road-bed a sufficient length of time to raise the presumption of a grant under the common law rule. The company rests its claim, and under the evidence in this case can rest its claim, alone upon the said act of the legislature, and the evidence in the case to bring the alleged acquired right of way within its terms.

I then turned to the case of Verdier v. Railroad Company, 15 S. C., 477 to 484, as the case containing the authoritative interpretation and most lucid exposition of the sections of said act, and especially of section 83. I told the jury that I preferred to adopt the language of that case in expounding to them the law of the case under consideration, as it was directly applicable and binding; and I proceeded to read in full the words of Justice McGowan on pages 482 and 483, wherein he explains and interprets the language and meaning of section 83. I then made the application to the present case,

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leaving it entirely to the jury to *say whether the evidence in this case satisfied them, from its preponderance, that the plaintiffs had permitted the defendant corporation "to enter upon the construction of their highway without previous compensation," &c. If the jury should so conclude, I proceeded, in the language of that case, to explain to them how the plaintiffs were estopped from afterwards denying the right of way to the defendant, and how they would be entitled alone to compensation, and the mode and manner in which they would, under the act, have to secure such compensation.

I instructed them that the permission of the executors of the will of James Tompkins, deceased, under whom the plaintiffs claim, would be sufficient, and would be binding upon all the plaintiffs, carefully leaving to the jury to find whether or not that permission had been given. I further explained to them that permission might be given expressly by word of mouth, or might be implied from acts, conduct, silence, and acquiescence, reading again the language of Justice McGowan, and the authorities cited by him in support of this proposition. It appeared in evidence that the road was not constructed in its entire course through this plantation on the exact line of the original or Ashmore survey, but that in a part of its course or line of construction it deviated somewhat from the said survey, and ran in rear of, instead of in front of, the residence, and near the family burial ground. The general direction of the line, however, was that of the Ashmore survey, and, in part, the two lines were the same.

I charged the jury that, if the permission to enter and construct was given, and the entry was made and the construction begun in consequence of this permission, the deviation on a part of the line such as was proved in this case, would not work a forfeiture of the permission, nor would it authorize the executors to revoke the general permission, in consequence of which the money, labor, and time of the company had been expended and bestowed in the construction of the road. A general grant of the right of way, or a general permission to enter and construct, when accepted and acted upon in whole or in part, cannot afterwards be, by the owner of the land, construed into a grant or a permission to locate and construct only on a certain mathematical line.

My charge in this respect is misapprehend-

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ed by the plaintiffs' *counsel, and incorrectly set out in the case. It is also misapprehension and error in the plaintiffs' counsel to represent me as saying to the jury: "It is for you to say whether from all the circumstances the company believed that there was permission. If so, then that ends the case," &c., &c. The belief of the company could have no weight in enabling the jury to infer permission, unless it was created by the acts, declarations, or conduct of the plaintiffs, the executors. From these and these only could the jury infer permission and find it as a fact, and so I instructed them.

The first three exceptions relate to questions of evidence. The question set forth in the first exception was allowed to be asked. Upon the second and third, I have to remark that Mr. S. S. Tompkins was allowed to say that he sent the letters spoken of in these exceptions, but was not allowed to state the contents of the letters, because no notice had been given defendant to produce said letters, and because it may readily be perceived that the exact language and full purport and meaning of a letter written upon such a subject is of the utmost importance. The witness might honestly think he had said one thing, whilst the letter, if produced, would

amount to something quite different. Hence I hold that the letter is the best evidence of its contents, and parol evidence thereof could not be admitted, since no notice to defendant had been given to produce these letters.

As to the fourth and fifth exceptions, it is enough to say that what I did say in regard to the act of 1868, and the case of Verdier v. Railroad Company, I have already explained.

Exception 6. I charged that the executors had power to give permission, but did not say that they "spoke the voice of the whole family."

Exception 7. Correctly put.

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Exception 15. I refused the proposition contained in this request because, as I told the jury, the question was not one of deceit, misrepresentation, and fraud, but one of permission.

Exception 16. I refused this request, because, as I have said, the executors, who were in charge of the land and in full control thereof under the will, had power to give permission such as would bind the devisees under the will.

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*Exception 17. I refused this request as not applicable to the case because the executors could bind the heirs by their consent.

It should appear in the case that I did charge the 3d and 4th requests of the plaintiffs, which are as follows: "3d. That in order for the jury to conclude that the plaintiffs are estopped, they must find from the evidence that the defendants were induced to locate and construct their railroad by the conduct of the plaintiffs; and that the defendants would not have located and constructed their railroad over the land of the plaintiffs as they did, if it had not have been for the conduct of the plaintiffs. 4th. That the burden of proving such conduct is upon the defendant." These two requests of the plaintiffs I regarded as very pertinent, and involving the very essence of the real issue, and I charged the jury, therefore, as requested.

The following are plaintiffs' exceptions, omitting those which the Circuit judge reported to be incorrect statements of his charge:

1. Because his honor erred in ruling that the defendants could ask the witness, Buckhalter, "Was there, or not, any act of S. S. Tompkins indicating a dissent?"

2. Because his honor erred in ruling out the testimony of S. S. Tompkins that he notified A. M. Aiken, one of the officers of the company, by letter that the company should not go through the land without condemning it according to law.

3. Because his honor erred in ruling out the testimony of S. S. Tompkins that he notified Eugene Verdery, the president of the company, by letter, that the company should not go through the land without condemning it according to law.

4. Because his honor erred in charging the jury that the act of 1868 was alone to be their guide, and that the act gives the landowners a remedy in every case, and that the plaintiffs had their remedy under such act.

5. Because he instructed the jury, after reading to them the case of Verdier v. R. R. Co., that the law in that case was applicable to this, whereas the plaintiffs claim that it has no application to the facts, as shown by the testimony.

6. Because he instructed the jury that the

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executors had suf*ficient power to give consent to the defendants to enter for purposes of construction, and that they spoke the voice of the whole family.

7. Because he charged the jury the following: "The question then is, Did the executors, or either of them, give consent to enter?"

15. Because he refused to charge the jury as requested by plaintiffs, as follows: "That before they can find a verdict for the defendants, they must find in the evidence adduced: 1. That the plaintiffs have made false representations or concealed material facts from the defendants in regard to the right of way over their land; 2. That these representations were made with knowledge of the facts; 3. That defendants were ignorant of the truth; 4. That the plaintiffs made them with intention that the defendants should act upon them; 5. That the defendants were induced to act upon the false representations;" but after reading the requested instructions, which had been argued by plaintiffs' counsel as propositions of law bearing directly upon the case, he charged the jury that these propositions were not applicable to the case.

16. Because he refused to charge the jury as requested by plaintiffs, as follows: "That if the jury find from the evidence that plaintiffs were tenants in common, and that one or more of the plaintiffs did acts or made declarations or admissions which amount in law to permission to the railroad company to enter upon the land in dispute and construct their road upon it, or to acquiescence in the occupation by the company of the land in dispute, such acts, declarations, or admissions can bind only the parties who made them; and if no such acts, declarations, or admissions were made by other plaintiffs, such plaintiffs not making them are entitled to recover." But, on the contrary, the presiding judge did charge the jury that permission of the executors is sufficient to bind all.

17. Because he refused to charge the jury as requested by plaintiffs, as follows: "That no acts, declarations, or admissions made by one tenant in common can bind his co-tenant, and that this rule applies with particular

force in the case of infants." The presiding judge assigned as reason for refusal of this

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*request, that it "involved a question as to power of executors to bind and the court holds that their permission is enough, if established."

[For subsequent opinion, see 30 S. C. 479, 9 S. E. 521.]

Messrs. Abney & Abney and Earnest Gary, for appellants.

Mr. J. Ganahl, contra.

September 9, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. This action was brought by the plaintiffs to recover possession of two strips of land in the possession of the defendant, constituting a part of its road-bed, as well as damages for withholding the same. It seems that neither the defendant, nor the company whose rights it had acquired by legislation and arrangement, had ever taken the steps prescribed by statute for the purpose of acquiring the right of way over the tract of land conceded to be the property of the plaintiffs, but that it, as well as the company with which it had been consolidated, had taken possession and constructed its railroad under an alleged consent of the owners, still, however, acknowledging its liability to pay the value of the land actually taken, as well as any special damages occasioned thereby. The jury found a verdict for the defendant, and the plaintiffs appeal on the ground of error on the part of the Circuit judge in his rulings as to the admissibility of certain testimony, and in his charge to the jury. The exceptions are very numerous, but as many of them were taken under a misapprehension of the judge's charge, as appears by his report settling the case for appeal, it will not be necessary to set out the exceptions in detail.

As we understand the case, two general questions arise out of this appeal: First, whether the Circuit judge erred in his rulings as to the admissibility of evidence. Second, whether he erred in instructing the jury that the permission or consent of the executors of James Tompkins, or either of them, was sufficient to warrant the defendant in going upon the land of the plaintiffs and constructing its railroad over said land, without first pursuing the mode prescribed by statute for having said land condemned.

While reference must be had to the record

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(which is too volu*minous to warrant us in undertaking to make even an abstract of it) for the origin and history of this case, a brief statement of such facts as may be necessary to a proper understanding of the questions raised will, perhaps, be desirable. It is conceded that James Tompkins died seized and possessed of the tract of land over which the railroad of the defendant has been constructed, and that the plaintiffs are his heirs at law; that by his will he devised the said tract of land to his widow, Huldah Tompkins, who died intestate in 1868, leaving as her heirs at law the plaintiffs in this case, together with her grandson who died in 1872, whose interest the plaintiffs have acquired; and that the plaintiffs, S. S. Tompkins and J. W. Tompkins, are the duly qualified executors of said will.

By the first clause of his will the testator directed that his debts and funeral expenses "be paid out of the debts due me or moneys on hand at my death, and if insufficient, then that my executors, hereinafter named, sell enough of my estate, not herein specially disposed of, either publicly or privately, and upon such terms as they may elect, to pay and satisfy all just claims against me." By the residuary clause of the will all the rest and residue of the estate is devised and bequeathed to certain persons therein named, and for the purpose of effecting division amongst the devisees and legatees so named, the executors are authorized "to sell and convey any part or all of my estate, either privately or at public or private auction, that is at auction at which only the beneficiaries under this clause are permitted to buy."

The plaintiffs contend that the land in question having been specifically devised to the widow, the same descended to them as her heirs at law upon her death in 1868, and that, therefore, the executors of James Tompkins had nothing whatever to do with the land, and had no control over it. It appears, however, from the record of a former suit between these same parties, introduced in evidence in this case, that these plaintiffs there distinctly alleged that the widow "declined to take under the said will, but claimed dower in all of the real estate of the testator." This being so (and the fact that it is so cannot now be denied by the plaintiffs), the devise to the widow never took effect,

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and the land fell into *the residuum of the testator's estate, and the plaintiffs can only claim it under the residuary clause of the will.

The question as to the competency of certain evidence resolves itself into two branches. After testimony had been adduced for the purpose of showing that the defendant company had entered upon the land in question by the permission or acquiescence of the executors, the following question was propounded to one of the witnesses: "Was there or not any act of S. S. Tompkins indicating a dissent?" which, upon objection, was ruled competent. We do not see any error in such ruling. The point of inquiry was whether the company had entered by permission of the executors, which permission may, as we shall presently see, be inferred from facts

and circumstances; and after evidence had been offered of such facts and circumstances, we not only see no error in the form in which the question was put, but it would seem to be the most natural termination of the inquiry.

The next inquiry is as to the correctness of the ruling by which the witness, S. S. Tompkins, was prevented from testifying as to the contents of certain letters alleged to have been written by the witness to Aiken and Verdery, two of the officers of the company. Nothing would seem to be clearer than that the letters themselves furnished the best evidence of their contents; and until the proper foundation was laid, it was clearly incompetent to introduce secondary evidence. If, as it seems to be contended, the plaintiffs were satisfied that the letters were in court, in the possession of the defendant or its officers, notice to produce them might have been given, even at the trial (Reynolds v. Quattlebum, 2 Rich., 140); and if the plaintiffs failed to do so, they have no just cause of complaint that the secondary evidence offered by them was rejected. Nor does the fact that Verdery subsequently testified as to these letters, alter the case. His testimony was given without objection, and the fact that one party has allowed the other to adduce incompetent testimony without objection, will not authorize him in turn to introduce other incompetent testimony when it is objected to.

The next question is as to the power of the executors, or either of them, to give the company permission to enter upon the land and construct its railroad; for the

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fact that such permission was *given must be regarded as settled by the verdict of the jury. This question has been argued by the appellants as if the defendant's position was that such permission operated as a transfer of the right of way; but we do not so understand the position of the defendant. On the contrary, by its pleadings in this case, as well as in the former suit between these same parties, the defendant expressly concedes its liability to pay for the right of way, and avers its willingness to do so, whenever the value of the land which it has taken, as well as the special damages, if any, shall be ascertained. The defendant only contends that the permission of the executors operated to relieve them from the charge of trespassing, in entering upon the land and constructing their railroad; and that, as the plaintiffs in this case, in order to enable them to recover, must not only establish their title to the land in question, but must go further and show that the person whom they are seeking to oust is wrongfully in possession, they cannot recover if it appears that such person is rightfully in possession.

Under the construction given to section 83 of chapter LXIII., of the General Statutes of 1872 (which is the law applicable in this case), by the case of Verdier v. Port Royal Railroad Company, 15 S. C., 476, where the landowner has permitted a railroad company to enter upon his land and construct its road, he cannot maintain an action to dispossess said company, even though the steps prescribed by the statute for the purpose of condemning so much of said land as may be necessary for the purposes of the company have not been taken. The statute, in compliance with the constitutional provision declaring that private property shall not be taken for the use of a corporation without the consent of the owner, or a just compensation being made therefor, provides that a corporation shall, before entering upon any land for the purpose of constructing its road, give notice to the owner, so that if he objects to such entry, the corporation shall first pursue the course prescribed by the statute to have a condemnation of the land; but if the owner does not object, but on the contrary, permits the company to enter, which permission, as is held by the case above cited, may be inferred from all the facts and circumstances, then such entry does not become unlawful, though it leaves the company

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still liable to pay for the value *of the land taken, together with any special damage that the landowner may sustain by reason of such taking. The only effect of such permission to enter is not to confer any right of way, but simply to relieve the company so entering from the character of a trespasser.

The practical inquiry, therefore, in this case is, whether the defendant had such permission to enter upon the land of the plaintiffs and proceed in the construction of its road; for if it did, then the entry was lawful and the company was rightfully in possession, and this action cannot be maintained. Inasmuch as the verdict of the jury establishes the fact that the company did have the permission of the executors of James Tompkins, or one of them, to enter upon the land for the purpose of constructing its railroad, the inquiry is narrowed down to the question whether the executors, or either of them, had the power to grant such permission. The statute, in dealing with this subject, uses the term "owner" of the land, and it is earnestly contended that the executors were not the owners of the land in question; but that, at most, they simply had a power to sell, for certain purposes, while the legal title remained in the plaintiffs, who were and still are the owners of the land.

It is quite obvious that the statute does not use the term "owner" in the sense of the holder of the legal title, but rather in the sense of one who has the control of the land. If a minor, or other person under disability, holds the legal title, the statute prescribes that the notices and other papers necessary in the proceedings for the condemnation of

the land, shall be served, not upon such minor or other person under disability, but upon his guardian, trustee, or committee—that is, upon the person who exercises control over the land, even though he does not hold the legal title, and is not, in the strict sense of the term, the owner of the land. In this case the executors must necessarily have had the control of this land, for they were not only authorized to sell it for division, but, after it had fallen into the residuum, by the widow's renouncing her rights under the will and electing to claim dower in the whole of the real estate, they had also the power to sell the whole or any part of it for the purpose of paying the debts of the testator. To exer-

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cise these powers, the exe*cutors must, of necessity, have retained the control of the land, and having such control, we see no reason why they, or either of them, could not grant permission to the defendant company to enter upon the land for the purpose of constructing its railroad, without in any manner interfering with the right of such of the devisees as become entitled, on the division of the land appropriated by the company, to claim compensation therefor.

In the argument here, the constitutionality of the act providing the mode of obtaining compensation for lands appropriated by a corporation, has been assailed. But inasmuch as no such question was raised in the Circuit Court, or by any of the exceptions, it is not properly before us for consideration. We may say, however, that even if it should be assumed that the act was unconstitutional (though upon that point we express no opinion), we do not see how it could help the case of the appellants. For without this act, if the company has entered upon the land by proper authority, then it is rightfully in possession and this action cannot be maintained, but the plaintiffs would be remitted to their claim for damages merely.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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21 S. C. 432

FLENNIKEN v. BUCHANAN.

(April Term, 1884.)

[*Pleading* ⇐8.]

A complaint alleged that G. was lawfully seized and possessed of a tract of land which she rented to K. for one bale of cotton, and that the interests and claims of G. and K. in the cotton made upon said land had been assigned to plaintiff for valuable consideration; that the sheriff had seized such cotton under warrant issued by the clerk of court at the instance of B., to enforce an alleged lien; that the defendants, the sheriff and B., unjustly detain said cotton, after demand made therefor by plaintiff; and judgment was asked for the cotton so seized, or for sixty dollars, its value, and for ten dollars damages. *Held*, that the complaint stated facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 23; Dec. Dig. ⇐8.]

Before Aldrich, J., Fairfield, February, 1884.

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*The opinion states the case.

Mr. J. E. McDonald, for appellant.

Mr. Edgar C. Haynsworth, contra.

September 20, 1884. The opinion of the Court was delivered by

Mr. Justice McIVER. The Circuit judge in this case sustained a demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and rendered judgment dismissing the complaint. The only question raised by the appeal, therefore, is, whether the complaint does state facts sufficient to constitute a cause of action.

For the determination of this question we are bound to assume the truth of all the material allegations of the complaint. These allegations, in substance, are as follows: That on January 1, 1883, Mrs. Anna S. Gradick rented to one Tobias Kennedy a tract of land, of which she was lawfully seized and possessed, Kennedy agreeing to pay her as rent, on November 1, 1883, one bale of cotton, weighing four hundred and eighty pounds; that on September 29, 1883, "six hundred pounds of lint cotton, made and cultivated upon the premises leased by the said Tobias Kennedy from the said Anna S. Gradick," were seized and taken into his possession by the defendant, McCarley, as sheriff, by virtue of a warrant issued by the clerk of the court "under an alleged statutory lien for rent," issued at the instance of the other defendant, Buchanan; "that the respective interests and claims of the above named Tobias Kennedy and Anna S. Gradick in and upon the cotton and produce so seized have been duly assigned, for valuable consideration, to D. R. Flenniken, the plaintiff in this action;" and that the defendants, after demand therefor, still unjustly detain the said cotton, the value of which is sixty dollars, to the damage of the plaintiff ten dollars.

The legal effect of these allegations are, first, that Mrs. Gradick was the legal owner, and entitled to the possession of the land in January, 1883, for that is the plain meaning of the terms "lawfully seized and possessed";

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second, that as such owner she *leased the premises to Kennedy, who thereby became entitled to the produce made on the place—the legal owner of it—(in the absence of any showing to the contrary, and there is no such showing here) subject to the lien of Mrs. Gradick for rent; third, that defendants, under some "alleged" statutory lien for rent

(by whom given does not appear), seized six hundred pounds of the cotton made on the said premises, and upon demand "unjustly" refuse to deliver it up to the plaintiff, who had bought the "interests and claims" of both Kennedy and Mrs. Gradick.

It is difficult for us to understand why these allegations are not a sufficient statement of a cause of action. It is true that there is no allegation, in so many words, that the plaintiff is the owner of the cotton, but that is necessarily implied from the allegations which are made. Kennedy having leased the premises from the legal owner, was unquestionably entitled, in the absence of any showing to the contrary, to the produce grown thereon; and when he sold his interest to the plaintiff, his right to the cotton in question passed to the plaintiff, who would have held the same subject to the lien of Mrs. Gradick; but as she too assigned her claim to the plaintiff, he thereby became the absolute owner of the cotton, until some one else is shown to have a superior title, or some lien which would justify its seizure; and this does not appear in the complaint. All that there appears is that the cotton was seized under an alleged statutory lien for rent, but by or to whom is not stated, though the inference would probably be that it was claimed to be due to the defendant, Buchanan. But whether there was in fact any such lien as alleged, and whether it covered the cotton in question, does not appear in the complaint; and if so, these facts must be made to appear by way of defence.

But without discussing the question further, we think the case of Childers v. Verner & Stribling, 12 S. C., 1, is conclusive. Indeed, this case is much stronger in favor of the plaintiff than that. In that case there was not only no distinct allegation of ownership in the plaintiff, but the allegation that she had rented the premises upon which the crop in question was grown could only be inferred by a somewhat strained construction of one of the paragraphs of the complaint; and

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this, too, notwithstanding *the fact that in preceding paragraphs it was distinctly alleged that the premises had been rented to one McFall, who had employed the plaintiff to work the crop. Yet the court held that, though the complaint was defective in its mode of statement, it was in substance sufficient; and that the defect in the manner of stating the facts constituting the cause of action should have been corrected by motion to make the allegations more distinct, and that the demurrer was improperly sustained by the Circuit Court.

The rule was there laid down, in the language of Pomeroy, as follows: "The true doctrine to be gathered from all the cases is, that if the substantial facts which constitute a cause of action are stated in a complaint or petition, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect, incomplete, and defective, such insufficiency pertaining, however, to the form rather than to the substance, the proper mode of correction is, not by demurrer, nor by excluding evidence at the trial, but by a motion before the trial to make the averments more definite and certain by amendment." Applying this rule to the case now under consideration, we think the Circuit judge erred in sustaining the demurrer.

The judgment of this court is that the judgment of the Circuit Court be reversed and that the case be remanded to that court for a new trial.

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21 S. C. 435

In re MALONE'S ESTATE. In the Matter of Notification by BRYAN, Escheator. Ex parte BUIST, Administrator. Ex parte MALONE. Ex parte BUIST, Administrator, et al.

(April Term, 1884.)

[1. *Descent and Distribution* ⇐75.]

Upon the death of a person intestate, title to his real estate instantly vests in his heirs, or, leaving none, in the state, although it may not be known until after judicial inquiry where the title has vested.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 243–251, 260–262; Dec. Dig. ⇐75.]

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[2. *Escheat* ⇐8.]

*Where title to real estate vests in the state, the state will not dispose of the property until the escheat has been ascertained in the mode prescribed by law; but the state may, before office found, grant to individuals or corporations her right to property already escheated, and even to such as may hereafter escheat, in which case the right, when legally established, has relation back to the death of the intestate.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. § 20; Dec. Dig. ⇐8.]

[3. *Municipal Corporations* ⇐64.]

The state retains absolute control over charters granted to municipal corporations, but not over the property of such corporations.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 156, 157; Dec. Dig. ⇐64.]

[4. *Constitutional Law* ⇐127.]

In 1799 the state granted to the City Council of Charleston for the benefit of its Orphan House, all escheated property, within certain limits, to the amount of $50,000; and in 1868 the constitution directed the proceeds of all escheated property to be preserved as a "State School Fund" for the use of "free public schools." In 1864 a person died intestate, leaving lands within said limits, which was claimed to be escheated property. *Held*, that the right so granted by the act of 1799 could not be divested by the constitution of 1868, and that the said city council were entitled to so much of this property (if escheated) as would, with its previous receipts from like sources, make up the amount of $50,000.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 332; Dec. Dig. ⇐127.]

[5. *Escheat* ⇐8.]

The right of the city to such balance is not affected by its failure to claim previously escheated property of greater value within those limits, which had been granted by the state to other parties.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. §§ 20, 22; Dec. Dig. ⇐8.]

[6. *Escheat* ⇐8.]

But an act of the legislature, passed in 1878, extending the limit of its former grant of $50,000 to $100,000, was in conflict with the constitution of 1868 (art. X., § 11), and therefore null and void.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. §§ 20, 22; Dec. Dig. ⇐8.]

[7. *Schools and School Districts* ⇐19.]

An Orphan House under the control of the city of Charleston, open only to "poor orphan children, or the children of poor, distressed, or disabled parents," is not a "free public school" of the state.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 37; Dec. Dig. ⇐19.]

[8. *Escheat* ⇐6.]

Notification of escheat was properly served under section 2300 of the general statutes, but the subsequent proceedings thereunder were not conducted in compliance with the law. Some parties came in and filed their traverse. *Held*, that the proceeding could not affect parties not appearing, but having been properly commenced, it should not be dismissed, and the parties who did appear were entitled to have a trial of their traverse.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. § 12; Dec. Dig. ⇐6.]

[9. *Escheat* ⇐6.]

Each separate traverse under a notification of escheat is a separate case, and should be separately tried.

[Ed. Note.—For other cases, see Escheat, Cent. Cent. Dig. §§ 7–17, 24; Dec. Dig. ⇐6.]

Before Witherspoon, J., Charleston, November, 1883.

These appeals were brought to this Court under the titles of: "In the matter of notification by George D. Bryan, Esq., deputy escheator for the City Council of Charles-

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ton; ex parte G. L. *Buist, administrator, v. G. D. Bryan, deputy escheator, et al.; ex parte Lemuel Malone, et al., v. G. D. Bryan, deputy escheator, et al.; ex parte G. L. Buist, administrator, et al., v. G. D. Bryan, deputy escheator." The opinion fully states the cases.

Upon the motion of Buist, administrator, to set aside all of the proceedings as "unconstitutional, null, and void," the Circuit judge, after making a statement of the facts, and citing and quoting Const., Art. X., § 11; act of 1799, § 15, 5 Stat., 366; Gen. Stat., § 2318, continued his decree as follows:

It appears from the year book for 1881, issued by the city of Charleston, introduced on argument, without objection, that the full amount of the $50,000 limited by the grant under act of 1799, has never been realized from escheated property by the City Council of Charleston for the benefit of the Orphan House. It will be observed that under the act of 1799 the grant is made not to the City Council of Charleston for governmental purposes, but to said City Council for the express benefit of the Orphan House of Charleston, a charitable institution. In Cooley's Const. Lim., 339, it is stated: "If a grant is made to a municipal corporation charged with a trust in favor of an individual private corporation or charity, the interest which the cestui que trust has under the grant may sustain it against legislative revocation." It will not be denied that the Orphan House, under the act of 1799, under grant from the state, was entitled to any interest or title of the state acquired at the death of Thomas W. Malone, in 1864, by escheat.

It is equally clear that if any right vested in the City Council for the Orphan House upon the death of Thomas W. Malone in 1864, such right could not be divested by any subsequent provision of the constitution of 1868. In Harlock v. Jackson, 1 Tr. Con. R., 135, it was held: "In cases of escheats for want of heirs the freehold is vested in the state from the time of the death." In this case the land had been granted to one Allison, who died without heirs. The court says: "It seems clear that the land in question is to be regarded as an escheat from the time of Allison's death. * * * In order to authorize the use of it to public purposes or the dis-

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posal of it by public au*thority, there must be an office found, that is to say, there must be proceedings to establish the escheat pursuant to act of assembly."

Under this authority it seems that the title cannot remain in abeyance, but instantaneously vests in the public upon death without any one who can lawfully claim by descent or purchase. I must conclude and hold that upon the death of Thomas W. Malone, the City Council of Charleston acquired, under the act of 1799, vested rights for the benefit of the Orphan House, that could not be annulled or repealed by the constitution of 1868.

Do the provisions of section 11 of article X. of the constitution of 1868 conflict with the provisions of the act of 1799? Whenever an act of the legislature can be construed and applied as to avoid conflict with the constitution, it should be done. The act of 1799 vests property now escheated, or which shall hereafter be escheated. Section 11 of article X. of the constitution directs the proceeds of estates of deceased persons who have died without leaving a will or heir, to be invested as a school fund. In this section of the constitution we find the limitation, "not otherwise appropriated by this state or the United States."

By reference to legislative acts, it appears to have been the policy of the legislature prior to the adoption of the constitution of

1868 to grant escheated property to a certain amount in value to trustees of schools and charitable associations in certain localities. It was decided in Nettles v. Cummings, 9 Rich. Eq., 440, that the legislature had the right to grant future escheats, and conferring power to hold and possess escheated property to a certain amount was not void for uncertainty. It occurs to me that the expression, "not otherwise appropriated by the state or the United States," in section 11 of article X. of the constitution, was intended as a recognition of the validity of former grants by the state of escheated property, and was only intended to apply the proceeds of escheated property in excess of the limits of such grants. Section 2,318 of the general statutes seems to me to sustain this view.

In this view, I do not think the constitution of 1868 conflicts with the act of 1799, but even if it did, it could not repeal said act, if, as I conclude, rights vested under said act

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at the death of *Thomas W. Malone in 1864. The act of December 23, 1878, must be held to be in conflict with article X., § 11, of the constitution of 1868, but this does not affect the conclusions reached already that this motion cannot be granted.

It is therefore ordered and adjudged, that the motion of George Lamb Buist, administrator of Thomas W. Malone, be refused.

The Circuit decree on the motion to dismiss the proceedings as "unauthorized under the laws of the state in such cases made and provided," (omitting its statement of facts), was as follows:

It was conceded in argument that George D. Bryan, deputy escheator, had not procured the inquest and verdict of a jury with the certificate thereof by a judge, as provided in section 2301 of the general statutes. At this stage of the proceedings to escheat the lands of Thomas W. Malone, this motion is made. The authority for the institution of this proceeding by George D. Bryan is not questioned. The motion only seeks to set aside all of the proceedings subsequent to the notifications of escheat as null and void, under the law regulating the escheat of property.

Chapter XCII. of the general statutes is substantially the same as the act of 1787 (5 Stat., 47), entitled "an act to appoint escheators and to regulate escheats." In McCaw v. Galbraith, 7 Rich., 86, the court, referring to the act of 1787, say: "This act and the amendments of it contain the only provision which we have of machinery for executing such law concerning escheats and forfeitures as now prevails in this State. * * * In providing in reference to such cases for inquest of office, public notice, order of sale, if there should be no claimant, traverse by a claimant and trial * * *."

In Harlock v. Jackson, 1 Tr. Con. R., 142, it is held that in order to authorize the use of property to public purposes or the disposal of it by the public authority there must be an office found, that is, proceedings to establish the escheat, pursuant to act of assembly. I therefore conclude and hold that a compliance with the provisions of section 2301 of the general statutes is necessary in proceedings for escheat of land.

Does the omission to comply with the pro-

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visions of the said *section render all of the proceedings had in this cause null and void? What proceedings have been had in this cause? The deputy escheator (whose authority to institute this proceeding is not questioned) is before the court with notice that certain lands have escheated. Upon the deputy escheator's notice, but before inquest of office, a claimant is permitted by the court upon petition in this proceeding to traverse the escheat and take testimony to be used at the trial of the cause. The court has therefore undertaken to determine the issue between the escheator and traverser. Pending this issue, other claimants, who have not as yet traversed the escheat, upon petition and notice move the court to set aside proceedings already had as null and void, because such proceedings have not been according to law.

If there had been a final determination between the escheator and traverser in this proceeding, as already indicated, I would hold that the escheat could not be established without the inquest and verdict of a jury under section 2301, as well as a compliance with the other provisions of law. In this proceeding the initiatory notice of escheat to the judge has been given as provided in section 2300 of the general statutes. There has been no inquest of office or public notice to claimants as required by sections 2301 and 2302. Whilst the law may contemplate the inquest of office and notice to claimants as therein provided at an earlier stage of the proceedings, for the escheat of Malone's lands, yet I can discover nothing in the law to prevent these steps still being taken.

I conclude and hold, that it would be competent for the court in which an issue is pending between an escheator and a traverser to allow any defect in the proceedings for escheat to be remedied at any time before a final determination of the issue. As the traverser is in no default, he should not be subjected to the delay or prejudiced in what might result from the granting of the motion at the instance of parties who have not as yet traversed the escheat.

Even if it were not competent for the court yet to allow the deputy escheator to proceed under his notice, I hold it would not be competent for this court to reverse and set aside orders passed in a cause before the court.

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The effect of the orders in *the cause as well as all other matters involving the regularity of the proceeding will be determined by the

court upon the trial upon its merits of the issue between the escheator and the traverser.

It is ordered and adjudged that the motion of Samuel Malone, Henry Malone, Bates Malone, and others, upon petition filed to set aside the proceedings in the above entitled cause, be refused. It is further ordered, that George D. Bryan, deputy escheator, do serve a copy of the notice of escheat of the lands of Thomas W. Malone upon Samuel Malone, Bates Malone, and others, named in the petition accompanying the notice of the motion herein refused, and that each of said parties have leave to traverse said escheat.

The exceptions to these decrees, taken by the several appellants, raise the points stated in the opinion.

Mr. Henry Buist, for Buist, administrator.

Messrs. J. D. Kennedy and T. H. Clarke, for G. W. Malone et al.

Mr. James Simons, for Lemuel Malone et al.

Mr. W. M. Thomas, for Henry Malone et al.

Mr. Robert Chisolm, for J. G. Fawkner et al.

Mr. G. D. Bryan, for the deputy escheator.

September 20, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. These three appeals, under the titles above stated, all grow out of proceedings instituted by Geo. D. Bryan, as deputy escheator for the City Council of Charleston, for the purpose of having certain real estate of the late Thomas W. Malone declared to be escheated and vested in said City Council for the benefit of the Orphan House of Charleston, upon the ground that he died leaving no person who can lawfully claim the same either by purchase or descent.

The facts out of which the questions to be

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determined arise are *substantially as follows: sometime in 1864 the said Thomas W. Malone departed this life, in the city of Charleston, intestate, leaving sundry lots in the said city, described in the notification of escheat, as well as some personal property. Soon after his death, George Lamb Buist, Esq., was duly appointed administrator of his personal estate, and he has been, and still is, in the receipt of the rents and profits of said real estate. On December 18, 1882, George D. Bryan, as deputy escheator for the City Council of Charleston, served a notification of escheat upon Judge Pressley, the judge of the 1st Circuit, which embraced the city of Charleston. After this notification, the respondent, John G. Fawkner, presented his petition, denying that the said Thomas W. Malone died leaving no heirs capable of inheriting his estate, and on the contrary averring that he and others therein named are the heirs at law and distributees of said estate. On February 3, 1883, Judge Pressley granted an order directing the deputy escheator to serve a copy of the notice of escheat upon the attorney of said Fawkner, with leave to him to traverse the escheat, which traverse was filed on February 10, 1883.

In the meantime, to wit, on February 7, 1883, George Lamb Buist, as administrator of Thomas W. Malone, upon whom a copy of the notice of escheat had been served, filed his petition denying that Thomas W. Malone had died without leaving any person capable of inheriting his estate; stating that he had been informed that the intestate left a sister, who formerly resided in one of the southwestern states, and that he had other connections in the state of Alabama; that he had been served with a notice by the attorney of said Fawkner, claiming that he and others named in the petition of said Fawkner were entitled as next of kin and heirs at law to the estate of the intestate; that an action had been commenced on January 13, 1883, by the said Fawkner against him as administrator and the said Bryan as deputy escheator, to recover the personal estate and to be let into possession of the real estate of said Thomas W. Malone, and for an account of the personalty and the rents and profits of the realty; submitting that no order can properly be made in the premises until notice has been published according to law, calling in all persons claiming to be

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heirs and distributees of said *Thomas W. Malone, and praying that his rights and interests may be protected in any order that may be made in the premises.

Subsequently to the filing of the petition and traverse of Fawkner, as above stated, but at what date does not appear, Geo. D. Bryan, as deputy escheator, filed his reply, controverting the allegations of Fawkner's petition, and praying that such further proceedings may be had as will give an opportunity to bring in all those who claim to be next of kin of said Thomas W. Malone, so that the rights of all parties may be finally adjudicated. On April 5, 1883, Henry Malone filed his petition and claimed to be an heir at law of said Thomas W. Malone, and on the same day an order was granted requiring the deputy escheator to serve the notice of escheat upon the attorney of said Henry Malone, with leave to traverse the escheat, but it does not appear that any traverse was filed by him.

On April 7, 1883, Judge Cothran, while holding the courts of the first Circuit, granted an order for the clerk to advertise, in accordance with the provisions of section 2302 of the general statutes, calling upon all persons claiming to be entitled to the estate of said Thomas W. Malone to come in and make good their claims. In pursuance

of this order, the clerk did publish an advertisement, without date, calling upon the heirs of said Thomas W. Malone "to appear and make claim to his estate before the expiration of six months from the date hereof." Mark Malone and others having presented their petition claiming to be next of kin of said intestate, the court granted an order on June 30, 1883, requiring the deputy escheator to serve a copy of the notice of escheat upon the attorney of the petitioners, with leave to them to traverse the escheat, but it does not appear that any traverse was ever filed by them.

On October 3, 1883, a claim was filed by Charles Malone and others, but no action seems to have been taken thereon. On October 4, 1883, a traverse was filed by Geo. L. Hill, one of the claimants named in the petition of John G. Fawkner, above mentioned. On October 5, 1883, a claim was filed by Geo. W. Malone and others, and no action taken thereon. On October 6, 1883, a petition was filed by Lemuel Malone and others, claiming that they and others, some of whom are in-

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fants, whose names are *unknown to the petitioners, are heirs at law and next of kin of the intestate, and as such entitled to his estate, both real and personal; that the mode prescribed by law by which lands are to be declared escheated has not been pursued in the proceedings herein; that the advertisement by the clerk, under the order of April 7, 1883, was not in accordance with the law; and praying that all the proceedings subsequent to the notification of escheat be set aside as null and void; and failing in this, that they may be served with a copy of the notification of escheat, with leave to traverse the same. On October 9, 1883, a traverse was filed by Margaretta Taylor and others, some of the parties named in the above mentioned petition of John C. Fawkner as heirs at law of the said Thomas W. Malone.

On the same day of the filing of the petition of Lemuel Malone and others, as above stated, these petitioners, by their counsel, gave notice to the clerk of the court, and to Mr. Bryan, the deputy escheator, that they would move the court at its next session "to set aside all the proceedings in the matter of the proceedings for the escheat of the lands of the said Thomas W. Malone subsequent to the notification of escheat therein, on the ground that the same are null and void, and unauthorized under the laws of the state in such cases made and provided."

On October 23, 1883, Geo. Lamb Buist, as administrator as aforesaid, gave notice to the attorneys representing the various parties of a motion to set aside all the proceedings upon the ground that under section 11 of article X. of the constitution of this state the proceeds "of all estates of deceased persons who have died without leaving a will or heir" are appropriated to the establishment and maintenance of "free public schools, and for no other purposes or uses whatever," and that, therefore, Geo. D. Bryan, as deputy escheator for the City Council of Charleston, has no authority to institute any proceedings for the escheat of lands in the city of Charleston, either for the benefit of the Orphan House of Charleston, or for any other purpose.

These motions were heard at November term, 1883, by Judge Witherspoon. At the hearing, it was contended by the administrator, Mr. Buist, and by those uniting with him in this appeal, that although the 15th

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section of the act of 1799 (5 Stat., 366), *vesting in the City Council of Charleston for the benefit of the Orphan House of Charleston all escheated property in the parishes of St. Philip and St. Michael, which embrace the city of Charleston, to an amount not exceeding the sum of fifty thousand dollars, had never been in express terms repealed, yet that it was abrogated by the provisions of section 11 of article X. of the constitution of 1868; but that if this position could not be maintained, then the City Council, having, as it was conceded, already received the proceeds of escheated property to the amount of $48,648.19, it can only claim the balance of the sum limited in the act of 1799 to $50,000, to wit, the sum of $1,351.81, and that for this purpose they should be required to confine their proceedings to only so much of the property as would yield that balance, notwithstanding the fact that the legislature, by the act of 1878 (16 Stat., 731), had amended the 15th section of the act of 1799, above cited, by increasing the sum therein mentioned from fifty to one hundred thousand dollars, because the act of 1878 was in conflict with the provisions of the constitution above cited.

On January 23, 1884, Judge Witherspoon filed his judgment holding that the provisions of the 15th section of the act of 1799 were not abrogated by the provisions of the constitution of 1868, but that the act of 1878 was in conflict with said constitution, and dismissing the motion of the administrator. From this judgment the administrator appeals, and all the parties claiming to be heirs at law of Thomas W. Malone, except John G. Fawkner and those mentioned in his petition, unite with the administrator in his appeal. Mr. Bryan, the deputy escheator also appeals upon the ground that the Circuit judge erred in holding the act of 1878 unconstitutional.

At the same term, the motion submitted on behalf of Lemuel Malone and others was heard, when it was contended by the moving parties that, inasmuch as the mode of proceeding prescribed originally by the act of 1787, 5 Stat., 46 (the provisions of which are substantially re-enacted in sections 2300–

2315 of the General Statutes of 1882), had not been strictly pursued after the notification of escheat had been served upon the judge of the 1st Circuit, all the proceedings

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subsequent to such notifica*tion were nullities and should be so declared. On January 22, 1884, Judge Witherspoon filed his judgment, holding that, while there were defects in the proceedings, they were not such as rendered the proceedings void, but that they might be supplied, and refused the motion. He also ordered the deputy escheator to serve a copy of the notice of escheat on the petitioners with leave to traverse the same. From this judgment, Lemuel Malone and the others named in the petition appeal, and all the other parties claiming to be heirs of Thomas W. Malone (except John G. Fawkner and those named in his petition), as well as Mr. Buist, the administrator, join in this appeal.

These appeals raise the following questions: 1st. Whether the provisions of the 15th section of the act of 1799 have been repealed or abrogated by the 11th section of article X. of the constitution of 1868. 2d. Whether the act of 1878, increasing the grant of escheated lands to the City Council of Charleston for the benefit of the Orphan House from fifty to one hundred thousand dollars, is in conflict with said constitutional provision. 3d. Whether the defects in the proceedings instituted by Mr. Bryan, as deputy escheator, are such as to render all of such proceedings, since the notification of escheat, null and void, or whether such defects may not yet be supplied.

I. Title to real estate cannot remain in abeyance; it must be vested in some one. When, therefore, a person seized of real estate dies intestate, the title to such estate vests at once in his heirs, if he leaves any, but if there is no person who can establish that relation, then the title must necessarily at once vest in the State as escheated property. The fact that it may be uncertain or unknown where the title does vest, until after a judicial determination of the question in whom the title is vested, does not prevent the immediate vesting of the title in the person really entitled; for the law will regard the title as vested in such person immediately upon the death of the intestate, although it may not then, or for some time afterwards, be known where the title has vested. This doctrine is fully supported by authority. Harlock v. Jackson, 1 Tr. Con. R., 135, reported also in 3 Brev., 254; City Council of Charleston v. Lange, 1 Mill Con. R., 454.

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*Although the title is thus vested in the state immediately upon the death of the intestate leaving no heirs, yet the state will not undertake to dispose of the property until after it has been ascertained in the mode prescribed by law, that the property has in fact escheated, and then only in the mode provided for by the escheat law—by sale—and will not re-grant the land as vacant land. Bodden v. Speigner, 2 Brev., 321. As is said by Cheves, J., in City Council v. Lange, supra, "the state forbears to exercise the right which the common law casts upon it, until that right is ascertained."

But while the state thus forbears to exercise the right of disposing of the property until the escheat has been ascertained, or, as it is usually expressed, until office found, it has always exercised the right of granting its rights in escheated property to corporations as well as private individuals, whether such property has been already declared escheated or not; and our court has distinctly held, in the case of Nettles v. Cummings, 9 Rich. Eq., 440, that the legislature may grant future escheats; that is, an act conferring upon the Sumterville Academical Society property theretofore or thereafter escheated, to the amount limited in the act, was a valid grant of property which escheated after the passage of the act as well as before, up to the amount so limited.

It is true that these legislative grantees of escheated property, like the state, cannot make escheated property available, except in the mode prescribed by the escheat law, either through the action of the state escheator or their own escheators, when, as in this case, they are authorized to appoint one. Still, like the state, they are invested with the right from the time of the death of the intestate, though they may not be able to enforce such right, so as to reap its fruits until the mode of proceeding prescribed by the escheat law has been pursued. But when that has been done, then their rights have relation back to the time of the death of the intestate. Thus in the case of the City Council of Charleston v. Lange, supra, in which the plaintiff was doubtless claiming under this same act of 1799, it was held that the City Council was entitled to recover from the administrator, not only the rents and

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profits of the real estate received by the *administrator which accrued after, but also those which accrued before office found.

This, it seems to us, shows conclusively that where escheated property, or that which may thereafter escheat, has been by legislative grant conferred upon a corporation or individual, such grantee becomes invested with all the rights of the state immediately upon the death of an intestate leaving no heirs, although the enforcement and enjoyment of the fruits of such rights are postponed until the property has been declared escheated in the manner prescribed by law. The practical inquiry, therefore, in this case is, whether the right vested in the City Council of Charleston for the benefit of the Orphan House to all the escheated property in the

parishes of St. Philip and St. Michael to an amount not exceeding fifty thousand dollars, by the 15th section of the act of 1799, could be taken away by the provisions of section 11 of article X. of the constitution of 1868.

While it is true that the state retains absolute control over charters which it may grant to municipal corporations, and may, at any time alter or modify or even repeal them altogether, yet it by no means follows that it retains the same control over all the property of such a corporation. The rule upon this subject, as stated by that eminent author, Mr. Justice Cooley, in his work on Constitutional Limitations, p. 237, of the 2d edition, is as follows: "When corporate powers are conferred, there is an implied compact between the state and the corporations that the property which they are given the capacity to acquire for corporate purposes, under their charter, shall not be taken from them and appropriated to other uses. If the state grants property to the corporation, the grant is an executed contract which cannot be revoked. The rights acquired, either by such grants or by any other legitimate mode in which such a corporation can acquire property, are vested rights, and cannot be taken away. Nevertheless, if the corporate powers should be repealed, the corporate ownership would necessarily cease, and even when not repealed, a modification of those powers, or a change in corporate bounds, might seriously affect, if not altogether divest, the rights of individual corporators, so far as they can be said to have any rights in public property. And in other ways incidentally, as *well as by direct intervention, the state may exercise authority and control over the disposition and use of corporate property, according to the legislative view of what is proper for the public interest, and just to the corporator, subject only, we think, to this restriction, that the purpose for which the property was originally acquired should be kept in view, so far as the circumstances will admit, in any appropriation that may be made of it."

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In the celebrated Dartmouth College Case, 4 Wheat., 518 [4 L. Ed. 629] where the whole subject of the control of corporations by the government was most ably and elaborately discussed, the court declared that while the charter of a municipal corporation was not like the charter of a private corporation, a contract, yet that municipal corporations could not be deprived of their vested rights of property. As Story, J., at page 694–5, says: "It may also be admitted that corporations for mere public government, such as towns, cities, and counties, may, in many respects, be subject to legislative control. But it will hardly be contended that, even in respect to such corporations, the legislative power is so transcended that it may, at its will, take away the private property of the corporation or change the uses of its private funds acquired under the public faith. Can the legislature confiscate to its own use private funds which a municipal corporation holds under its charter, without default or consent of the corporators? * * * From the very nature of our government the public faith is pledged the other way, and that pledge constitutes a valid compact, and that compact is subject only to judicial inquiry, construction, and abrogation." Again, at page 698, he says: "The truth is that the government has no power to revoke a grant, even of its own funds, when given to a private person, or a corporation, for special uses. It cannot recall its own endowments granted to any hospital, or college, or city or town, for the use of such corporations." See also Terrett v. Taylor, 9 Cranch, 43 [3 L. Ed. 650] and Town of Pawlet v. Clark, 9 Cranch, 292 [3 L. Ed. 735].

In Fletcher v. Peck, 6 Cranch, 87 [3 L. Ed. 162] it was settled that a legislative grant of property was an executed contract and within the protection of that clause of the constitution of the United States which forbids a state from passing any law impairing the obligation of contracts. Judge Cooley, in commenting on this case *and showing that every grant to a municipal corporation does not constitute a contract, says, at page 277 of his work on Constitutional Limitations, 2d edition: "If, however, a grant is made to a municipal corporation charged with a trust in favor of an individual, private corporation, or charity, the interest which the cestui que trust has under the grant may sustain it against legislative revocation; a vested equitable interest being property in the same sense and entitled to the same protection as a legal."

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In view of these principles, thus authoritatively settled, we think it clear that the provisions of section 11, article X., of the constitution cannot have the effect of annulling or repealing the legislative grant of all escheated property in the parishes of St. Philip and St. Michael, to the extent of fifty thousand dollars, to the City Council of Charleston for the benefit of the Orphan House of that city.

In the argument here it was contended that, inasmuch as the legislature had, in numerous instances since the passage of the act of 1799, made special grants of escheated property in the city of Charleston to private individuals, the City Council, by neglecting to assert its rights to such property, had forfeited its rights under the act of 1799 to the extent of the value of the escheated property so lost to it, and that by taking into account the value of the property so lost by its neglect, the City Council should be regarded as having already received the full amount secured to it by the act of 1799. No such question seems to have been raised or

considered in the Circuit Court, and therefore it is not properly before us. But even if it were, the remarks of the court, through Johnston, Ch., in the case of Nettles v. Cummings, in response to a similar position taken in that case would seem to be conclusive. He says: "As to the objection that the society by neglecting to enforce its rights in former cases of escheated property has forfeited its rights to the extent of the property thus lost—is there anything in the statutes compelling it to take its remedy out of the first property which presents itself? Is not the authority plainly conferred to take the remedy out of whatever escheated property it might select, provided it should not raise more than the amount limited in the acts?"

II. As to the constitutionality of the act

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of 1878. It is quite *clear, upon the principles hereinbefore announced, that this act is unconstitutional. The proceeds of all escheated property in the state having been appropriated by the constitution of 1868 (art. X., § 11), "as a state school fund," the legislature certainly had no power, ten years after such appropriation, to divert any portion of the proceeds of such property to any other purpose. The act of 1878 was an attempt by the legislature to make a new and additional grant of escheated property in the city of Charleston, to the amount of fifty thousand dollars, to the City Council of Charleston, for the benefit of the Orphan House, but as all of such property had already been devoted by the supreme law of the land to another purpose, such attempt must necessarily fail, as beyond the competency of the legislature.

It is argued, however, that the Orphan House of Charleston is a free public school, "combining with it the feature of support for poor orphan children," and, as such, that it falls within the constitutional provision in regard to the proceeds of escheated property. As we understand it, however, the Orphan House is not a state but a city institution. It is not under the control of the state, but of the city authorities or commissioners appointed by them. The school attached to it is not under the control of the superintendent of education, or of the school commissioners. Its doors are not open to all, but only to "all poor orphan children, and children of poor, distressed, or disabled parents, as shall be deemed proper objects of admission by the commissioners;" and while it is undoubtedly a noble charity, and a great credit to the city in which it has been established, it cannot, in any proper sense of the terms, be regarded as a "free public school," and as such, entitled to participate in the "state school fund." Hence, after the proceeds of all escheated property have been devoted by the constitution to the "state school fund," which "shall be faithfully appropriated for the purpose of establishing and maintaining free public schools, and for no other purposes or uses whatever," the legislature has no power to divert any portion of such proceeds to the support of the Orphan House.

III. The only remaining inquiry is, whether the defects in the proceedings instituted by Mr. Bryan, as deputy escheator, to have the real estate of the late Thos. W. Malone,

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in the city of *Charleston, escheated, are such as to render all of such proceedings subsequent to the notification of escheat (to which no objection seems to be raised) null and void.

Section 2300, of the general statutes of 1882, requires that a notification of escheat shall be served on the judge of the Circuit within which the supposed escheated lands lie, and this requirement seems to have been properly complied with. Section 2301 requires the judge presiding at the court next ensuing after the service of the notification, to cause the jury to make a true inquest of such supposed escheated lands, and certify their verdict to the escheator, who is required to record the same in a book to be kept for the purpose, and return the original within two months to the office of the clerk of the court, to be there filed and kept as a record. None of these various requirements were complied with.

Section 2302 requires the clerk, upon the return of the inquest, to cause to be advertised in a newspaper the first week in every month for six months, a notice containing certain specified particulars, calling upon all persons claiming under the person last seized of the supposed escheated lands to appear and make claim; and section 2303 provides that if no person shall appear and make claim within twelve months after the expiration of the time prescribed for advertising, the clerk shall issue process signed by the judge to the escheator, pronouncing the said lands escheated and vested according to law, and directing him forthwith to sell the same upon the usual notice. The provisions of these two last mentioned sections were not complied with, but under an order of the judge, the clerk did advertise for claimants (his advertisement being without date) for six months, requiring them to come in and file their claims, not, however, within twelve months after the expiration of the time prescribed for advertising, as required by the statute, but within six months from the date of his advertisement.

Section 2304 prescribes the manner in which the escheator shall advertise the sale and the terms thereof. Section 2305 provides for the division of the land, if it exceeds six hundred acres, into smaller parcels. Section 2306 provides that, "if any person shall appear, within five years, and make

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good title to *such lands in the Court of Common Pleas, on an issue tried, he shall

forthwith receive adequate compensation." Section 2307 reads as follows: "Any person without delay, shall be heard on a traverse, in the Court of Common Pleas, on a petition setting forth his right, and the said lands shall be committed to him, if he shall show good evidence of his title to hold until the right shall be found and discussed for the state and the claimant; such claimant finding sufficient security to prosecute his suit with effect, and without delay, and to render to the state the yearly value of such lands, if the right be found for the state." The provisions of the remaining sections of the chapter contain nothing material to the present inquiry.

From this brief summary it is quite manifest that no valid sale of the lands alleged to be escheated can be made until the requirements of the statute, which have been omitted, are complied with, but it does not by any means follow that these omissions will invalidate the traverse already filed by some of the claimants who are in no default whatever. The object, clearly, of the requirements which have been omitted, especially that in reference to the advertisement, is solely to give full and ample notice to all persons who may have any claim to the supposed escheated lands to come in and make good their claim before they are disposed of by sale. Hence, if any person chooses to come in without the publication of the notice as required by statute, he will be bound by all subsequent proceedings, just as an absent defendant would be who chooses to come in without due publication of notice to absent defendants; but those who do not come in will not be bound until after all the requirements of the statute are complied with, and therefore the court would not be justified in ordering a sale until such requirements had been complied with, because until then it could not be known that all persons who might have a claim had been offered and had neglected the opportunity to come in and assert their claims. But how the omission of any one of those requirements can affect a traverse of one who chooses to come in before all the formalities are complied with, we are at a loss to conceive.

Each traverse is a separate case. Such was the practice adopted in McCaw v. Gal-

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braith, 7 Rich., 74, and such must *necessarily be the practice from the very nature of the proceeding. The fact that one traverse may fail in the issue which he has tendered, has no effect whatever upon a traverse that may be filed by another. Indeed, the requirements of the statute, which appellants claim were omitted in these proceedings, are not conditions precedent to the filing or trial of a traverse, but only to the order of sale. There is no reason why a traverse should not be filed and tried before the expiration of the time prescribed for the notice to all claimants to come in and make good their claims. Certainly the law does not contemplate that a claimant shall not file his traverse and have it tried until after the expiration of eighteen months from the date of the first publication of the notice. On the contrary, the statute expressly provides that, "any person without delay shall be heard on a traverse in the Court of Common Pleas, on a petition setting forth his right." Not a word is in the statute even implying that a person who wishes to traverse must wait until after all the steps necessary to a sale have been taken before filing his traverse and having it heard; but on the other hand the statute expressly declares that his traverse shall be heard, without delay, on a petition setting forth his right.

Now if a claimant may file his traverse and have it tried before the expiration of the time within which any person who may have a claim is allowed to come in and make good his claim, that is within twelve months after the expiration of the time (six months) prescribed for advertising, making in all eighteen months, we see no reason why a person, if he chooses so to do, may not file his traverse and have it tried before the notice has been published at all in accordance with the requirements of the statute, the only effect of such trial being to determine the issue between himself and the escheator, without prejudicing, in any manner, the rights of any other traverse. We see no error, therefore, on the part of the Circuit judge in refusing the motion submitted by Lemuel Malone and others to set aside all the proceedings subsequent to the notification of escheat.

The judgment of this court is that both of the judgments of the Circuit Court, which have been appealed from, be affirmed.

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***ROBERTS v. SMITH.**

SMITH v. BOYLE.

(April Term, 1884.)

[1. *Vendor and Purchaser* ⟸191.]

One who purchases land, goes into possession with the consent of the vendor, and pays the purchase money, but receives no deed of conveyance, is entitled to specific performance, and for all practical purposes is the owner of the land. And it does not alter the case if part of the purchase money was paid after the death of the purchaser.

[Ed. Note.—Cited in Sweatman v. Edmunds, 28 S. C. 62, 5 S. E. 165; Buchanan v. Buchanan, 38 S. C. 415, 17 S. E. 218; Watts v. Witt, 39 S. C. 368, 17 S. E. 822; Rapley v. Klugh, 40 S. C. 144, 18 S. E. 680; Peay v. Seigler, 48 S. C. 514, 26 S. E. 885, 59 Am. St. Rep. 731.

For other cases, see Vendor and Purchaser, Cent. Dig. § 395; Dec. Dig. ⟸191.]

[2. *Wills* ⟸8.]

After-acquired land did not pass under the will of a testator who died before 1858.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 12, 13; Dec. Dig. ⟸8.]

[3. *Trusts* ⟸69.]

An assignment to the widow of such purchaser of the title deed to the property held by the vendor, which assignment was made without consideration and executed without witnesses, conveyed no title; but if regular, the widow would have held as trustee for the heirs.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. ⟸69.]

[4. *Adverse Possession* ⟸10.]

Quere. Can the creditor of one deceased urge a plea of adverse possession in behalf of the debtor's estate, no such claim being asserted by the heirs or administrator of the deceased?

[Ed Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 58–64; Dec. Dig. ⟸10.]

[5. *Adverse Possession* ⟸62.]

A devisee who is also executrix, does not hold the subject of the devise by adverse possession against the creditors of the testator, until his debts are all paid.

[Ed. Note.—Cited in Brock v. Kirkpatrick, 69 S. C. 237, 48 S. E. 72.

For other cases, see Adverse Possession, Cent. Dig. § 325; Dec. Dig. ⟸62.]

[6. *Adverse Possession* ⟸62.]

When a widow, who is also executrix, claims by devise what is afterwards discovered to be intestate property, such discovery cannot have relation back, so as to change the character of her possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 325; Dec. Dig. ⟸62.]

[7. *Tenancy in Common* ⟸15.]

One co-tenant cannot claim land by adverse possession against her co-tenants living with her, there having been no ouster, and two of them being minors.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42–52; Dec. Dig. ⟸15.]

[8. *Judgment* ⟸686.]

Judgment was recovered against B in 1849, renewed against his administrator in 1869, and incidentally affirmed in 1870 in an action to which all the heirs at law of B were parties. *Held*, in action brought in 1882, that this judgment was an outstanding debt of B's estate.

[Ed. Note.—Cited in Leitner v. Metz, 32 S. C. 387, 10 S. E. 1082.

For other cases, see Judgment, Cent. Dig. § 1209; Dec. Dig. ⟸686.]

[9. *Executors and Administrators* ⟸202.]

B gave his bond in 1850, secured by mortgage, and judgment upon this bond was obtained against B's administrator in 1871, B's heirs at law not being parties. Whether this judgment was a lien upon the lands of B depended upon the character of his heirs' possession, but the bond and mortgage are valid claims against B's estate (which is the land mortgaged), his heirs, parties to this action, raising no objection to their payment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 730, 738–745, 748, 754, 763; Dec. Dig. ⟸202.]

[10. *Payment* ⟸66.]

Where a debtor acknowledged her bond as a subsisting obligation within thirteen years after its maturity, the currency of a presumption of payment dates only from such acknowledgment. Distinction drawn between the force of admis-

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sions made on a debt not yet *presumed to be paid, and on one where the presumption of payment is complete. This case thus distinguished from McQueen v. Fletcher, 4 Rich. Eq., 161.

[Ed. Note.—Cited in Dickson v. Gourdin, 26 S. C. 398, 2 S. E. 303.

For other cases, see Payment, Cent. Dig. § 186; Dec. Dig. ⟸66.]

[11. *Payment* ⟸66.]

After judgment obtained on a bond, the debtor, by letter to her creditor, acknowledged her indebtedness on the "bond" held by the creditor. There being no other indebtedness by her to this creditor, *held*, that it was an acknowledgment of the judgment debt.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 176–188; Dec. Dig. ⟸66.]

Before Wallace, J., Charleston, June, 1883.

These were two actions heard together: 1. Action by Susan V. Roberts against T. H. Smith, administrator of M. E. J. Boyle, Susan Smith, Sarah C. Miles, and L. C. Boyle, commenced April 4, 1882, to foreclose a mortgage given by M. E. J. Boyle. 2. Action by Susan Smith against L. C. Boyle, Sarah C. Miles, T. H. Smith, Susan V. Roberts, A. C. Schaffer, as administrator L. C. Boyle, the elder, and against the heirs of Josiah I. Perry, deceased, commenced May 11, 1882, for partition of the estate of L. C. Boyle, deceased. The opinion fully states the cases.

Mr. W. M. Thomas, for appellant.

Messrs. Lord & Inglesby and Jennings W. Perry, contra.

September 22, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. These cases were filed in Colleton county, were removed to Charleston by order of court, and, involving substantially the same issues, were by consent heard together. An order of reference was made, requiring the master, G. H. Sass, Esq., to take the testimony and report upon "all the issues of law and fact," whose report discloses substantially the following facts:

Lionel Chalmers Boyle purchased the plantation known in the proceedings as the "Singleton tract," the subject of the suits, from Josiah Isaac Perry in the year 1850. He paid cash, $400, of the purchase money, but this amount he borrowed from the said Perry, as executor of Susan M. Perry, and to secure the bond given for the same, executed to the said Perry as executor as aforesaid, a mortgage of the land so purchased, but this

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mort*gage was not recorded until February 5, 1868. It seems that no formal conveyance was executed to Boyle, but he was let into the possession and occupied it until December 21, 1850, when he died, leaving a will bearing date August 13, 1849, by which he bequeathed and devised in terms the whole of his property, real and personal, to his wife, Mary E. J. Boyle. The dates show, however, that he purchased the Singleton land after he had executed his will, and

therefore being after-acquired property, it did not pass under his will according to the law then in force, but was intestate property.

It is manifest, however, that the parties thought the land well devised to the widow. The remainder of the purchase money was paid after the death of L. C. Boyle, through O'Hear, Roper & Stoney, who had been the factors of Boyle in his life-time, and continued to be the factors of the estate after his death. After the balance of the purchase money was paid in this way, Josiah I. Perry still did not make title direct, but endorsed on the deed of the land made to him by his vendor, the executor of Singleton, an assignment in the following words: "The State of South Carolina, Colleton county. I do hereby transfer and assign the within named plantation to Mrs. M. E. J. Boyle, her heirs and assigns forever, for and in consideration of full value received. In witness whereof I have hereto set my hand and seal, this first day of March, 1851. (Signed) Josiah I. Perry. [L. S.]" As appears, this assignment was under seal, but it was not witnessed or recorded, and there was no proof that it had ever been delivered.

The following claims were set up against the proceeds of the land:

1. The widow, M. E. J. Boyle, and her children, continued in possession of the land after the death of L. C. Boyle, and on March 22, 1853, she executed her bond to Jacob A. Lockwood, trustee, for $1,350, and to secure it, executed to him, as such trustee, a mortgage of the said plantation, of even date, which was recorded April 14, 1853. This mortgage did not include all of the Singleton land, but only two parts of it—one of 700, and another of 500 acres; two other tracts—the "Pine Barren tract," consisting of 200 acres, and another, called "Cattles," containing 405 acres, included in the Single-

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ton land, were omitted in the *mortgage to Lockwood, trustee. The land and mortgage were assigned by Lockwood, trustee, to Susan V. Richards (now Roberts), the cestui que trust, and are now sought to be foreclosed on the land, in the case first stated in the title. There remains due upon this debt of M. E. J. Boyle the sum of $500, with interest from August 1, 1864.

2. On March 17, 1853, Jacob A. Lockwood, as guardian, recovered judgment against Mary E. J. Boyle for $3,135. This judgment is still unsatisfied, but it is claimed that it must be presumed paid by lapse of time. To rebut this presumption, Mrs. Roberts relies on the following letter of Mrs. Boyle, viz.: "Mr. Richards—Sir: I received a short time since a letter from you relative to amount of balance due on bond to Mr. Lockwood, as guardian. I regret very much it is not in my power at present to settle same, but assure you I shall endeavor to do so as soon as possible. Must beg your further indulgence. February 9, 1866. Yours, very respectfully, (signed) M. E. J. Boyle." Mrs. Boyle died intestate on December 10, 1867, and T. Henry Smith administered upon her estate.

3. As before stated, L. C. Boyle had in his life-time given a bond to Perry, as executor, for $400, which was secured by a mortgage of the Singleton land, not recorded until 1868. Upon this bond Perry, after the death of Boyle, sued A. C. Schaffer, his administrator, without making the heirs parties, and recovered judgment against the administrator in December, 1871. This judgment is still unsatisfied, and is claimed to be due by the estate of L. C. Boyle.

4. In February, 1849, before the death of L. C. Boyle, "The Bank of the State" recovered judgment against him for $3,000, which was revived by proceedings against Schaffer, administrator, on November 10, 1869. In December, 1869, Josiah I. Perry, as assignee, brought suit against T. Henry Smith and wife, and others, heirs at law of L. C. Boyle, to foreclose a mortgage on an Edisto plantation belonging to the estate of L. C. Boyle. The date of the mortgage was junior to that of the judgment of the bank, and the complaint charged that the judgment must be considered as paid by presumption from lapse of time, or if not, that the bank should be required to revive the same and to pro-

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*ceed by execution to exhaust all the other property of L. C. Boyle before resorting to the premises mortgaged. The answer of T. H. Smith and wife, Susan, a daughter of L. C. Boyle, set up the same defence to the judgment. The bank answered, declaring their willingness to levy on other property of the estate, if any of such property could be pointed out; but that not being done, the court, in 1870, made a decree sustaining the validity of the judgment, which was satisfied in part out of the proceeds of sale of the mortgaged Edisto premises. The remainder of the judgment was afterwards assigned to Thomas Henry Smith April 21, 1876, and is now claimed by him as a valid and subsisting lien against the estate of L. C. Boyle.

As the claims one and two are against the estate of M. E. J. Boyle, the wife, and three and four are against that of L. C. Boyle, the husband, it was necessary in the first place to determine to which of the estates the Singleton tract of land properly belonged. Upon the facts stated the master held, as matter of law, that L. C. Boyle was the owner of the Singleton plantation and had a good title thereto in his life-time; that Mrs. Boyle took no title under the assignment, nor did she take any title under the will, her only title in the property being her distributive share, viz., one-third thereof after the debts of her husband were paid, and to that amount only could her mortgage lien attach.

As to the Roberts mortgage, executed by Mrs. Boyle, he held that it is a lien on her distributive share after the payment of L. C. Boyle's debts, &c. As to the judgment of Lockwood, guardian, against Mrs. Boyle, he held that the presumption of payment by lapse of time had not been rebutted. As to the judgment recovered by Perry, trustee, against the administrator of L. C. Boyle, he held that it is a valid and subsisting lien, according to its rank against the estate of L. C. Boyle. As to the judgment of the Bank of the State, assigned to T. Henry Smith, he held that its validity was established in the case of Perry, Assignee, v. T. H. Smith and Wife, et al., in which the heirs of L. C. Boyle were parties, and that the balance still due is a valid lien upon the estate of L. C. Boyle.

Upon exceptions and argument in the Circuit Court, Judge Wallace affirmed the re-

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port in every particular, and from that *decree Mrs. Susan V. Roberts appealed to this court upon the following exceptions:

I. Mrs. Roberts objects: 1. Because there was no legal testimony of any sale by J. I. Perry to L. C. Boyle, and the master erred in not stating his rulings on the proposed testimony of the sale. 2. Because the presumption is, that the assignment of Perry to Mrs. Boyle was recorded on the second record in 1868, and that it was delivered, and there is no evidence to the contrary. 3. There is no proof of any judgment of Perry against Schaffer, administrator of Mr. Boyle, and the presumption of time, and from the assignment of the land by the mortgagee, Perry, to Mrs. Boyle, for a valuable consideration, is that the mortgage debt was paid by her.

II. Mrs. Roberts denies: 1. That L. C. Boyle in his life-time ever had a good title to the land. 2. That the taking of a mortgage by Perry from Mr. Boyle was an estoppel in the sense of a presentation of his making title to Mrs. Boyle, especially where it is in evidence introduced by the family, that he, Perry, said he had made no title to Mr. Boyle. 3. That the possession of Mrs. Boyle was not adverse under her title from Perry to the other heirs and creditors of Mr. Boyle; and she alleges that the report of the master in this behalf is inconsistent in itself in holding (1) that Mrs. Boyle and the whole family "regarded her as the owner," working it, mortgaging it, and holding it for twenty-two years, ten years at least after the majority of the youngest child; and (2) that this possession was not adverse. 4. That the assignment of Perry to Mrs. Boyle was a nullity, the facts and presumption showing that she paid for it, besides the "good consideration" mentioned in the assignment to her by Perry. 5. That the Roberts mortgage was a lien only on one-third of the land, and not on all. 6. That the promise to pay Lockwood, guardian, within twenty years did not rebut the presumption of payment of her judgment to him. 7. That the judgments of the bank and of Perry (if proved) against Schaffer, administrator of Mr. Boyle, is binding on the heirs of Mr. Boyle, and especially on Mrs. Boyle's interest, covered as it was by a mortgage long before recorded.

III. Mrs. Roberts alleges: 1. That the

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master ought to have *reported the land as belonging to Mrs. Boyle. 2. That if it was a family mistake, and the land did belong to Mr. Boyle, the family should not now be allowed to take advantage of that mistake to the worry and injury of this mortgagee, who was at that time a minor. 3. That a mistake taken advantage of in that way would be a fraud, which would call for the strongest intervention of the courts. 4. That it was neither a mistake nor fraud, but a good title, which the mother of this family mortgaged to Mrs. Roberts, &c.

The leading question in the case is as to the ownership of the Singleton tract of land, for on that must depend the proper application of the proceeds of sale. The pleadings are not in the Brief, but the master found, and the Circuit judge concurred, that L. C. Boyle, in his life-time, purchased the Singleton plantation from Josiah Isaac Perry, paid part of the purchase money, and was let into possession; that he executed a mortgage to the vendor to secure the part of the purchase money paid, and that the remainder of the purchase money was paid soon after his death from the products of his estate, through his factors. And under this state of facts, it was held as matter of law "that L. C. Boyle was the owner of the Singleton plantation and had a good title thereto in his life-time."

In this conclusion we concur. It is true there was no proof of a formal deed from the vendor to the vendee while he lived. But one who purchases land, goes into possession with the consent of the vendor, and pays the purchase money, is entitled to have specific performance, and for all practical purposes must be regarded as the owner. It does not alter the case if a part of the purchase money is paid after the death of the purchaser. Spears v. Oakes, 4 Rich., 347; Watson v. Child, 9 Rich. Eq., 129. In the case of Oakes it was held that, in the absence of proof, title in the vendee is the legal implication of the vendor's accepting from him a mortgage of the premises; and as to the time of the payment of the purchase money, Judge O'Neall said: "So, too, of the payment to the South Carolina Society by Mr. Dart—that was in his duty as administrator, and rather strengthened than weakened the presumption of the plaintiff's title," &c. The case of Watson v. Child was, in several re-

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*spects, very much like this. In that case there was no deed to the purchaser in his

life-time, only an agreement to purchase and a payment of a part of the purchase money. After the death of the purchaser, McLennon, his executors paid a balance due out of the personalty, and took title in their names; held, that as the land was purchased after the will was executed, "they were trustees for the heirs, and not for the legatees and devisees."

It is clear that Mrs. Boyle never had title as original purchaser, for the land was bought by her husband in his life-time, who paid part of the purchase money, the remainder being paid after his death from the proceeds of his farm. It is also clear that Mrs. Boyle had no title as devisee under her husband's will, for the land was purchased after the execution of the will, and he died before 1858. See 12 Stat., 700; Watson v. Child, supra; and Bell v. Towell, 18 S. C., 94. It is quite as clear that the endorsement of Perry on the deed to him from the executor of Singleton conveyed no title to Mrs. Boyle, for it was without witnesses or consideration, and was not shown to have been delivered. Besides, if the deed had been in all respects regular and delivered, she would have been held to be a trustee for the heirs under the authority of the case of Watson v. Child, supra.

But assuming that Mrs. Boyle only inherited one-third of the land, subject to the payment of her husband's debts, it is insisted that her possession of the land from 1850, when her husband died, until 1867, when she died, gave her title to the whole of it by adverse possession against her husband's heirs and creditors. Neither her administrator nor heirs make such defence, but the effort is made by Mrs. Roberts, one of her creditors, to set up the bar of the statute for Mrs. Boyle, so as to enlarge the property liable for her debt. The administrator of the debtor is the proper person to plead the statute of limitations. Bolt v. Dawkins, 16 S. C., 198.

But passing that, we fail to see that Mrs. Boyle's possession was adverse either to her husband's heirs or creditors. Her possession was on the assumption that the land was well devised to her by the will; but in that view the devise was subject to the payment of her husband's debts. As executrix and devisee, she was charged with certain du-

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ties as to those debts, from which the *mere possession of the land could not absolve her. As was said in the case of Simons v. Bryce, 10 S. C., 368: "The widow, being both executrix and devisee, she cannot, in the latter capacity, claim any rights inconsistent with her duty in the former. Her first duty as executrix was to pay the debts of her testator so far as his property would extend, and until she had performed that duty, it is difficult to understand how she could acquire any adverse rights to such property, which was in her hands primarily for the purpose of paying such debts. She must be regarded, therefore, as in possession as executrix until the debts are paid; and the lands devised to her must, while in her hands, remain liable for the payment of the debts due by the testator in preference to any debts due by her in her individual capacity," &c.

It is urged, however, that Mrs. Boyle was not devisee and in possession as such; that she was mistaken and all the other parties were also mistaken as to her rights in the land. This may be so, but we do not see how the subsequent discovery of the truth can have relation back, so as to change the whole character of her possession. No intentional fraud was practised upon Mrs. Roberts. She, or those who acted for her, simply had the misfortune to give credit to one who seemed to own property which she did not. Although the land turned out to be intestate property of L. C. Boyle, it was not, on that account, any the less liable for his debts. The possession of Mrs. Boyle was certainly not adverse to the rights of her children, who were her co-tenants and living with her. There is no pretence of ouster of any of the tenants. Harvin v. Hodge, Dudley, 23. At least two of the children, L. C. Boyle and Sarah C. Miles, were minors down to the death of Mrs. Boyle in 1867. Thomson v. Gaillard, 3 Rich., 422 [45 Am. Dec. 778]. The Singleton plantation must be regarded the property of L. C. Boyle, sr., at the time of his death, and, not passing under his will, was intestate, and after the payment of his debts, was subject to distribution among his heirs under the statute—one-third to his widow, Mrs. M. E. J. Boyle, and the remaining two-thirds among his children.

This brings us to the inquiry as to what claims are established against the estate of L. C. Boyle and his widow, M. E. J. Boyle,

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*respectively, and first as to those against L. C. Boyle, which must be paid before distribution. No. 3, the judgment of the Bank of the State, was recovered against L. C. Boyle in his life-time (1849). It was renewed against his administrator, Schaffer, in 1869, and in 1870 was incidentally affirmed by the court in the case of Perry, assignee, v. T. Henry Smith and wife et al., in which the heirs of L. C. Boyle were parties. We see no reason to doubt that the balance due on this judgment is a valid debt of the estate of L. C. Boyle.

No. 4, the bond debt of Perry, trustee, for the $400 borrowed by L. C. Boyle for payment on the purchase money of the land, and which was secured by a mortgage of the premises in 1850, was sued to judgment against Schaffer, as administrator, in 1871. In this action the heirs of L. C. Boyle were not made parties, and on that account Mrs. Roberts objects, that the judgment is not a lien upon the land. The master and Circuit judge held it to be a lien, on the general ground that "a judgment against an admin-

istrator binds the lands of the intestate, even if the heirs are not made parties, and are in possession." Whether this ruling was correct depends entirely upon the character of the possession of the heirs. See the late case of Huggins v. Oliver, ante 147. But we do not regard the point as necessarily involved in this case. There was certainly a bond debt secured by a mortgage of these very premises. All the heirs of L. C. Boyle are before the court in this proceeding, and they make no such question. The amount still due on this judgment is a valid lien, according to its rank, against the estate of L. C. Boyle.

After the aforesaid debts are paid out of the proceeds of the land, one-third of the remaining proceeds are applicable to the debts of Mrs. Boyle, and the remaining two-thirds are distributable among the children of L. C. Boyle. No. 1, the mortgage given by Mrs. Boyle to Jacob A. Lockwood, as trustee, March 22, 1853, assigned to Mrs. Susan V. Roberts, and sought to be foreclosed in the case first stated. This claim is not contested, and the remainder due, as found by the master, is payable out of Mrs. Boyle's distributive share as above stated.

No. 2, the judgment originally for $3,135, obtained against Mrs. Boyle by Jacob A. Lockwood, as guardian, March 22, 1853.

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*The master and the Circuit judge held that, as this judgment was obtained more than twenty years before these proceedings were instituted, it must be considered as presumed paid, notwithstanding the note upon the subject written by Mrs. Boyle on February 9, 1866, upon the ground that the said note contained no such "distinct admission of a subsisting legal obligation unaccompanied by any conduct or expression indicative of unwillingness to pay," as was required in the case of McQueen v. Fletcher, 4 Rich. Eq., 161. In this conclusion we do not concur. The doctrine as taken from McQueen v. Fletcher is correct as applied to a debt already barred by the lapse of full twenty years, but has no application to admissions made before the presumption is complete.

In that case it was held that in considering admissions relied on to rebut the presumption of payment, the same principles were applicable, which apply when admissions are relied on to take a case out of the statute of limitations. "So long as the lapse of time is less than twenty years, any admissions which oppugn the inference of payment drawn from it, go to the jury along with it, and all are considered together according to their natural force; but when full twenty years have expired, an admission that the payment has not in fact been made cannot of itself destroy the effect of the presumption." As to acknowledgments to take a case out of the statute of limitations, the distinction is familiar between a debt barred and one not barred. In the latter case a mere acknowledgment that the debt had not been paid and is still due, will be sufficient. "When an acknowledgment is made in writing by the debtor, charging him in direct terms, or if there be made a part payment or part satisfaction of interest then due, the action must be brought in twenty years next after the time of such acknowledgment, part payment, or part satisfaction." Boyce v. Lake, 17 S. C., 488 [43 Am. Rep. 618]; Best Pres., § 188.

Now apply these principles to this case. The judgment was recovered in 1853, and on February 9, 1866, less than thirteen years thereafter, Mrs. Boyle, the debtor, wrote to Mr. Richards, the then husband of Mrs. Roberts, "I received a short time since a letter from you relative to amount of balance due on bond to Mr. Lockwood, as guardian.

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I regret very much it is not in my *power at present to settle same, but assure you I shall endeavor to do so as soon as possible. Must beg your further indulgence," &c. This was before the lapse of full twenty years, and we think was an acknowledgment of the debt quite sufficient to give a new starting point to the running of the twenty years, which have not yet expired. It is true, Mrs. Boyle did not refer to a judgment, but we hear of no other debt of hers "to Mr. Lockwood as guardian," and we have no doubt the reference was made to this same debt which was in judgment, and which is a subsisting debt against her estate.

The judgment of this court is that the judgment of the Circuit Court be modified as herein stated as to the Lockwood judgment against Mrs. Boyle, and that in all other respects it be affirmed.

21 S. C. 466

GLENN v. COLUMBIA AND GREENVILLE R. R. COMPANY.

(April Term, 1884.)

[1. *Master and Servant* ⟸139.]

A train hand, sent back at night to signal an approaching train, saw it coming, although it had no head-light, but upon its emerging from a curve in a cut, he discovered that the engine was very close upon him, and in getting off the track upon which he was still standing, his foot was caught by the rail, and in extricating his foot his hand was caught by the train and crushed. From the railroad cut to where this train hand stood, the distance was too short for the train to stop. In action against the railroad company for damages, the Circuit judge granted a non-suit. *Held*, that in this there was no error, the absence of a head-light in this case not having contributed to the injury received by this train hand.

[Ed. Note.—Cited in Ruff v. Columbia & G. R. Co., 42 S. C. 121, 20 S. E. 27; Wragge v. South Carolina & G. R. Co., 47 S. C. 112, 25 S. E. 76, 33 L. R. A. 191, 58 Am. St. Rep. 870; Brown v. Spartanburg, U. & C. R. Co., 57 S. C. 435, 35 S. E. 731; Land v. Southern

Ry., 67 S. C. 294, 45 S. E. 203; Lyon v. Charleston & W. C. Ry., 77 S. C. 343, 58 S. E. 12.

For other cases, see Master and Servant, Cent. Dig. § 275; Dec. Dig. ⟸139.]

[2. *Railroads* ⟸389.]

To recover damages for injury done to a party by a railroad company, the plaintiff must not only show negligence by the company, but also that the injury complained of was the result of such negligence.

[Ed. Note.—Cited in Wallingford & Russell v. Columbia & G. R. Co., 26 S. C. 269, 2 S. E. 19; Adkins v. Atlanta & C. Airline R. Co., 27 S. C. 76, 2 S. E. 849; Petrie v. Columbia & G. R. R. Co., 29 S. C. 318, 7 S. E. 515; Barber v. Richmond & D. R. Co., 34 S. C. 450, 13 S. E. 630; Ruff v. Columbia & G. R. Co., 42 S. C. 120, 20 S. E. 27; Smith v. Gilreath, 69 S. C. 359, 48 S. E. 262.

For other cases, see Railroads, Cent. Dig. §§ 1319–1323; Dec. Dig. ⟸389.]

[This case is also cited in Agnew v. Adams, 24 S. C. 89, without specific application.]

Before Fraser, J., Richland, July, 1883.

The opinion fully states the case.

Mr. John Bauskett, for appellant.

Mr. J. C. Haskell, contra.

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*September 24, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiff brings this action to recover damages for certain injuries sustained by his son, Manus Glenn, a minor, occasioned by the alleged negligence of the defendant. On the night of February 19, 1881, Manus Glenn, who was in the employment of the defendant company as a train hand and brakeman on a freight train on its way to Columbia, was sent down the track by the conductor, when his train stopped at Saluda Old Town to take on wood, to signal an approaching up train from Columbia.

In his testimony, Manus Glenn gives the following account of the manner in which the accident occurred: "I took the red lantern and went down the track nine telegraph poles, according to instructions from the conductor, when I heard the train approaching and saw a light from the cab of the engine. There was a curve in the track about a hundred yards from me, and the train was a good ways on the other side of this curve when I first heard it coming and saw the light from the cab. There was no headlight on the engine. It was in the middle of the night, about 12 o'clock. The night was dark and drizzling rain. When the train entered the curve I could not see it. I signalled the train, when I first heard and saw it, with the red light, which is a signal of danger, and the engineers must stop when they see it. I then started to meet this train to get on it and ride back to the train to which I belonged. When I had gone about twenty steps, I saw by the light of the fire-box under the engine that it was close on me. I attempted to get off the track, when my shoe caught in a piece of the iron rail, a sharp splinter of it, and I had to use my hand to get my foot loose. In jerking it loose, which I did with my hand, my hand was caught by the iron splinter running through it, and before I could get it loose the engine was on me and crushed my arm. It was broken and crushed so badly it had to be cut off. I was brought to Columbia. Dr. Green cut the arm off. I was laid up in the house for about two months. I saw a light from this engine that run over me three times—once from the cab when I first signalled it with the red light before it entered the curve, and

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again saw the light *from the cab as it turned out of the curve, and afterwards the light from the fire-box from the engine when I was trying to get my foot loose from the splinter of the rail. I was hired by the company at seventy-five cents per day. My father, Britton Glenn, received and collected my wages. I had the red lantern on my arm when I was struck. I carried it back to the train. I was not instructed to stand on the side of the track in flagging trains down. I stood on the track and flagged the lantern across the track. I could have seen the engine better had there been a head-light on the locomotive; I could have seen the reflection of the light on the trees and woods when the engine was in the curve."

The plaintiff also testified that the night was dark and rainy; that there was no head-light on the engine; that he hired his son to the company and collected his wages; that the length of the up train was about sixteen cars; that the track was tolerably level, a little down grade going towards Greenville; that the train was running at the rate of about ten miles an hour, and that "with fifteen cars, can take up its own length, about five hundred feet, if every brakeman is to his place."

James Nelson, another witness for plaintiff, testified that he was a train hand and brakeman on the train which ran over Manus Glenn; dark and rainy night; no headlight on the engine; had been taken off that day as they went down and left at the shops at Helena for repairs; was to get it as they went up; were behind time, and shops were closed when they reached Helena, therefore did not get head-light; witness was on top of the train and never did see Manus's red light; took up about the length of train after striking Manus; about fifteen cars in the train and three brakemen; don't think the train could have been stopped in less than three hundred yards; before they struck Manus, the engineer blew for brakes about one-quarter of a mile from Saluda Old Town. When they first blew brakes, it would have taken one-quarter of a mile to take up

train—two hundred yards past the point where Manus was struck. There was a curve in the track, and if the head-light had been burning, he (Manus) would not have seen it till it rounded the curve. Engineer might have seen Manus Glenn one hundred

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yards. At *that time he could not have stopped train under two hundred yards.

This, with the testimony of Dr. Green as to the extent of the injury and the necessity for amputating the arm, was substantially all the evidence adduced by the plaintiff. At the close of the plaintiff's testimony a motion for non-suit was made and granted, and plaintiff appeals upon the following grounds: 1. "Because his honor erred in granting the non-suit in this that there was evidence of gross negligence on the part of the company in not providing a head-light to the locomotive, which was running in the night time, and thereby caused the accident. 2. Because his honor held that no negligence was proved against the defendant, and that the negligence was all on the part of the plaintiff. 3. Because his honor held that running a locomotive and train of cars in the night time without a head-light, and the locomotive running over a man, was no negligence on the part of the railroad company. 4. Because his honor erred in not allowing the case to go to the jury, when it is respectfully submitted that there was sufficient evidence of negligence for the jury to pass upon."

The "Case," as prepared for argument here, does not contain the slightest evidence that the Circuit judge made any such rulings as are imputed to him in the second and third grounds of appeal, and it is not admitted by the counsel for respondent that any such rulings were made. There is nothing, therefore, upon which these grounds rest, and they cannot be considered by us.

The only question left for us to determine is whether there was an entire lack of testimony to sustain all or any one of the points necessary to be established in order to enable the plaintiff to maintain his action. As is said by Simpson, C. J., in Carrier & Harris v. Dorrance, 19 S. C., 32: "It is well settled that a non-suit is proper only where there is a total failure of testimony by the plaintiff either as to his whole case or to some material and essential part thereof." Was there such a failure in this case?

To determine this question, it will be necessary to consider, first, what were the points material and essential to the plaintiff's case. To enable the plaintiff to maintain this ac-

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tion, he must *not only show negligence on the part of the defendant, but he must go further and show that the injury complained of was the result of such negligence. Mere proof of negligence on the part of the defendant gives the plaintiff no cause of action, because there is no wrong done to him until it is shown that he has been a sufferer by reason of such negligence. It may, and doubtless would, be considered gross negligence for a railroad company to allow a train of cars, with some of the wheels cracked, to be run over a road where there were defective rails or cross-ties, or over a decaying trestle or bridge; but if a third person should be injured by such a train, not by reason of its running off the track, but by a collision with another train, or with some vehicle crossing the track, such negligence could not constitute any foundation for a cause of action in favor of the person injured, because it could not in any way be regarded as causing the injury complained of. In such a case, the negligence of the company, though highly reprehensible, would constitute no wrong to the person injured, and would, therefore, furnish no ground for an action on his behalf.

Applying these principles to the case under consideration, in which the negligence imputed to the defendant was in failing to furnish a head-light for the engine, we find that the testimony as to such negligence was quite sufficient, as to that point, to send the case to the jury; but we look in vain for any evidence whatever tending to establish the equally material and necessary point that the injury complained of was in any way the result of such negligence. On the contrary, the testimony of the party injured demonstrates the fact that the absence of the head-light had nothing to do with causing the injury. The object of the head-light, as we suppose, is to enable the engineer to see objects ahead of him on the track, and perhaps to enable persons to see an approaching train at a sufficient distance to avoid collision with it.

Now, according to the uncontradicted testimony adduced for the plaintiff, the accident occurred at a point near a curve which rendered it impossible for the engineer to see far enough ahead even with the very best head-light, to enable him to take up his train before it reached the point where Man-

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us Glenn was struck, *and he himself says that he not only heard, but saw, at least three times, the approaching train before it came within one hundred yards of the point where he was struck. So that it is perfectly manifest that the absence of the head-light in no way contributed towards causing the injury complained of. There being no testimony tending to establish this material and necessary point in the plaintiff's case, there was nothing to leave to the jury, and there was, therefore, no error in granting the non-suit.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

21 S. C. 471

LUMB v. PINCKNEY.

(April Term, 1884.)

[1. *Ejectment* ⟸146; *Improvements* ⟸4.]

Where a complaint under the betterment act (Gen. Stat. §§ 1835–1839) alleged a former recovery by defendant against plaintiffs of the land described, the possession by plaintiffs under title which they supposed had conveyed a fee, and the value of improvements erected on this land by plaintiffs, and contained a prayer for a recovery of the value of such improvements, the complaint stated facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 516; Dec. Dig. ⟸146; Improvements, Cent. Dig. § 24; Dec. Dig. ⟸4.]

[2. *Constitutional Law* ⟸87, 160, 278; *Eminent Domain* ⟸2; *Improvements* ⟸2.]

The betterment law of this state (Gen. Stat. §§ 1835–1839) is not in conflict with sections 1, 14, 21, or 23 of article I. of the constitution of this state, but is a valid and binding enactment of the legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 156, 446, 917; Dec. Dig. ⟸87, 160, 278; Eminent Domain, Cent. Dig. § 3; Dec. Dig. ⟸2; Improvements, Cent. Dig. § 5; Dec. Dig. ⟸2.]

Before Cothran, J., Hampton, September, 1883.

This was an action by James M. Lumb and others against Adele R. Pinckney and others, commenced in February, 1883. The opinion sufficiently states the case.

Mr. John S. Reynolds, for appellants.

The rule of the civil law touching betterments has never been recognized in this state. 4 DeSaus., 465; Chev. Eq., 213. The complaint discloses no facts that give a cause of action. Pom. Rem., § 519; 18 S. C., 530; 10 Id., 451; 31 Vt., 306. This law gives a right of action against one charged with no wrong, and makes the lien of the trespasser

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sufficient to divest *the true owner's title; and the judgment for the improvements carries costs. The betterment act of this state is taken from the Vermont statute, but in Vermont there is an elective feature, which may preserve to the owner his property; and upon this ground the statute has been sustained. 4 Vt., 37. In most of the states this elective feature exists. 12 Mass., 314; 14 Ill., 174; 50 Me., 322; 18 Blatch., 202; 18 Iowa, 267; 3 Ohio St., 467; and so in other states. Cool. Con. Lim., 386, 389. See, too, this elective feature in other parts of our statute law. Gen. Stat., §§ 1840, 2289, and the homestead laws; 19 S. C., 243. This law violates Const., art. I., § 1; 7 Cal., 6; 11 S. C., 315; 8 Wheat., 17, 24, 101; 18 Tex., 546. It also violates art. I., § 14. Cool. Cons. Lim., 353, 357; 18 Iowa, 268; 24 Minn., 372; also, art. I., § 21; 1 Yerg., 384; Cooke, 293. And it also violates section 23 of the same article. 14 S. C., 423. This statute is not a mere regulation of the remedy. Cool. Con. Lim., 289, 362; 35 N. Y., 302; 13 Rich., 498.

Mr. C. J. C. Hutson, contra.

The complaint states a cause of action. Code, § 163; 28 Barb., 231; 8 S. C., 104; 12 Id., 1; 16 Id., 392. Compensation for improvements is founded in equity. Black, Tax Titles, 17; 3 Kent, 334; 2 Id., 336; 5 Rep., 30; 4 T. R., 168; 1 Story, 38; 2 Id., 605; Code Civ. of France, art. 552–3; Bell Com., § 538; Chev. Eq., 231; 2 McCord Ch., 455; 4 Rich. Eq., 476. Our betterment act is a copy of the Vermont statute, which was sustained in 31 Vt., 300. Like statutes in other states have been sustained. 12 Mass., 314; 18 Blatchf., 202; 10 Yerg., 477; 13 Ala., 31; 4 Kans., 358; 18 Iowa, 261; 5 Ohio, 133; 13 Id., 74, 308; 2 Peters, 492; 8 Wheat., 1; 1 Black., 374; 14 Ill., 171; 19 Wis., 235. See, too, 12 S. C., 488; 15 Id., 368; 17 Id., 594. This act violates none of the sections of the constitution referred to by appellants. 4 Wheat., 122; 12 Id., 213; 14 Rich., 135; Cool. Con. Lim., 348, 437, 439; 6 Cranch., 87; Bald., 74.

September 24, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The action

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below was an action *under the act, known as the "betterment act," to recover the value of certain improvements erected upon the lands recovered by the defendants from the plaintiffs in a former action brought for that purpose. To this action for betterments, a demurrer was interposed, on the ground that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and the defendants have appealed. The appeal presents two questions. 1. Whether the facts stated in the complaint are sufficient to bring the case within the provisions of the betterment act; and, 2. If so, whether the betterment act is constitutional. The appeal rests on the negative of both of these questions. Can these denials be sustained?

I. There are several sections of the betterment act. Gen. Stat., §§ 1835, 1836, 1837, 1838, 1839. The most important of these sections, in fact the only one necessary to be considered here, is section 1835, because in that section are found the conditions upon which the right to betterments is founded, and the recovery thereof is allowed and authorized. That section provides: "That after final judgment in an action to recover lands and tenements in favor of the plaintiff, if the defendant has purchased the lands so recovered, &c., supposing at the time of such purchase, &c., that his title was good in fee, such defendant shall be entitled to recover of the plaintiff in such action the full value of all improvements made upon such lands by such defendant, or those under whom he claims, in the manner hereinafter provided for."

Now, all that is necessary to be stated in a complaint under the reformed procedure, so as to escape a demurrer like that interposed here, are the facts which have given rise to the right of action, as contradistinguished from legal conclusions. A simple narrative of the facts upon which the right of action is based is not only good pleading, but the best. From such a narrative the court deduces the legal conclusions, and determines whether any primary right of the plaintiff has been invaded by the defendant, and consequently whether a cause of action exists. Suber v. Chandler, 18 S. C., 530; Hogg v Pinckney, 16 Id., 392.

The facts specified in section 1835, supra, which, when existing, entitle a party to the

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action therein provided, and which *must be stated in the complaint as a cause of action under the act, are: 1. A final judgment in favor of the plaintiff in an action to recover lands and tenements; and, 2. That the defendant, in such action, and those under whom he claims being in possession under the supposition that he was seized in fee, had erected improvements of value upon the land. Upon these facts the act in terms entitles such defendant to recover of the plaintiff "the full value of all said improvements—the said value to be measured by the sum which such land shall be found at the time of the rendition of such judgment to be worth more in consequence of the improvements than it would have been without them." § 1836.

Does the complaint state the facts thus required by the act and upon which a right of recovery attaches? In the first paragraph the former action for the recovery of the land by the defendant against the plaintiff, and the verdict in favor of defendants are stated; in the second and third the possession of plaintiffs under titles which they supposed conveyed to them the land in fee is set out in detail; and in the fourth the value of the improvements erected by the plaintiff and those under whom they claimed is presented, with a prayer for judgment for said value to be recovered in accordance with the statute in such case made and provided. We do not see how the complaint could have followed the act more closely.

II. Is the betterment act unconstitutional? This is the real question in the case, and it deserves full consideration.

It is true that according to the severe and rigid principles of the English common law, founded and established in feudal times and in support of feudal interests and doctrines, title to lands carried with it the land and every thing affixed and attached thereto. The owner of the fee was regarded as the owner of all structures and improvements found upon the premises; so that he who erected such improvements, erected them at his peril. This doctrine, though firmly established in the common law, and though a logical result from the settled principles applicable to real estate and the ownership thereof in England; yet is obviously a harsh and inequitable doctrine when adhered to as a universal and inflexible rule, and it is no-

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where found as a ruling princi*ple, except where the English common law prevails in all of its original severity. It has no place in the laws of France, Spain, or Scotland; in fact, is repudiated wherever the equitable principles of the civil law have found a foothold in the administration of justice.

In this country, even before the legislatures of the different states intervened by special acts on the subject, the courts of equity, influenced by what Judge Story styled a "persuasive equity" to the contrary, struggled against it, and contended for the higher doctrine, that he who bona fide takes possession of land under a prima facie legal title, and makes valuable improvements, which must pass with the freehold to the party asserting his paramount right, is deemed by the established rule in chancery entitled to compensation. Bright v. Boyd, 2 Story, 607; Lowndes v. Chisolm, 2 McCord Eq., 455 [16 Am. Rep. 667]; Williman v. Holmes, 4 Rich. Eq., 476; followed by Annely v. DeSaussure, 17 S. C., 389; Scaife v. Thomson, 15 Id., 366; and Jacobs v. Bush, 17 Id., 594. No fair mind can hesitate to acknowledge the justice of this principle; and still further, that services of a lasting and permanent character rendered by one to another, demand compensation whether such services were procured originally by request or not, and a perfect system of jurisprudence would require the application of this principle in all cases where parties stood in this relation to each other. It is admitted, however, that neither the common law nor the equity courts have gone to this extent as yet. Nor can they, not being invested with legislative power.

In most of the American states the equity of this principle as to improvements bona fide erected on lands supposed to be owned in fee, but afterwards recovered by paramount title, has however, been recognised, as appears in the numerous betterment acts which have been passed. Among these the betterment act of our state is found. No doubt these acts in their details are more or less imperfect, and in their application are not only surrounded with difficulties, but frequently work injustice. Yet as to the end intended to be accomplished, but few can fail to approve. The question, however, before us is not as to the wisdom of the act nor its efficiency, nor whether it is suitable to

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the end *designed, nor yet whether it might be improved by the incorporation of other features. The act is upon the statute books,

and we must take it as we find it, and if valid must enforce it.

Is the act constitutional? Mr. Justice McIver, in the case of State v. Gaillard, 11 S. C., 309, laid down a clear and concise rule by which to test the legislative power of the general assembly of the state, and the constitutionality of any special act. He said: "There is no doubt but that under article II., section 1, of the constitution, the legislative power of the state is vested in the general assembly, but there is as little doubt that this is not a grant of complete and absolute legislative power, but only such as is not forbidden by the terms of the constitution of the United States or of this state, either in express words or by necessary implication. Hence, when the inquiry arises, whether a particular act of the general assembly is within the scope of the powers granted to that body, the only question necessary to be considered is whether such act is forbidden, either in express terms or by necessary implication by any provision of the constitution of the United States or this state: for if it is not so forbidden, then such act has the full force and effect of law; but if it is so forbidden, then it has no such force and effect, and must be declared to be unconstitutional, and therefore void."

This is the test we must apply to the question here. It is not claimed that any provision of the constitution of the United States is involved. The question, therefore, is, does the constitution of the state forbid it either in express words, or by necessary implication? It has not been contended that any express inhibition can be found in that instrument, nor is there ground for such position. Is there any for an inhibition by necessary implication? Without attemping here to define the conditions of a necessary implication applicable to every case where the question arises, it is sufficient for our present purpose to say that the constitution guarantees in several of its sections, certain rights to the citizen, and inasmuch as the constitution is the supreme law of the land, it by necessary implication forbids the general assembly from passing any law in conflict with these guarantees. The general assembly has no power to repeal a section of the constitution, not that it is expressly prohibited from such act, but

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*because the constitution is the organic law, ordained and enacted by the people themselves, the source of all governmental power, and therefore beyond the reach of all subordinate authorities.

The principal sections containing these guarantees are sections 1, 14, 21, and 23, of article I. The appellants contend that the act violates all of these sections. In section 1 the right of acquiring, possessing, and protecting property, is declared to be one of the inalienable rights of the citizen. In section 14 it is declared that no one shall be deprived of his estate, but by the judgment of his peers or the law of the land. Section 21 forbids the enactment of any law impairing the obligation of contracts. And section 23 provides that private property shall not be taken, or applied for public use, or for the use of corporations, or for private use, without the consent of the owner or a just compensation being made therefor: Provided, That laws may be made securing to persons or corporations the right of way over the lands of other persons or corporations, &c.

Does this act infringe upon the inalienable right of acquiring, possessing, and protecting property guaranteed in section 1? We think not. On the contrary, the purpose of the act being to protect the right of the improving claimant to the property which he has placed upon the premises in dispute, under the bona fide belief that the premises were his, it is, in our opinion, in full harmony with that section, and so far as the improving claimant is concerned, carries out its intent and object. There are equitable as well as legal primary rights in reference to the acquisition of property, and the protection of the constitution may be invoked by either, as the one or the other may happen to be the superior. Now while, as we have said, it is a principle of the common law, that the legal title of real estate, as a general rule, carries with it not only the land, but also all structures or improvements thereon, yet the equity doctrine in cases where valuable improvements have been made under the bona fide supposition that the land belonged in fee to the party erecting them, is that said improvements belong to said party, and this being a paramount right, it is entitled to the shield of the section referred to in preference to the legal title growing out of the mere ownership of the land. In this view

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the betterment act, being intended *as a means of securing to the improving claimant his recognized equitable rights over an inferior legal claim, is therefore not only not in violation of section 1, article I., but, on the contrary, is in accordance therewith.

Section 14 declares "that no one shall be deprived of his estate except by the judgment of his peers or the law of the land." This is an important and fundamental guarantee, one which lies at the foundation of all progress and improvement, and, within the limits intended by the framers of the constitution, it should be most sacredly guarded. But to construe it as intending to fix unalterably all laws of force at the adoption of the constitution, and as an inhibition against the passage of any new laws giving new rights and remedies as advancing civilizaton may demand, would be changing it from a shield of protection into an instrument of intolerable oppression. Such a construction would negative and destroy the grant of legislative power to the general assembly, and render that de-

partment of the government a useless appendage to our governmental system. This was not intended, nor can this section be so interpreted by any legitimate rule of construction. It simply means what it says, to wit: "That no one shall be deprived of his estate except by the judgment of his peers or the law of the land." Under it, the citizen, before surrendering his estate, has the right to demand a judgment of his peers requiring him to do so, or the existence of some law which when enforced demands it, and to that extent it is a limitation upon the power of the general assembly forbidding the enactment of any law which can deprive one of his estate by any other means. Thus understood, we do not see that the betterment act in any way conflicts with this section. The act has no application, except as the law of the land, nor can it be enforced, except through the verdict of the jury.

Section 21 provides, "that no law shall be passed impairing the obligation of contracts," and it is said that a grant from the state is a contract between the state and the grantee, and therefore any legislative act that impairs the obligation of the grant is unconstitutional. This, no doubt, is true, but we fail to see its application here. As well might it be said that the laws allowing the enforcement of contracts, or the collection of debts

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by the *sale of real estate, through judgments and executions, impaired the obligation of the original grant from the state, and were therefore void. The betterment act, formulating an underlying principle of equity, creates a legal obligation in the nature of a debt against the owner of the land, which, if he fails to meet, the land itself is made liable to be reached by ordinary process as in other cases of debt, and is as free from the objection raised as any of the modes provided for the enforcement of claims by the sale of lands granted by the state. The remedies in the two classes are the same in principle, and must stand or fall together.

Section 23. It appears to us that the respondent has the best right to invoke this section. It declares that private property shall not be taken for public or private use, without the consent of the owner, or a just compensation being made therefor. A party has erected valuable and permanent improvements upon a city lot, of which he is a bona fide purchaser, under a title apparently perfect and complete, enhancing ten times its original value. The true owner of the lot, either from inexcusable laches, or from some other cause, delays the assertion of his rights until these improvements have been completed. He then institutes action, recovers the lot, takes possession with the improvements, and refuses compensation. Should he be allowed to shield himself under this or any other of the sections of the constitution referred to? On the other hand, could not the improving claimant, with infinite more justice, claim their protection?

The claim of the land owner stands upon a mere legal technicality. He has titles to the land, it is true, which, at common law, carries with it every thing attached thereto. But the claim of the improving claimant stands upon substantial equity, based upon his labor and industry, and while he has no right to the land, it would be a blot upon any system of jurisprudence to make him forfeit the improvements, and that for the benefit of one who has expended neither labor nor money in their erection. The true idea is, that both parties should be protected according to their respective rights and interests. This the betterment act attempts by giving the improving claimant, not the costs of the improvements, but such an amount only as they may, in the judgment of the peers of both parties, increase the value of

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the *premises. This certainly is the equity of the case, and we do not find that the constitution, in any of its sections, forbids its application and enforcement.

The appellants' counsel has referred us to several cases from some of the western states, in which acts similar in their purpose to ours have been held unconstitutional. But these decisions, upon examination, have been found to be based upon special matter peculiar to the acts under discussion there, and therefore not in point, even if they could be relied on as authorities, which they could not be, except so far as they are sustained by established general principles. Besides the weight of the decisions in the different states where betterment acts have been enacted, is in favor of their constitutionality. See Cooley Const. Lim., title "betterment laws," the cases there cited, and Blackwell Tax Titles, 681.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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MIMS v. CHANDLER.

(April Term, 1884.)

[1. *Trusts* ⇦79.]

Where M. furnished a part of the money to purchase a tract of land and C. the balance, C. taking titles in his own name to secure the amount so advanced by him, which was to be repaid by M., it would seem that there was a resulting trust in favor of M., certainly to the extent of the money paid by him.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 111, 112; Dec. Dig. ⇦79.]

[2. *Frauds, Statute of* ⇦106.]

A receipt in writing for $285, "to be placed on land papers," is not a sufficiently definite memorandum to take a parol agreement for the purchase of land out of the statute of frauds.

[Ed. Note.—Cited in Peay v. Seigler, 48 S. C. 496, 26 S. E. 885, 59 Am. St. Rep. 731.

For other cases, see Frauds, Statute of, Cent. Dig. § 211; Dec. Dig. ⇦106.]

[3. *Frauds, Statute of* ⟸129.]

Payment of the purchase money is not such part performance as to be sufficient of itself to take a case out of the statute of frauds, but part payment by the purchaser, with possession delivered by the vendor by virtue of the agreement, and improvements made by the purchaser, are sufficient; and a contract for the purchase of land may, under these circumstances, be established by parol proof.

[Ed. Note.—Cited in Humbert v. Brisbane, 25 S. C. 510; Kennemore v. Kennemore, 26 S. C. 255, 1 S. E. 881; Boozer v. Teague, 27 S. C. 363, 3 S. E. 551; Hunter v. Mills, 29 S. C. 79, 6 S. E. 907; Tant v. Guess, 37 S. C. 496, 16 S. E. 472; Peay v. Seigler, 48 S. C. 512, 26 S. E. 885, 59 Am. St. Rep. 731.

For other cases, see Frauds, Statute of, Cent. Dig. § 311; Dec. Dig. ⟸129.]

[4. *Specific Performance* ⟸46.]

M., a tenant of 212 acres of land, agreed to purchase from his landlord 65 acres of this tract, and paid part of the purchase money, C. paying the balance and taking the title to himself as security for the repayment by M. of such balance. *Held*, that M.'s subsequent pos-

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ses*sion of the 65 acres was not under his former tenancy, but should be referred to a new possession under his agreement to purchase.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 128; Dec. Dig. ⟸46.]

[5. *Specific Performance* ⟸131.]

Upon M.'s payment in full of this balance due to C., the title to these 65 acres should, under the agreement, be made to M., and the Circuit decree erred in permitting the master to make title to M.'s wife.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 426–435; Dec. Dig. ⟸131.]

[6. *Fraudulent Conveyances* ⟸163.]

One having full knowledge of the contract between C. and M., purchased this land from C. in consideration of a past due debt owing to him by C. *Held*, that this deed must be set aside as fraudulent and void.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 510, 517; Dec. Dig. ⟸163.]

[This case is also cited in Brown v. Cave, 23 S. C. 256, as to facts, and in Rapley v. Klugh, 40 S. C. 134, 18 S. E. 680, and distinguished therefrom.]

Before Aldrich, J., Sumter, March, 1883.

This was an action by Timothy Mims against Daniel Wesley Chandler and T. Duncan Chandler. The case is fully stated in the Circuit decree, which was as follows:

This is an action for the specific performance of a contract for the sale of land. Although much time was consumed in the development and argument of the case, the facts are in a narrow compass. Mr. Frierson was the owner of a tract of land containing 212 acres, more or less. The plaintiff Mims was his tenant at a rent of five bales of cotton a year. Frierson says: "I first bargained to sell the land to Mims for $1,500 on a credit of three years, or five bales a year rent. I afterwards agreed to sell him the land for $1,200 cash, and to let the rent of five bales of cotton, which Mims owed me, go in as part payment. Mims paid me $285 and Chandler $15. In thirty days after, Chandler paid me the balance, $900, and received titles for the land."

It appears that when Mims had made his agreement with Frierson, Goodman entered into an agreement to buy the land remaining, after Mims had cut off 65 acres, the tract on which he lived with his wife and children. When the purchase came to be completed, the defendant, D. W. Chandler, paid the purchase money and took the title in his name. Goodman says: "I went in with Mims and thought Frierson was to make the title, but Chandler said he would take the title in his own name, because he knew Mims could not meet the payments next year, and he could indulge him." Mims had married Chandler's aunt.

When the land was bought from Frierson, Mims says Chandler told him to raise $300, or as near that amount as he could, and that he would give one and two years to pay the

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balance, $400; *that he sold five bales of cotton for $260, took $25 out of his pocket, and Chandler advanced the other $15, which he charged in his books to Mims's account; that on December 21, 1880, he and Goodman went to Chandler to get their titles; that he made the title to Goodman and took his mortgage; he then said to Mims, "I can't draw your papers, it is late now; but I will have them fixed up by Dr. Mayes, and send them to you. Go home, go to work, and make yourself easy;" he gave the following receipt: "$285. Mayesville, S. C., Dec. 21, 1880. Received of Timothy Mims two hundred and eighty-five dollars, to be placed on land papers. (Signed) D. W. Chandler."

He further says he bought the land for a home, because his wife's relations lived in the neighborhood; that he went to work with his son, cleared, ditched, and drained about ten acres, made it good planting land and improved the health of the place; that in September, 1881, he told Chandler he had picked out three bales of cotton, who replied, "If you will gin it out and bring it to me, I will make your title, take your mortgage, and wait on you until next fall for the balance;" that he delivered him the three bales in payment for the land, sent him two bales, and a few days after carried him the third. "When I asked him for the title, he said, 'My business is such I can't fix them up today, but will send or bring them to you in a few days.' He gave me the two following receipts: '$98.28. Received. Mayesville, September 15, 1881, of Timothy Mims, $98.28, to be placed on account (Signed) Daniel Chandler.' '$50. Received. Mayesville, S. C., of Tim. Mims, ($50) fifty dollars on account. September 15, 1881. (Signed) D. W. Chandler.'"

Mims said he was always ready to carry out his part of the contract, but soon after

he had made the last payments he received a letter from Chandler, ordering him off the place. He then "went to see him, when Chandler said, 'I understand you are going to offer the balance of the money due on the land. I will not take it, nor will I make you a title.' A day or two after I commenced this suit. D. W. Chandler sold this land to his brother Duncan. When Duncan bought, he knew all about the transaction, for a month before I commenced this suit Duncan came to my gate and I said to him, 'Wes.

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has not fixed up my *papers yet. I have got some more cotton which I expect to let him have when I get my papers,' and showed him my receipts. He said, 'You have no idea Wes. will cheat you? he has been sick and not able to attend to business.' I replied, 'No; but I want the matter fixed up.' That was at least a month before the suit was commenced, and he said nothing about buying the land."

Goodman corroborates Mims as to making the title when the $285 was paid. "Chandler told me in the fall of 1881, if Mims would pay him three bales of cotton, he would make him the title and take a mortgage for the balance. After Mims delivered him the cotton, he said he saw no chance for him to pay, and he would not make the title. He did say something about making title to his aunt if he could get his money. That is the first time I heard about his aunt, a year after the sale to Mims. Chandler told me of the bargain with Mims before the $285 was paid."

J. A. Lemon testifies: "Chandler told me, 'I can do nothing with uncle Tim.' He said, 'Go and tell him if he will bring me three bales of cotton, I will make him the title.' I did tell him, Mims did bring the cotton and Chandler said he could not make the title then, but would get Dr. Mayes to draw it and would send it. He gave him a receipt. Chandler said he believed he would make the title to one of the boys. That was the first time I heard about making to any one else."

E. C. Mims testified: "Was at Chandler's just before Christmas, 1880, when bargain was made. Frierson made the title to Chandler. When Chandler made title to Goodman, father paid him $285, and Chandler gave a receipt, saying he had not time to make title then, but he would make them out and father could come and get them."

This was the plaintiff's case. When he closed, Mr. Earle moved to dismiss the complaint. I suggested to Mr. Earle to reserve the question and to go into his defence. He insisted on his motion and it was refused. The defendants then went into their defence, and proved by C. J. Wilson that he was present in November, 1881, when Mims told Chandler he could not pay for the land, that he had tried to borrow the money, and that Chandler would have to take it back. It

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was the year of the drought. *He asked Chandler if he would rent? Chandler said he would see him. In November, 1881, Lemon says Mims told Chandler he could not meet payments on land—was humming and hawing about renting. Nothing said about Mims's wife.

T. D. Chandler produced a title from his brother, dated December 13, 1881, to the land in question, for $500. Mims told my brother he could not make payments, and spoke about renting. He says he does not know what land is worth—at least $500. He bought it for $500, paid no money, that he had money in his brother's hands, which he had lent him from time to time; that his brother offered to take $500 for the land—what he owed him. He said Mims did show him the receipts at the gate, and he did tell him his brother would not cheat him—not to be uneasy. He said he heard nothing about going to law. His deed is dated December 13, 1881, recorded January 21, 1882; the complaint is dated December 14, 1881. The conversation at the time Mims showed him his receipts at his gate was before that about not making payments.

D. W. Chandler then testified that on December 21, 1880, he bought the land from Frierson for $900, provided Mims paid his rent to date. "The deed was for $1,200, which I paid, except $285, which Mims paid on his rent to me, and I receipted for. One hundred acres was sold to Goodman for $500. Mims was in possession as a tenant of Frierson, and had five bales of cotton destrained for rent. I paid Frierson thirty days after. Mims has not paid me a dollar. All of his payments have been made on account of his advances. I did promise to settle the land on my aunt and her children when she paid me $400. Had no conversation with her—the agreement was with Mims. The $285 receipt was the money he paid for Frierson's rent, the balance in full. The other receipts were on his accounts. I had no connection with the Frierson agreement. Am willing to convey land to my aunt and her children when I am paid $400 at 12 per centum interest. Not a dollar has been paid on it. Mims said he was satisfied, and agreed to pay three bales of cotton. I owed my brother $585, and was to pay 12 per centum interest. Had no idea of this suit. I may have had the conversations referred to, but they were on the agreement to make titles to

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*Mims's wife. I did tell Goodman about September 10 to tell Mims if he would pay three bales on his account, I would take a mortgage on the land and wait a year, if I could possibly arrange my business; if not, I would notify him. Sent for Mims in November, told him I must have the $400 for the land. Went into a settlement—he expressed

himself satisfied, and asked for an extension of credit. Told him I was compelled to have money. He said, 'I will give it up,' and asked if he could rent. Replied, 'I do not know; think I will be forced to sell.' He agreed to it. Sent for him in December, told him I would rent for three bales. He expressed thanks."

On the cross-examination, this witness read from a paper which he said he had made night before the last, "Frierson came with Mims when land was sold. Mims sold the cotton and brought the money to the store. Goodman is mistaken when he says I promised to make title to Mims. I did not send the message about three bales to be credited on the land. You (Mr. Lee) told me about this suit last November; I asked you to wait, as I thought I would settle with Mims. Supposed I had, and was surprised I was sued."

The plaintiff Mims was then recalled, who said, "Not a word was said about my wife on the day of the agreement to the last payment, and when I offered to pay the balance which he refused, Chandler said, 'If you do not pay me all the accounts you owe me, you shall not have the land.' I did say, 'I do not see how I can raise all the money.' I never offered to rent, but said, 'I can't tell you now, and want to see my attorney.'"

This, in substance, is the whole case. I do not think I have omitted a material fact or statement. After seeing and hearing the witnesses, a careful review of the testimony, and full consideration of the earnest and able arguments submitted on both sides, I do not think there can be the slightest doubt in any candid mind that Mims, Goodman, and Frierson have given the exact truth in relation to this transaction. Whether Chandler had a sinister purpose in assisting his uncle, Mims, to make the purchase from Frierson, I am not certain, but am inclined to think not. That he knew all the particulars of the bargain and sale, I feel assured. He was prosperous then, as shown by his

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*ability to raise the $900 to complete the cash payment; hence, he promptly gave his receipt for $285, "to be placed on land papers." What can he mean by that? Can there be any other solution than that the agreement as stated by Mims was the real transaction, and the payment in part performance? This view is strengthened by the fact, about which there can be no doubt, that at the very time of receiving the money and giving the receipt, he promised to have the papers prepared and sent to Mims. Chandler himself supports this view when he says this rent was to be a part of the purchase money.

To my view, after the payment of the $285 of the purchase money, the reception of the receipt for land papers, and remaining in possession, that Mims was Frierson's tenant is extravagant. How could he be? Frierson had conveyed the land to Chandler, who had paid $285 of Mims's money as part of the purchase money, made title to Goodman, given his receipt to Mims on land papers, and promised to execute and send the title in a few days. To hold now that he was Frierson's tenant, and not in under a contract of sale, is such a tax on credulity, that I cannot entertain it for a moment.

But, independently of this, if Chandler did not regard his uncle, Mims, as the purchaser of that 65 acres, why did he permit him to improve it? He knew he was a poor man, that he was anxious to secure a home for his family, and yet he never uttered a word of warning, to say, your labor may be in vain! It is true, to cut down, ditch, and drain ten acres is no great undertaking for a landed proprietor of means, but when a poor man, who cannot afford to buy more than 65 acres, goes on that small tract, thinking he has bought his home, and with his boy, a mere youth, with their own hands cut down timber, dig ditches, drain wet places, and bring it into cultivation, improving the healthfulness of the residence, it is a big job, although there be but ten acres redeemed. Chandler saw his uncle and cousin doing this work. Can there be a plausible reason for permitting them to waste their labor, if he claimed the land?

That there was an agreement to purchase by Mims, at the date of the purchase, is beyond doubt according to Chandler's own statement. He does not deny the conversa-

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tions referred to as to *the title, but says there was an agreement to make title to Mims's wife and children. Now, if this be so, when was the agreement made? It must have been at the time of the purchase, and the $300 must have been a part of the purchase money, which was paid by Mims, for Chandler says, "I did promise to settle land on my aunt and her children when she paid me $400, at 12 per cent. per annum interest." What does that mean? The contract price was $700, Mims paid $300, balance $400. This confirms the whole transaction, as related by Mims and the other witnesses for the plaintiff. It is clear, however, to my mind, this settlement on his aunt is an afterthought. Chandler himself says, "She was not present: I had no conversation with her;" and all the witnesses swear that nothing was said about his aunt until a year or more after the contract to purchase.

I do not hesitate in my conclusions that there was part payment, possession under the purchase, a promise to make title, and that this is an effort to apply payments on the land to an antecedent debt against the express instruction of the debtor.

I am not so certain but that Chandler may be regarded in the light of a trustee. He had nothing to do with the contract to purchase from Frierson, in its inception. That was entirely between Mims and Frierson, for Goodman says, "I bought from Mims; went

in with Mims, and thought Frierson was to make the title." After the contract to purchase for $1,200 had been completed between Frierson and Mims, Chandler came in and agreed with Mims, if he would raise $300, or as near that amount as he could, he would raise the other $900, take the title in his own name, make title to Mims and Goodman, and give them time to pay, the debt being secured by bond and mortgage of the land each was to get. In pursuance of this agreement, he did make title to Goodman and took his bond and mortgage, gave a memorandum in writing to Mims for his cash payment, $285, and promised to prepare the papers another day, it then being too late.

Is that not only a compliance with the statute of frauds, writing and part payment, but does it not place Chandler in the position of a trustee, holding for the benefit of Mims, when he paid the balance of the purchase

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money? Can one *occupying such a relation to an innocent purchaser invoke the protection of the statute? Will he be permitted to practise such a fraud upon the trusting relative, whose money he has used, and who has diligently complied with every part of his engagement? I think not.

This whole transaction has, to my mind, very much the appearance of a contrivance on the part of Chandler, finding that he was embarrassed, and that the purchase of the land was a good speculation, to turn the advantage to his own account; or, as if he had intended from the first to entrap Mims into the payment of the $300, and collect, under the pretence of procuring for his wife and children, his preëxisting accounts for advances for which he had no security, and against the express instructions of his uncle how to apply the payments. The equity side of this court cannot lend its aid to such a contrivance. Daniel Wesley Chandler must perform his contract, and make title to his uncle, Timothy Mims.

Very little need be said as to the conveyance from Daniel W. Chandler. A more transparent fraud I have never seen. Inadequate price; no money paid; title made the day before the date of the complaint; knowledge of the suit; inspection of Mims's receipt; indignant exclamation to Mims, "Do you think my brother would cheat you?" The whole thing is too thin to waste time and words. The deed must be set aside as fraudulent and void.

1. It is ordered, adjudged, and decreed that Daniel W. Chandler do perform his contract. 2. That the master do make title to Timothy Mims of the land described in the complaint on receiving from him the sum of $296.76, with interest from February 16, 1883. That the costs be paid out of the money paid by Mims, and the balance to T. Duncan Chandler.

As D. W. Chandler says the land was purchased for the benefit of his aunt, Mrs. Mims, and her children, and that his brother is now ready to carry out that arrangement, it is finally ordered that the master may make title to Mrs. Mims, on such terms and conditions as may be agreeable to her husband, Timothy Mims, the plaintiff in this action.

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*The testimony of the plaintiff and of each of his witnesses concerning the agreement for the sale of land was objected to by the defendants upon the ground that such an agreement could not be proved by parol. These objections were overruled, and the defendants excepted. At the conclusion of plaintiff's testimony, the defendants moved that the complaint be dismissed, upon the ground that the alleged agreement was within the statute of frauds. This motion was refused, and defendants excepted. The exceptions to the decree appear in the opinion.

Messrs. Earle & Beard, for appellants.

Messrs. Moises & Lee, contra.

October 6, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action, in the nature of a bill in equity, to set aside the conveyance of a certain tract of land, alleged to be fraudulent, and to enforce a parol agreement as to the same. The defence denied the existence of the alleged parol agreement, and interposed the statute of frauds to exclude all evidence of such agreement. The case came on to be heard by Judge Aldrich, who admitted the testimony, the substance of which is fully stated in the decree of the judge, with an abstract of the testimony of the different witnesses. It will therefore be unnecessary to restate the testimony, or to do more than give such a general outline of it as to show its character and make the points intelligible. [Here follows a statement of the testimony of Mims and Goodman as given in the Circuit decree.] There was other testimony, but none, as we think, very materially changing the substance of this statement.

The Circuit judge decreed that the conveyance of the land from D. W. Chandler to his brother, Duncan, should be set aside as fraudulent; that D. W. Chandler should execute the trust assumed by him to convey the land to Mims, and that the master should make title to the said Mims, on his paying the balance of the purchase money, viz., $296.76, with interest thereon from February 16, 1883, the costs to be paid out of the money thus to be paid; and the following was

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added: "As D. W. Chandler *says the land was purchased for the benefit of his aunt, Mrs. Mims, and her children, and that his brother is now ready to carry out that arrangement, it is finally ordered that the master may make title to Mrs. Mims on such terms and conditions as may be agreeable

to her husband, Timothy Mims, the plaintiff in this action."

The defendants appeal to this court upon the following grounds:

1. "Because the agreement alleged in this case could not be proved by parol.

2. "Because his honor erred in holding that the alleged agreement was not within the statute of frauds.

3. "Because the receipt for '$285 to be placed on land papers' is not such a memorandum as the statute requires.

4. "Because Mims had been in possession under Chandler's grantor, and the retention by him of a pre-existing possession does not take the case out of the statute.

5. "Because the payment of a part, or even the whole, of the purchase money is not sufficient to take the case out of the statute.

6. "Because the circumstances as proved do not satisfy the statute.

7. "Because his honor erred in holding that the payments made by Mims should be credited upon the alleged account for the purchase of the land and not upon his account for merchandise sold to him by Chandler.

8. "Because if an agreement for the sale of the land ever existed between the parties, Mims released all his rights thereunder before the conveyance of said land to T. Duncan Chandler was executed.

9. "Because his honor erred in holding that the plaintiff was not estopped from setting up the alleged agreement against T. Duncan Chandler.

10. "Because, under the circumstances as proved, T. Duncan Chandler has at least the right to be reimbursed the amount paid by him for the land.

11. "Because his honor erred in his conclusions of fact and of law."

We incline to think that the second view of the Circuit judge was the correct one;

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that the facts made out a case of trust *resulting to Mims, which was susceptible of proof by parol. Billings v. Clinton, 6 S. C., 102. Mims made the contract of purchase from Frierson, not from Chandler—who did not appear in the business at all until the purchase money was to be paid. It is true that he then delivered the money to Frierson,—not as a purchaser for himself, but for Mims, who furnished $285 of the money so paid. This payment, through Chandler, raised a resulting trust in favor of Mims, certainly to the extent of the payment, if it did not give color and character to the whole transaction. It was clearly proved that actual payment of a definite proportion of the purchase money was made by Mims, the cestui que trust, at the time of the purchase. Ex parte Trenholm, 19 S. C., 127.

But as Mims did not pay in cash the remainder of the purchase money ($415), which was advanced for him by Chandler when he took the title, we will assume that Chandler really occupied the relation of vendor to Mims, and we think that, even upon that assumption, the result must be the same. The statute of frauds, embodied in section 2019 of the general statutes, does provide "that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any right in or concerning them * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the parties to be charged therewith," &c. The agreement sought to be enforced by the plaintiff—that Chandler held the legal title of the land only as a security for the purchase money advanced by him—was not in writing. At the time Chandler took the title, he gave to Mims a receipt in writing for $285, "to be placed on land papers," and we have no doubt that receipt had reference to the land in question, and was an acknowledgment of part payment of the purchase money. We do not, however, think that the receipt expressed the agreement alleged to exist, or was such "a memorandum thereof" as the statute requires. It did not contain the particulars of the agreement in such definite and unambiguous terms, as has been held to be necessary under the statute. Church of Advent v. Farrow, 7 Rich. Eq., 378.

But while the receipt was not such a mem-

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orandum of the *agreement as to take it out of the statute, it is well settled that "the Court of Equity will enforce specific performance of a contract within the statute when the parol agreement has been partly carried into execution. The distinct ground upon which Courts of Equity interpose in cases of this sort is that otherwise one party would be enabled to practice a fraud upon the other." 2 Story Eq., § 759; 2 Pom. Eq. Jur., 423. Was there such part performance in this case as to take it out of the statute? We think there was. The Circuit judge found that the payment by Mims of the $285 at the time the arrangement was made, for which a receipt was given, stating that it was "to be placed on land papers," was in part payment of the purchase money, and in this finding we concur. That payment could not (as claimed by Chandler) have been a payment for the rent due Frierson, for the price of the land ($1,200) had absorbed and extinguished the rent to Frierson as such. Nor could it have been for rent due to Chandler himself, for there is not an intimation in the case that at that time Mims owed Chandler any rent.

This and the other payments to Chandler, indicated by the receipts "on account," were payments on the land purchase as directed by Mims; but, according to the authorities, these payments on the purchase were not

alone sufficient to take the case out of the statute. It seems that the payment of the whole purchase money would not of itself suffice for that purpose, but it is a circumstance which, in connection with others, may be considered. Smith v. Smith, 1 Rich. Eq., 130. According to the authorities, it seems that putting the purchaser into possession is to be considered as stronger evidence of part performance than mere payment of the purchase money, for the reason that such act would be a fraud upon the purchaser unless the agreement should be fully performed. "Especially will it be held to do so when the party let into the possession has expended money in building, or repairs, or other improvements; for under such circumstances, if the parol contract were to be deemed a nullity, he would be liable to be treated as a trespasser; and the expenditure would not only operate to his prejudice, but be the direct result of a fraud practised upon him." 2 Story Eq., § 763.

To have such effect, of course the posses-

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sion must not be ob*tained wrongfully or independent of the agreement, but by virtue of it and held under it. In this case it was contended that the possession of Mims, being obtained originally as the tenant of Frierson, and Mims never having gone out as tenant and reëntered as purchaser, must still be considered as possession under Frierson; that his possession from December, 1880, when the purchase was made, until December, 1881, when the action was brought, continued to be his old possession of tenant, and not a new possession as purchaser. We cannot adopt this view, which is contradicted by every fact in the case, as well as by the declarations of Chandler himself. "If the possession may be referred to an independent title, e. g., where it is held under a pre-existing tenancy, the same principle does not apply, unless the parties so conduct themselves as to show that they are acting under the contract," &c. Adams Eq., 212.

The Circuit judge found as matter of fact, and we concur with him, that on December 21, 1880, Mims ceased to be the tenant of Frierson, and was let into a new possession as purchaser. Up to that time, as tenant of Frierson, he was in possession of the whole land; afterwards he was only in possession of the parcel (sixty-five acres) purchased by him. On the day indicated, Frierson conveyed all his interest in the land, and of course Mims's tenancy to him then ceased, and there is no evidence that on that occasion, or any other, he took a new lease from Chandler or any one else. On the contrary, he then commenced a new possession of the parcel purchased by him, in accordance with the direction of Chandler himself, who said, "I can't draw your papers, it is late now, but I will have them fixed up by Dr. Mayes and send them to you. Go home, go to work, and make yourself easy."

He was in this possession as purchaser for a year at least, and during that time made improvements on the land without dissent or warning. It is true the improvements were not extensive. It may be considered a small matter to clear, drain, and ditch ten acres of land, but it is not probable that as mere tenant he would have done so much, and the improvements do not seem to be out of proportion to the means of the parties. This possession by the direction of Chandler,

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with the improvements made, consid*ered in connection with the other circumstances, and particularly the payments on the purchase money, were sufficient to take the case out of the statute, and the parol proof established the contract alleged by the plaintiff. We agree with the Circuit judge that the plaintiff is entitled to have the land conveyed to him upon the payment of the balance due on the advances made by Chandler with interest.

But we do not concur in so much of the decree as authorized the master to make the title to Mrs. Mims. At the time of the agreement nothing was said about conveying the land to Mrs. Mims. What was afterwards said by Chandler was ex parte and without consideration. Timothy Mims made the contract, also the payments in part, and he will be required to pay the balance due. The title should be made to Timothy Mims himself.

In reference to the deed of the land from D. W. Chandler to his brother, Duncan, the latter testified that "he does not know what the land is worth; at least $500;' he bought it for that price; paid no money; had money in his brother's hands, which he had lent him from time to time; that his brother agreed to take $500 for the land, what he owed him." He said Mims did have the receipts at the gate, and he did tell him his brother would not cheat him, &c. The deed bore date December 13, 1881, one day before the action was brought. At that time, T. Duncan Chandler knew all the facts as to the manner in which his brother held title to the land. He paid nothing for it, and we agree with the Circuit Judge that the deed should be set aside as fraudulent and void.

The judgment of this court is that the judgment of the Circuit Court be modified so that the title to the land described shall be made to Timothy Mims, and in all other respects affirmed.

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*CROUCH v. CHARLESTON & SAVANNAH RAILWAY COMPANY.

(April Term, 1884.)

[1. *Navigable Waters* ⟸20; *Negligence* ⟸113.]

Contributory negligence is a matter of defence, and the burden of proving it is on defendant. It is not necessary, therefore, that the plaintiff should allege in his complaint that he exercised due care.

[Ed. Note.—Cited in Joyner v. South Carolina Ry. Co., 26 S. C. 58, 1 S. E. 52; Donahue v. Railroad Co., 32 S. C. 302, 303, 11 S. E. 95, 17 Am. St. Rep. 854; Whaley v. Bartlett, 42 S. C. 473, 20 S. E. 745.

For other cases, see Navigable Waters, Cent. Dig. § 96; Dec. Dig. ⟸20; Negligence, Cent. Dig. § 186; Dec. Dig. ⟸113.]

[2. *Navigable Waters* ⟸20.]

Knowledge that there are defects in a draw to a bridge does not relieve the owners of the bridge from all responsibility. And so, where a steamer had several times passed through such a draw without injury, but on one occasion was injured while passing through with proper care, in action for damages for such injury, the judge properly refused a non-suit.

[Ed. Note.—Cited in Agnew v. Adams, 24 S. C. 89; Kaminitsky v. Northeastern R. Co., 25 S. C. 59; Quinn v. South Carolina Ry. Co., 29 S. C. 385, 7 S. E. 614, 1 L. R. A. 682.

For other cases, see Navigable Waters, Cent. Dig. § 96; Dec. Dig. ⟸20.]

[3. *Navigable Waters* ⟸20.]

The failure of the steamer to "drop anchor and drag through," as is required of boats, &c., passing under a bridge (Gen. Stat., § 1115) does not affect this case.

[Ed. Note.—Cited in Laney v. Chesterfield County, 29 S. C. 146, 7 S. E. 56; South Carolina Steamboat Co. v. Wilmington, C. & A. R. Co., 46 S. C. 334, 24 S. E. 337, 33 L. R. A. 541, 57 Am. St. Rep. 688.

For other cases, see Navigable Waters, Cent. Dig. § 96; Dec. Dig. ⟸20.]

[This case is also cited in Elliott v. Pollitzer, 24 S. C. 85, without specific application, and in Steamboat Co. v. Railroad Co., 30 S. C. 547, 9 S. E. 650, 4 L. R. A. 209, 14 Am. St. Rep. 923, and distinguished therefrom.]

Before Witherspoon, J., Charleston, November, 1883.

Action by H. W. Crouch and others against the Charleston and Savannah Railway Company. The opinion states the case.

Messrs. Brawley & Barnwell, for appellants, cited 11 East, 60; 88 Mass., 39; 1 Abb. Forms, 444, 446; Wood Nuis., § 703; Ang. Water Cour., § 567; 2 Bland, 2; 2 Cart., 586; 66 Mass., 488; 36 Vt., 580; Thomp. Neg., 1203–7; 119 Mass., 564; Wood Nuis., §§ 73, 846, 864; 71 N. C., 311; 9 N. Y., 456; Gen. Stat., § 1115.

Messrs. Lord & Inglesby, contra.

October 6, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. The plaintiffs are the owners of the steamer "Silver Star." The defendant is a chartered corporation, with the power to conduct their railroad across any river, creek, waters, or water courses that may be in their route from Charleston to Savannah, provided that the navigation of the stream be not obstructed thereby. Under the charter a bridge was constructed across the Ashley River, a navigable stream.

The complaint alleged that the defendant, since June 7, 1880, has unlawfully kept and continued the said bridge across the Ashley, with an improperly constructed draw there-

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in, and has *thereby obstructed and continued to obstruct the navigation of said river. That on September 27, 1882, while the steamer of the plaintiffs was proceeding upon the said river, she struck upon and against the said bridge, and thereby received injury to the amount of two thousand dollars. The answer of defendant denied each and every allegation of the complaint not specifically admitted, but admitted it to be true that on the day named, September 27, 1882, the plaintiffs' steamer, known as the "Silver Star," did receive certain injuries in passing the said bridge, but insisted that the same was caused by the negligence and want of care of the persons in charge of the steamer, in not taking the proper precaution while passing the bridge.

At the trial the defendant corporation demurred orally that the complaint did not state facts sufficient to constitute a cause of action, which demurrer was overruled and the trial proceeded with. The testimony submitted by the plaintiffs tended to show, that the draw was not properly constructed, or of sufficient width to enable vessels to pass through in safety; that the injury occurred in the afternoon of a fair day, and that, in attempting to make the passage, every possible precaution was taken by the officers of the boat to avoid accident. There was no testimony offered to rebut this proof, but the defendant seemed to rely upon the general proposition that the improper construction of the draw was apparent, and being known to the officers of the boat, the effort to pass through should not have been made, and to do so amounted to want of proper care or negligence upon their part. It appears that the steamer "Silver Star" had, in pursuing her business, frequently passed through this draw-bridge without injury, and that complaints had been made to the defendant of the improper construction and narrowness of the draw.

The defendant moved for a non-suit which was refused, and the jury rendered a verdict for the plaintiffs for $1,158.

The defendant appeals to this court, I. From the ruling of the judge, in refusing to sustain the demurrer and dismiss the complaint, upon the grounds, 1. "Because the complaint does not state that the plaintiffs were in the exercise of ordinary care in passing defendant's bridge. 2. Because it does not

state facts, from which it might be infer-
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red that the plaintiffs were in the ex*ercise of ordinary care in so passing the bridge." II. The defendant also appeals from the order of the judge refusing a motion for nonsuit on these grounds, 1. "That plaintiffs' testimony shewed that in passing said bridge they were doing what prudent men would not attempt under similar circumstances, and were therefore not in the exercise of ordinary care. 2. Because plaintiffs' testimony showed that they did not drop anchor and drag through defendant's bridge as required by law," &c.

First, as to the demurrer. It is true that in actions like this for damages on account of alleged negligence, great consideration is given to the question of contributory negligence on the part of the plaintiff. In a majority of the cases probably, the conduct of the plaintiff is interposed in answer to the charge of negligence on the part of the defendant; but the better view seems to be, that the conduct of the plaintiff is not a necessary element in his cause of action and to be alleged by him; but a defence to be alleged and proved by the defendant. In pleadings under the code, great clearness and simplicity are required, surplusage being regarded as a vice. The complaint must only state "the facts which are the occasion for the primary right and duty to arise, and those which form the breach of such right and duty, to the entire exclusion of the other elements that enter into the cause of action, the legal rules, and the legal rights of the parties," &c. Pom. Rem., § 524.

This court has held in the recent case of Carter v. C. & G. R. R. Company, 19 S. C., 28 [45 Am. Rep. 754], that contributory negligence is a matter of defence and the burden of proving it is with the defendant. We think it follows from the onus of proof being on the defendant, that it is not necessary for the plaintiff to make the allegation of due care in his complaint, and thus anticipate the defence. "Where contributory negligence is mere matter of defence, a complaint or declaration will not be held bad solely because it omits an allegation that the plaintiff or person injured was without fault. * * * It is not necessary for the plaintiff to aver due care on his part, in order to introduce proof of it." 2 Thomp. Neg., 1178, in the notes. We think there was no error on the part of the Circuit judge in refusing to sustain the demurrer.

Second, as to the non-suit. Assuming that
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it was incumbent *upon the defendant to make out a case of want of proper care on the part of the plaintiffs, we think that the testimony on the subject tended to show that all possible care was taken in passing the draw; at least that it was quite sufficient to require the judge to submit the question to the jury. Indeed, proper care of the officers in passing the draw does not seem to have been questioned, but the general ground was taken that the defects of the bridge were so obvious, and so well known to the officers of the steamer, that the effort, under the circumstances, to pass at all, was itself clear proof of want of proper care upon their part—so clear that the judge upon that ground should have ordered a nonsuit. We cannot accept the view that the knowledge of the defects on the part of the officers, should relieve the defendant from all responsibility. Such knowledge was entitled to proper consideration, but to make it conclusive against the injured party, would be to give primary importance to a secondary consideration, and to absolve the wrong-doer for the very reason that his wrong was so great and apparent that it was known by all. The greater the obstruction, the more certain immunity from its consequences! that is to say, to give the obstructor advantage of his own wrong.

It is true that no one is justified in wantonly throwing himself against an obvious and impassable obstruction, and such conduct clearly proved would prevent a recovery for an injury thereby produced; but we do not see that such failure could cure the original wrong of the obstructor. Besides, in this case, experience had shown that it was possible to pass through the defective draw without injury, as the "Silver Star" had done many times before. The plaintiffs were engaged in business, which made it necessary to navigate the Ashley River. They had a right to do so unobstructed, and the defendant corporation had no right to place such obstructions across the river as required them, for fear of injuries, to give up the navigation and their business. The doctrine contended for would certainly put the navigation of the river at the mercy of the defendant corporation.

We think the proper doctrine on the subject was announced in a late Maryland case, County Commissioners of Prince George v. Burgess (Md.) 17 Reporter, 245, February.
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1884, in which *Judge Irving, in delivering the judgment of the court, said: "It is well settled in this state that the burden of showing contributory negligence on the part of a plaintiff, is on the defendant. Bacon's Case, 58 Md., 484. This rule has been laid down in suits against railroads for injuries occasioned by them; and we see no reason for establishing a different rule as applied to accidents occasioned by defective county roads and bridges. The presumption that a man will act prudently and with care for his own safety, and will not recklessly rush into destruction, must exist as well in one case as in the other. In this case it is argued that because the evidence showed that the plain-

tiff knew of the condition of the bridge, therefore the burden shifted, and it was incumbent on him to show affirmatively that he used due care and prudence in driving. It is wise for a plaintiff shown to know of a defect, to prove that he drove with caution (that was shown in this case); but we cannot accede to the view that the onus of showing want of care rests any where but on the defendant. If the bridge was wholly impassable and the plaintiff knew it, his knowledge would be conclusive, and the case might have been taken from the jury. In this case it does not appear from the proof that the bridge was wholly impassable. It was unsafe and had a hole in it, into which appellant's horse fell and was injured. The simple fact of its existence, with the knowledge of the plaintiff, was not sufficient to bar recovery. The hole might possibly have been avoided with ordinary care in driving, and the knowledge of its existence, ought to have prevented carelessness on the part of the plaintiff, and naturally would have induced care on his part; but the onus of showing that such care and prudence were not exercised still rested on the defendants. The case of Reed v. Northfield, 13 Pick., 94, is very similar to this case. There was a dangerous hole by the side and edge of the bridge, of which the plaintiff had knowledge. He crossed the bridge and in doing so his horse got into the hole and was seriously injured. The jury was instructed that the knowledge of the hole being there was not conclusive evidence of negligence. On appeal Chief Justice Shaw, pronouncing the decision of the court, said that the ruling was perfectly correct. See Horton v. Ipswich, 12 Cush., 492,

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&c. The doctrine to be *extracted from all these cases is, that if the defect in a road or bridge be such as to make the same practically impassable, a person takes all the hazard who, with such knowledge, attempts to pass over the road or bridge, and will not be redressed if he is injured. But if the defect be one which does not render the road wholly unfit for use, or bridge substantially impassable, and is only a defect which might result injuriously if not shunned, in such case it cannot be that a citizen with business must remain at home and may not make any attempt to use the road or bridge as his necessity requires," &c.

Section 1115 of the General Statutes, under the head of "Bridges," provides that "All vessels, boats, and rafts passing under any bridge shall, before they come to the same, drop anchor and drag through under the same; and if any vessel, boat, or raft shall pass, or attempt to pass, under any bridge without dragging as aforesaid, every such vessel, boat, or raft shall forfeit the sum of fifty dollars, to be recovered by immediate seizure and detention of the said vessel, boat, or raft, until the payment of the said sum, by information being given of the same to the Circuit Court in the county where the offence was committed; the money, when so recovered, to be applied for rebuilding or keeping in repair such bridge," &c. This is not a proceeding to recover the penalty imposed by this section, which we do not think has any application to the case. This is a private bridge with a draw to it defectively constructed. The difficulty was not in getting under the bridge, but through it. There was no evidence that in passing the draw, it was customary, or would have been attended with less danger to the vessel, to "drop anchor and drag through."

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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21 S. C. *501

*FROST v. FROST.

(April Term, 1884.)

[1. *Wills* ⇐561.]

A testator devised to "my two children, U. and S., the tract of land whereon I now live. I give S. 140 acres to be laid off at the upper end of the tract. I give my daughter H. 130 acres on Bee Tree Branch. I give to my son U. all my other lands." *Held*, that S. took the 140 acres in severalty, and that U. and S. took between them the residue of the home tract, and that the "other lands" devised to U. meant lands not specifically mentioned.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1221–1224; Dec. Dig. ⇐561.]

[2. *Evidence* ⇐372.]

A deed more than thirty years old was properly admitted in evidence, its genuineness having been established by the corroborative facts that it was found in the grantee's possession, and had endorsed upon it a certificate of registration in the proper office (the records of which office had since been destroyed by fire), and that the grantee had been in the occupancy of the land for over fifty years.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1616; Dec. Dig. ⇐372.]

[3. *Tenancy in Common* ⇐35.]

A deed by two tenants in common of a specified number of acres construed to convey their interest in a larger tract of land.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 27; Dec. Dig. ⇐35.]

[4. *Evidence* ⇐186.]

A case, as reported in "McCord's Reports," was properly admitted in evidence to prove the judgment of the court, the records of both Circuit and Appeal Courts being proved to have been destroyed by fire in 1865. The case thus reported was not only the next best evidence, but was specially made evidence by the act of 1865 (13 Stat., 354).

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 671; Dec. Dig. ⇐186.]

[5. *Judgment* ⇐665.]

A decision of the court of last resort is binding upon the parties to that suit, although

afterwards, in another cause, a different principle is declared.

[Ed. Note.—Cited in Jones v. Charleston & W. C. Ry. Co., 65 S. C. 418, 43 S. E. 884.

For other cases, see Judgment, Cent. Dig. § 1178; Dec. Dig. ⟸665.]

[6. *Curtesy* ⟸8.]

In this state a husband has no estate by curtesy in lands of his deceased wife held by her in fee simple.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. § 18; Dec. Dig. ⟸8.]

[7. *Tenancy in Common* ⟸15.]

In 1826, a husband purchased an interest in lands, and thereby became a tenant in common with his wife, who died in 1839, leaving him and their children surviving; and by the death of two of his children he subsequently acquired an interest in their shares. He never claimed to hold the lands adversely to his children, but asserted that it belonged to the estate of his wife. *Held*, that he had committed no ouster, and that to action brought in 1882, by some of the surviving children against a purchaser at sheriff's sale of their father's interest in this land in 1877, the statute of limitations could not be successfully pleaded.

[Ed. Note.—Cited in Odom v. Weathersbee, 26 S. C. 248, 1 S. E. 890.

For other cases, see Tenancy in Common, Cent. Dig. §§ 42–52; Dec. Dig. ⟸15.]

[8. *Execution* ⟸260.]

The purchaser at the sheriff's sale gave public notice that the land did not belong to this father, but to his children. *Held*, that while the sale stood unimpeached, such purchaser was entitled to all the interest that the father had in such land.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 743–746; Dec. Dig. ⟸260.]

Before Hudson, J., Richland, April, 1883.

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*The opinion fully states the case.

Messrs, Abney & Abney and J. P. Thomas, Jr., for plaintiffs.

Mr. F. W. McMaster, contra.

October 6, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. About the beginning of the century, one Burrill Faust lived on a plantation near the bridge over Crane Creek on the Monticello road, in Richland county. In 1815 he died, leaving surviving him his wife, Christina, and her two unmarried children, Uriah and Sallie. He had been twice married and by his first wife he had two children, Elizabeth and Mary, but they had both married and settled off; Elizabeth had married James Boatwright, and Mary had married John Glover. Burrill Faust left a will by which he devised as follows: "I give my two children, Uriah and Sallie, the tract of land whereon I now live. I give Sallie one hundred and forty acres, to be laid off at the upper end of the tract adjoining Jasper Faust's lands, by a straight line from the river. I give to my daughter Harriet, a tract of land, containing one hundred and thirty acres, situate in the state and district above mentioned, on Bee Tree Branch, the waters of Crane Creek, bounded, &c. I give to my son Uriah all my other lands," &c. No account can be found of a settlement of the estate or division of the lands, but after the death of the testator, his widow, Christina, and her two children, Sallie and Uriah, continued to live together on the homestead. In or about 1820, Sallie married John D. Frost, sr., who was the owner of large landed estates in the neighborhood; but upon his marriage, he went to live with his wife's family, and engaged in the cultivation of that place in common with his own.

In 1825, Uriah Faust died intestate, never having been married. There was no administration upon his estate, and no proceeding was had to divide or partition the lands between his heirs and his sister Sallie, except what may be regarded as proved by the following facts: In the fourth volume of McCord's Reports, page 439, there is a case re-

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ported styled James Boatwright and *others v. Christina Faust and others, which, after citing the clause of Burrill Faust's will making provision for Uriah, states that "James Boatwright and Elizabeth, his wife, and John Glover and Mary, his wife, who are both daughters of Burrill Faust, sued for partition of the lands devised to Uriah Faust, between and among the heirs of Burrill Faust, claiming that a life estate was only devised to Uriah Faust. The defendants demurred, and the demurrer was sustained by Mr. Justice Waities," &c. Upon this statement, the demurrer was overruled by the Appeal Court, which held that "there are no words in this will from which an intention to give a fee can be inferred. By the act of 1824 it is declared that every gift of land by devise shall be considered a gift in fee simple. But that act cannot affect the will now in question, as it was passed since the execution of the will, and even since the death of testator;" and thereupon reversed the judgment below, thereby in effect declaring that, Uriah being dead, the lands given to him became the intestate property of the estate of his father, Burrill Faust, and were distributable among his heirs, viz., Christina, the widow, one-third, and Elizabeth Boatwright, Mary Glover, and Sallie Frost, each, a third of the remaining two-thirds.

The records of both the Circuit and Appeal Courts in Columbia were destroyed when the city was burned in the late war, and one of the questions in the case is whether the book of reports (4 McCord) was admissible as evidence of the facts therein stated. In this connection, it appeared that there was an instrument of writing, purporting to be a deed from James Boatwright and wife and John Glover and wife to John D. Frost,

sr. bearing date June 21, 1826, conveying to him, for the consideration of $4,240, their shares (stated as 420 acres) of the lands which had been devised for life to Uriah Faust. This paper was found after the death of John D. Frost, sr., in an old trunk which had belonged to him. The execution of the paper was not proved, but it was offered in evidence as "an ancient document." It had upon it evidence that Elizabeth Boatwright and Mary Glover respectively relinquished their inheritance, and that it had been regularly recorded in 1826. Whether this paper was properly admitted in evidence is another question in the case.

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*John D. Frost, sr., and his family continued to live with the widow, Christina, at the old homestead, until she died. The precise time is not stated. She died intestate, and there was no administration upon her estate or division of her interest in the lands, as her daughter, Sallie Frost, was her sole heir at law. After the death of Christina, John D. Frost and family remained on the home place for some years, but finally moved off to the "Flat House," or Boatwright place, where Sallie Frost died in 1839 intestate, leaving as her heirs at law her husband, John D. Frost, sr., and seven children, viz., Uriah C. Frost, Mary F. Maxcy, Agnes W. Walker, John D. Frost, jr., Sarah A. Guignard, Campbell Frost, and Cassius Frost. There was no administration upon her estate or division of her lands. Campbell and Cassius both died intestate after their mother, unmarried and without children; and no division of their estates was ever made. The children still lived with their father in possession of the old homestead until they respectively married and settled off. The youngest child was born about 1837 or 1838, and was not of full age until about the beginning of the war in 1860. Uriah C. Frost was never married, and Mrs. Maxcy was not married until 1874.

The war came on, and by its results John D. Frost, sr., lost some two hundred slaves and was made insolvent. Judgments were obtained against him, and, after homestead was laid off to him, the sheriff of Richland county, on February 5, 1877, offered for sale, under executions against him, "all that tract of land, five miles from Columbia, on the Monticello and Broad River roads, &c., containing six thousand and five hundred acres," &c. The tract of land thus described consisted of lands which undoubtedly belonged in his own right to the defendant, but also embraced the lands now in question. At the sale, John D. Frost, jr., one of the sons of the defendant in execution, announced publicly that the lands about to be sold as the property of his father, John D. Frost, sr., did not belong to him, but to his children. The sheriff, however, proceeded with the sale, and the lands were knocked down to the said John D. Frost, jr., at the price of $12,350, who, on February 7, 1877, received sheriff's title for the same. John D. Frost,

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jr., had *always lived upon the land, and he continued to do so until April, 1881, when his father, John D. Frost, sr., died intestate.

On June 2, 1882, the plaintiffs, three of the children of Sallie Frost, instituted these proceedings, alleging that all the said Faust tract of land belonged to the estate of Mrs. Sallie Frost, the last survivor of the Faust children, and praying that it might be partitioned among her surviving heirs, viz., Uriah C. Frost, Mary F. Maxcy, Agnes M. Walker, Sarah A. Guignard, and John D. Frost, jr. To this the said John D. Frost, jr., being in possession, objected, and claimed that the whole of the land belonged to him in severalty; that his father, John D. Frost, sr., in his life-time, acquired title to the whole of it, part by the purchase from Mrs. Boatwright and Mrs. Glover, part by inheritance from his deceased wife, Sallie, and sons, Cassius and Campbell, and the remainder by lapse of time and the statute of limitations; and that being in his father, the title to the whole passed to him as purchaser at the sheriff's sale aforesaid. It was referred by consent to the master to take the testimony, which is printed in the brief. The case came on to be heard by Judge Hudson, who decreed that the land belongs to the plaintiffs and defendants in certain proportions, and ordered partition of the same among the parties according to their respective rights so ascertained. From this decree, both parties appeal upon the following grounds:

Exceptions of the Plaintiffs.

I. Because his honor admitted in evidence the paper purporting to be a deed from Boatwright and Glover and their wives to John D. Frost, sr., holding that it was over thirty years old, and was found in possession of the grantee, when there was no proof of its age outside of the dates on the paper, no proof that the paper had ever been in the possession of the grantee, or that he had ever held under it. II. Because his honor admitted in evidence the 4th volume of McCord's Reports to prove the facts that there was a case between Boatwright and others and matters involved in the case, holding that the loss of records in the court below and the Appeal Court was proved, when the existence of such records never appeared.

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III. Because his honor held that John *D. Frost, sr, became entitled under said deed to two-thirds of two-thirds of Uriah's half of the home tract of land. IV. Because his honor admitted in evidence any portion of

the testimony reported by the master in his September report (March 31, 1883), his honor holding that the self-serving declarations of J. D. Frost, sr., were not admissible in evidence, but so much of the testimony in this report as was competent, was admissible. V. Because his honor held that the act of 1791 abolished tenancy by the curtesy in fee simple estates in South Carolina, and that the plaintiffs and defendants, as heirs at law of their mother, were not entitled to all the lands mentioned in the complaint. VI. Because his honor held that the deed from the sheriff to John D. Frost, jr., was proved, without the introduction of the advertisement in a newspaper. VII. Because his honor did not hold that John D. Frost, jr., was estopped from denying the title of the children of his mother in and to all of these lands by his conduct at the sale, when he notified the public of their title, &c.

Exceptions of John D. Frost, Jr.

I. Because his honor having admitted as an ancient deed the deed of Boatwright and Glover and their wives, should have held that John D. Frost, sr., was entitled to the full amount of 420 acres conveyed in said deed. II. That his honor erred in decreeing that John D. Frost, sr., was entitled to two-thirds of two-thirds of Uriah's half of the land, instead of holding that J. D. Frost was entitled to two-thirds of two-thirds of the balance of the land. III. That his honor erred in construing the following words of the will of Burrill Faust, "I give my two children, Uriah and Sallie, the tract of land whereon I now live. I give Sallie one hundred and forty acres, to be laid off at the upper end of the tract adjoining Jasper Faust's land by a straight line from the river. * * * I give my son Uriah all my other lands." His honor's construction was that he gave Sallie 140 acres, and one-half of the other land, whereas the construction should have been, that Sallie received as her share the 140 acres, the upper portion of the tract, and the "other lands" should have been construed the balance of the tract, this balance being 955 acres, according to the

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DeBruhl survey, and 985 acres according *to the Miller survey. IV. That his honor erred in holding that the plaintiffs are entitled to rent for the years 1881 and 1882, the plaintiffs having waived all claim to rent prior to the death of John D. Frost, sr., which occurred April 4, 1881; whereas defendant maintains, if any rent should be allowed, it should be computed from the time of bringing this action. V. Because his honor failed to sustain the defendant's plea of the statute of limitations, notwithstanding the proof that John D. Frost, sr., had purchased nearly two-thirds of the land fifty-seven years ago, and had exercised absolute control over the whole of the said tract for about fifty years, and had granted the right of way through the land to the Greenville and Columbia railroad company thirty-five years ago, and for twenty-five years after the youngest child came of age, held the land adverse to plaintiffs. VI. Because the wealth of John D. Frost, sr., his acts of ownership over the land, his advances to his children during a period of over twenty years are such evidences of ouster against the plaintiffs as co-tenants, that his honor should have held that the plaintiffs were estopped from bringing any action. VII. Because his honor erred in not holding that the deed from Mrs. Boatwright and her husband and Mrs. Glover and her husband, and the entering of John D. Frost thereunder and his continued possession thereof, would create a color of title and make in John D. Frost, sr., an adverse possession as to 420 acres of said tract in dispute, &c.

The first question in order is that as to the construction of Burrill Faust's will. As Mr. Preston is reported to have said in the argument of the case in McCord, "the will is obviously the production of a very ignorant man." In disposing of his lands he used no paragraphs, but the devises follow each other with no other separation than a dash. There is a separate provision for Harriet (his illegitimate daughter), between that for his two children, Uriah and Sallie, and the phrase lower down, "I give to my son Uriah all my other lands." We do not think that this subsequent provision for Uriah was intended to have reference back to the home place, which had already been given to "Uriah and Sallie," but was to be rather in the nature of a residuary clause, covering and disposing of other lands which might not have been specifically given by the will.

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Uriah and Sallie *were both unmarried and living with their mother in the homestead, which was on the tract, but outside of the parcel given to Sallie, and the father probably intended to give both of them an interest in the home place, subject to the gift of 140 acres to Sallie in severalty, "to be laid off at the upper end of the tract adjoining Jasper Faust's lands," &c.

As to the admission in evidence of the Boatwright and Glover deed, the rule as to "ancient deeds" is laid down by Mr. Greenleaf in the following terms: "To the rule requiring the production of the witnesses there are some exceptions, and the first is when the instrument is thirty years old, in which case it is said to prove itself, the subscribing witness being presumed to be dead, and other proof being presumed to be beyond the reach of the party. But such documents must be free from just grounds of suspicion, and must come from the proper cus-

tody, or have been acted upon so as to afford some corroborative proof of their genuineness." 1 Green. Evid., §§ 570, 144, and note 1.

If the paper is thirty years old, that alone will be sufficient, provided its genuineness is beyond all doubt. Usually certain other facts are required to be shown, as that it came from the proper custody, or has been accompanied by possession, &c., but proof of these facts are required simply in corroboration; that is, that some evidence shall be offered auxiliary to the apparent antiquity of the instrument, to raise a sufficient presumption in its favor. As soon as its genuineness is satisfactorily established by any circumstances, the deed is admitted. "Any incontestable fact going to show that a deed was in existence more than thirty years before it is offered in evidence, will authorize its introduction as an ancient muniment of right. Possession is that which seems to be most generally resorted to for this purpose, because it is the most usual mode of asserting a right under legal title. This, however, is not indispensably necessary. [Duncan v. Beard] 2 Nott & McCord, 404." Swygart v. Taylor, 1 Rich., 54; Edmondston v. Hughes, Cheves, 81; Thompson v. Brannon, 14 S. C., 550, and authorities.

In this case the deed was found after the death of the grantee, John D. Frost, sr., in an old trunk which had belonged to him. It had probably been in his custody for over

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fifty years, accompanied *by possession of the premises referred to. It bore date in 1826, and had the marks of having been recorded at the time. Upon this proof of its genuineness, the Circuit judge admitted it in evidence, and we cannot say that he committed error therein.

But in so ruling we do not think that the deed conveyed to John D. Frost, sr., any particular parcel of land containing 420 acres. We hear nothing of an actual partition, which most probably was never made, as Mrs. Sallie Frost and Mrs. Christina, the widow, were the only other persons then thought to have an interest, and they were in possession along with John D. Frost, sr., who simply purchased the interest of Boatwright and wife and Glover and wife. If the parties acted under a mistaken view as to the extent of their shares, that could not enable them to convey larger interests than they possessed. The shares of the vendors together amounted to two-thirds of two-thirds of Uriah's half of the homestead (outside of the 140 acres of Sallie), which the deed conveyed, and no more.

This deed is in accord with a decision of the highest state court of that day, in the case of James Boatwright and others v. Christina Faust and others, found in 4 McCord, 439, which held that Burrill Faust's will gave Uriah only a life estate in these lands, which, after his death, were distributable among the heirs of the said Burrill, as his intestate property. The original record of that case was not in evidence, but its loss was satisfactorily accounted for by the burning of Columbia during the late war, and the case, as printed in a volume of the reports purporting to be published by "D. J. McCord, state reporter," was the next best evidence upon the subject. 1 Green., § 84, and note; Cook v. Wood, 1 McCord, 139. Besides, we do not see why the volume of reports was not admissible under the first section of the act of 1865, "To provide a mode by which to perpetuate testimony in relation to records destroyed or lost during the late war," which, among other things, declared that as secondary evidence, "statements in the record of any suit in any of the courts, produced from the proper place of custody, or in the printed volumes of state reports published by the authority of the general assembly, shall be admissible for the consideration of the court or jury, having jurisdiction of the issues of fact," &c. 13

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*Stat., 345. We are judicially satisfied that there was such a case as reported, and that the judgment was as therein stated.

It is true that judgment gave a different interpretation to the act of 1824 as to the necessity for words of perpetuity in a devise of real estate from that which was soon after (1828) established in the case of Hall and others v. Goodwyn and others, reported in the same volume (4 McCord, 442), which declared that the act of 1824 was a declaratory law and retrospective in its operation. Although the doctrine held in Boatwright v. Faust was not afterwards approved and followed, yet the case itself, so far as we are informed, was never overruled, and therefore was binding upon the parties to that suit, and as to them must be regarded as a matter adjudged.

John D. Frost, jr., claiming to be the owner of his father's interest in these lands under the sheriff's deed of 1877, insisted that at that time his father, John D. Frost, had acquired title to the whole of it, part by the purchase from Boatwright and Glover, part by inheritance from his deceased wife and children, Campbell and Cassius, and the remainder by adverse possession, lapse of time, and the statute of limitations. To this, it was replied by the other children that as to his wife's lands he was only in possession as husband during her life, and after her death he held it during his own life as tenant by the curtesy, and that the interest of the heirs did not vest in possession until his death in 1881, and of course there could be no adverse possession until that time.

This court has lately held that in this state the husband has no estate by the cur-

tesy in lands of his deceased wife held in fee simple.[1] But we agree with the Circuit judge that nothing was added to the interest of John D. Frost, sr., by operation of the statute of limitations. He had no interest, except as husband, until he purchased the shares of Boatwright and Glover, and thus became tenant in common with his wife, Sallie, in regard to the interest of Uriah under the interpretation of the law then adopted. At the death of Christina he acquired no additional interest, as his wife, Sallie, was the sole heir of her mother. He continued to be tenant in common with his wife

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until she died in 1837. After her *death and that of his children, Campbell and Cassius, he had an increase of his interest as heir, but he was still tenant in common with his children who lived with him. It is familiar law that a tenant in common holds possession for his co-tenants as well as for himself, and cannot plead the statute of limitations unless there has been an ouster and adverse possession. Villard v. Robert, 1 Strob. Eq., 393; Allen v. Hall, 1 McCord, 131. Ouster was not shown by the testimony, and it is not to be assumed that John D. Frost ousted any of his children from the little pittance of an estate inherited from their mother. On the contrary, as was natural, they lived with him, and his possession was their possession. He always denied that he held adversely to his children, and refused to allow any part of this land to be included in his homestead, saying "it belonged to the estate of his wife." We concur with the Circuit judge that there was no ouster, and that John D. Frost, sr., acquired no rights as against his children by the statute of limitations.

In behalf of the other children, it is urged that John D. Frost, jr., is not entitled, as purchaser at the sheriff's sale, to the whole interest of his father, John D. Frost, sr.; that he is estopped from so claiming for the reason that at the sale he gave public notice that the lands did not belong to his father, but to his children. That announcement probably had the effect of chilling the biddings and of enabling him to purchase the lands for less than their true value, and that should certainly induce him to do no less than exact and scrupulous justice to his brothers and sisters, who were in no way benefited by that advantageous purchase. But while that sale stands unimpeached, we are constrained to hold that all the legal title which at that time had vested in John D. Frost, sr., passed by the deed of the sheriff to John D. Frost, jr. We concur with the Circuit judge that as to the shares of the other children he should account for rents and profits at least from January 1, 1881.

[1] Gaffney v. Peeler, ante 56.—REPORTER.

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*Shares of the Different Parties.

First. Mrs. Sallie Frost (her share in severalty),	140	acres.
Her $\frac{1}{2}$ of homestead proper, $985\frac{1}{5}$ acres,	$492\frac{3}{5}$	"
Her mother's $\frac{1}{3}$ of $\frac{1}{2}$ of $985\frac{1}{2}$ (Sallie sole heir),	$164\frac{1}{3}$	"
Her interest as heir in Uriah's part, $\frac{1}{3}$ of $\frac{2}{3}$ of $\frac{1}{2}$ of $985\frac{1}{5}$,	$109\frac{7}{15}$	"
Sallie's share distributable at her death,	$906\frac{4}{15}$	"
$\frac{1}{3}$ to husband, John D. Frost, sr.,	$302\frac{4}{45}$	"
For her children,	$604\frac{8}{45}$	"
Seven children (share of each),	$86\frac{98}{315}$	"
Upon the death of Campbell and Cassius, their shares,	$21\frac{814}{15}$	
Were divisible among brothers and sisters and father (6), Share of father and each living child, $21\frac{814}{21}$—	$28\frac{98}{315}$	"
Share of each living child,	$115\frac{23}{225}$	"
Second. 1. John D. Frost, sr., purchase from B. & G. $\frac{2}{3}$ of $\frac{2}{3}$ of $\frac{1}{2}$ of $985\frac{1}{5}$,	$218\frac{14}{15}$	"
2. Share of his wife's estate,	$302\frac{4}{45}$	"
3. Share of estate C., &c.,	$28\frac{14}{21}$	"
Passed to John D. Frost, jr., under sheriff's deed,	$549\frac{31}{45}$	"
Added his own proper share,	$115\frac{23}{225}$	"
Whole share of John D. Frost, jr.,	$664\frac{178}{225}$	"

Chargeable with rents and profits, &c.

Share of Uriah C. Frost,	$115\frac{23}{225}$	acres.
Share of Mary F. Maxey,	$115\frac{23}{225}$	"
Share of Agnes M. Walker,	$115\frac{23}{225}$	"
Share of Sarah A. Guignard,	$115\frac{23}{225}$	"

The judgment of this court is that the judgment of the Circuit Court be affirmed, and all the appeals dismissed.

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*BOYKIN v. BOYKIN.

(April Term, 1884.)

[1. *Wills* ⇨630.]

The words of a will were: "I direct that all the rest of my real estate shall be kept undivided until the death of my wife, to be worked by the slaves of my estate and those which I shall in this bequeath to my wife, under the control and management of my executors; and from and immediately after her death I devise the said real estate to my sons, equally to be divided among them, share and share alike, to them and their heirs forever. And should any of my sons die before the time herein appointed for the division of my real estate and should leave issue living at that time, then I direct that such issue shall take among them, share and share alike, the same portion of real estate to which their parent would have been entitled if he had survived my said wife, to them and their heirs forever. And if any of my sons shall arrive at the age of twenty-one years before the death of my said wife, I direct that such son or sons shall

be permitted to cultivate, each for himself, such a part of real estate as shall be allotted for that purpose by my wife and executors until the final division, when he or they shall receive his or their own share." *Held*, that the devise created vested interests in the sons living at the death of testator, and only the division and possession were postponed to the death of the widow; therefore the interest of two sons who died intestate and without issue after testator, but before the widow, vested in their mother and other heirs at law.

[Ed. Note.—Cited in Dickson v. Dickson, 23 S. C. 224; Tindal v. Neal, 59 S. C. 11, 36 S. E. 1004; Charleston & W. C. Ry. Co. v. Reynolds, 69 S. C. 503, 48 S. E. 476; Hays v. Western Union Tel. Co., 70 S. C. 40, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731; Brantley v. Bittle, 72 S. C. 184, 51 S. E. 561; Walker v. Alverson, 87 S. C. 55, 63, 68 S. E. 966, 969, 30 L. R. A. (N. S.) 115; West v. Smith, 89 S. C. 544, 72 S. E. 395.

For other cases, see Wills, Cent. Dig. § 1477; Dec. Dig. ⟸630.]

[2. *Wills* ⟸623.]

Held, further, that in the case of the death of such sons without issue no cross-remainders were provided for, nor was it necessary that the court should imply them.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1445; Dec. Dig. ⟸623.]

[3. *Wills* ⟸728.]

The will also bequeathed certain slaves to the widow and directed that "they may be worked on my general estate under the control of my executors, who shall, as long as she lives, pay to her annually out of the proceeds of my general estate the sum of $600 in full compensation for the use, labor, and profits annually of said slaves." *Held*, that this provision for the widow ended with the emancipation of the slaves.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1776; Dec. Dig. ⟸728.]

[4. *Wills* ⟸730.]

The executors were authorized and directed to keep the widow supplied as long as she lived with suitable carriage and a pair of carriage horses, to be purchased at the expense of the estate whenever the executors "may deem it necessary." And they were also required to pay out of the undivided estate for all repairs and renewals of furniture for the dwelling house of testator (which was given to the widow for life) whenever directed by the executors, to be continued during the widow's lifetime. All the provisions of the will for the widow were in lieu of

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dower. After testator's death, *and after the war, the widow found a change of residence necessary, and exchanged, with her surviving son, the testator's homestead for a house in town. *Held*, that the widow was entitled to the carriage and horses, and to have the furniture in her town house repaired.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1787; Dec. Dig. ⟸730.]

[5. *Wills* ⟸755.]

There was a legacy to the widow of "$2,000 in six per cent. stocks of the State of South Carolina." The testator owned some stocks of this state at his death. *Held*, that the legacy was demonstrative and not specific, and that the widow was entitled to demand the same, with interest at six per cent. (which is the rate of interest on such securities).

[Ed. Note.—Cited in Chapman v. City Council of Charleston, 30 S. C. 560, 9 S. E. 591, 3 L. R. A. 311; Rogers v. Rogers, 67 S. C. 172, 45 S. E. 176, 100 Am. St. Rep. 721.

For other cases, see Wills, Cent. Dig. § 1948; Dec. Dig. ⟸755.]

[6. *Wills* ⟸719.]

The delay of the widow in asserting her claims, her acquiescence in the payment of other legacies, and her knowledge of the sale of testator's state stocks, did not estop her under the circumstances of this case.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1722–1725; Dec. Dig. ⟸719.]

[7. *Wills* ⟸765.]

The several provisions in favor of the widow being in lieu of dower, will not abate for the payment of debts, but they are not a charge upon the lands devised; and the use of the state stocks by the executors to pay to her daughters their legacies which were charged upon such lands, does not entitle her to be subrogated to their rights.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1979; Dec. Dig. ⟸765.]

[This case is also cited in Kennedy v. Boykin, 35 S. C. 81, 14 S. E. 809, 28 Am. St. Rep. 838, as to facts.]

Before Hudson, J., Kershaw, February, 1883.

This was an action by Sallie W. Boykin against Thomas L. Boykin, as executor of the will of Burwell Boykin, deceased, and against all the devisees and legatees under said will, and against certain creditors of the said Thomas L. Boykin. The opinion states the case.

The Circuit decree, omitting its statement, was as follows:

I will here observe that there has been no accounting taken of the actings and doings of the executor, T. L. Boykin, so that we are not informed of the condition of the estate in his hands, except that it is stated in argument of counsel that he is totally insolvent; and we may presume that whatever of the personal estate was not destroyed by the results of the war, and has not been paid to legatees, is not available. But that is yet to be judicially ascertained upon an accounting.

All litigants have expressed a desire to obtain a construction of the will, and an adjudication of the main legal questions preparatory to an accounting and settlement. This we think proper, and to this duty we will at

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once address ourselves, and *in doing so will take the sections of the will in dispute in their regular order.

The first and second clauses of the will present no question difficult of interpretation, as the language is plain and unambiguous in regard to the rights and privileges of the wife and daughters of the testator. It is in evidence that the two hundred acres of land were marked off and admeasured, and that the widow and daughters continued to dwell in the family homestead, being provided for by the executor as the will directs,

though not fully, and the repairs and renewals were not well kept up. So matters continued without any effort on their part by legal steps to enforce a better performance of duty on the part of the executor until a few years ago, when the widow sold to Thomas L. Boykin her life estate in the premises, in exchange for an estate in fee in a residence in Kirkwood, in the suburbs of Camden.

We do not think that under the circumstances, after so long a delay, she is entitled to have an estimate made of the arrearages of the annual cost of what should have been expended by the executor in keeping up the establishment on the plantation, and now recover that as a gross sum from the executor; but we do think that she has a right to demand of him a suitable carriage and pair of horses, and a proper repairing and renewal of her present household furniture. Of course, the altered condition of things, and the present age and circumstances of his mother, should be taken into consideration in deciding upon a proper outlay in this respect at this juncture. The estate has been greatly reduced by the casualties of war. Perhaps the executor has been also guilty of devastavit, but how far is yet to be determined, and much depends upon the evidence on this point. We cannot prejudge him.

Nor do we experience much difficulty and hesitation in construing the third clause of the will, and feel free to say that each of the three sons surviving the testator took under that clause a fee in the one-third of the body of land devised. The testator directs this fee to go absolutely to the issue of such of the sons as should die before the mother, leaving issue surviving, but does not provide how the share of a son should go in the event he should die before the mother and leave

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no issue to take. *It is argued that his purpose and intention were that in such event the son's share should vest in the surviving sons, and that Eugene and John having successively died unmarried, and without issue, by right of survivorship Thomas L. Boykin has become vested with the entire devise. If such had been the testator's intention, it would have been very easy for him to have so declared. In this clause cross-remainders are not created by express words, nor are they raised by necessary implication. I have carefully examined the authorities relied upon in support of this doctrine of cross-remainders, but in my judgment they do not sustain the construction contended for by the creditors of T. L. Boykin. I hold that as Eugene and John died leaving no issue to take, their respective shares in fee vested in those who filled the description of their heirs at law at the dates of their deaths respectively. But, of course, the period of partition and enjoyment in severalty remains as the testator has fixed it, to wit, the death of the widow. Until then the land is to be kept together for the use of the estate, as prescribed by the will. In refutation of the cross-remainder theory, see Smither v. Willcox, 9 Ves., 233, referred to in 2 Jarm. Wills, 493, and note.

We agree entirely with the master in his construction of section fourth of the will. The six hundred dollars to be paid annually to the widow was the testator's estimate of the compensation which should be paid her for the annual labor and services of her eight negro slaves on the plantation, which was to be worked for the benefit of the estate. The widow having accepted the slaves, as well as her entire legacy, in lieu of dower, and the slaves having been emancipated, this source of income was dried up. The corpus and income became a loss to her.

The legacy of $2,000 in state stocks I do not regard as specific, but merely pecuniary and general. The remarks of the learned author of William on Executors, Vol. 2, *pages 999 and 1000, are in accord with Jarman on Wills, and are adopted by Redfield, and sufficiently support me in holding that this legacy is not specific, and must therefore be paid, but I think with only six per cent. interest from July 27, 1862. But how it is to be paid is a question made interesting by the earnestness and zeal displayed in the argument of counsel. Clearly, the execu-

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tor is *responsible under the testimony as it comes to me, although, as I have before remarked, the extent of his devastavit has not been fully enquired into. He has assented to the legacy, has paid less favored legacies, and has disposed of the rents, issues, and profits of the land, and, to some extent, the land itself. He does not interpose the plea of the statute of limitations, nor could he do so whilst he maintains to this legatee the relation of trustee.

The provision for the widow stands upon high grounds—higher in law and in equity than that of ordinary legatees, mere volunteers. She is a purchaser, or rather the testator became, by her acceptance of his offers, a purchaser of her interest in his real estate, and she a vendor for valuable consideration. So highly is her legacy esteemed, that in case of a deficiency of assets personal, her claim does not ratably abate with other legacies, but must be paid, even if thereby the legacies of the children should be defeated in whole or in part. 2 Wms. Ex'rs, *1169, 1170; 1 Roper Leg., *432. Such a claim of a widow is so greatly favored, that before she will be driven to her election she will be allowed time in which to be fully informed of the real condition of the estate, so as to enable her knowingly and understandingly to make her choice. Should she elect hastily and unadvisedly, she will be allowed to recall her imprudent election. Here, however, she has elected, and too long

a time has elapsed to think of asking to recall, nor does she do so. She sues now to recover the provision made for her in lieu of dower, declaring very truthfully and properly that she has made her election.

Her counsel insists, however, that her legacy is not only favored in law, and preferred to one that is a mere bounty, but that it is a charge upon the specific devises of land—not that the testator has so declared it to be, but that the law so declares it. In this they err. The law does not only not so declare, but the very nature of the acceptance of such a legacy implies a renunciation of all interest in the land, saving what may be expressly, or by necessary implication, contained in the legacy itself, as where it is made a charge on land, or payable out of the usufruct, &c. There is nothing of the kind in the legacies given to this widow, except the current expenses of the household, repairs, and renewals of furniture, &c.,

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whilst the *wife and daughters live in the family residence, and even those outlays are to be supplied from the proceeds and income of the general estate, and not from the sale of any part of the land.

In the absence of any specific directions to that effect in this will, these legacies to the wife in lieu of dower are not charges on the land specifically devised. Therefore, should there be a deficiency of personal assets, so that there must be a marshalling of assets as between legatees, we know no rule of law nor of equity that will enable the widow to subject the land specially devised to the payment of her claim. 3 Jarm. Wills, 530, 531; 3 Red. Wills, 369, citing Forrester v. Lord Leigh, Amb., 171; Scott v. Scott, Amb., 383; Herne v. Meyrick, 1 P. Wms., 201; Clifton v. Burt, Ibid, 678. As, however, all the debts have been paid, and all other legatees settled with, and as the landed estate is still undivided, and required to be kept together and managed for the use of the family until her death, and since hers is a favored legacy, every advantage and preference must be granted her henceforth in getting what justly belongs to her.

It is, however, contended, that as the state stock was taken by the executor to satisfy in part the legacies to the girls given in the 9th clause of the will, which legacies are made a charge on the land, the widow now has the right to be subrogated to their rights in the premises, and thus to resort to the land for payment. But only one thousand dollars of the state stocks was so applied (the balance being paid in other funds and stocks), and this was done many, many years ago, and with her full knowledge and consent. And we do not perceive how, at this late day, having so long acquiesced in this act of the executor, she has any equity, by subrogation or otherwise, to demand payment of her legacy out of a specific devise. She has a preferred claim upon all the personal assets in the hands of the executor, and these, perhaps, will consist of the rents and profits of the undivided realty. If from this source she cannot be paid, she is entitled to a personal judgment against the executor, which, however, as a lien upon his individual property, including his devise in fee, will take rank only from its date, and must be junior to subsisting outstanding liens, such as mortgages and judgments.

Now, it appears that Thomas L. Boykin

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has undertaken to *mortgage portions of his land, by metes and bounds, and to convey by deed other parts; and that under decrees of foreclosure and sale, still other parts have gone into the hands of purchasers. Clearly, he had no right to do more than mortgage or sell his undivided interest in fee in this land. In so far as any of these purchasers or lien creditors may have such a deed or mortgage, to wit, of the right, title, and interest of T. L. Boykin, he or she will have a lien superior to a personal judgment recovered by the plaintiff against the executor in this action; but, otherwise, it may turn out that her judgment will take priority. Much depends upon the nature of these liens and purchases, and the outcome of the partition which may be made after the death of the plaintiff. Until that time the possession of each and every of these purchasers must be at the will of the tenants in common, or rather the devisees of the land and their heirs, among whom T. L. Boykin is only one of a goodly number. These remarks do not apply to the 200 acres bought of his mother. That is his absolute property, with contingent limitations.

The compromise agreement spoken of by the referee I have never seen, but learn that it is signed only by the counsel for the parties, whilst I believe there are minors in interest. I do not deem it necessary to go further in this decree than to adjudicate the widow's rights and to interpret the will, and the parties and these purchasers may hereafter adjust their claims according to their desire and agreement, whatever that may be. I can only say that none of them have, against the consent of the devisees, a right to the possession of any of the land until after the death of the plaintiff, and not then, even, unless it be that they have purchased the interest of T. L. Boykin, and can stand in his stead in the partition.

As the insolvency of T. L. Boykin is conceded, and as the rents and profits are likely to constitute the only fund out of which the plaintiff can realize anything, which rents and profits have been for a short time collected and disbursed by the master of this court, who is dead, a receiver must be appointed to take charge of the estate with all convenient speed.

It is therefore ordered, adjudged, and decreed: First. That the sons, as devisees un-

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der the third clause of the will of Bur*well Boykin, deceased, took each for himself a vested interest in fee, transmissible to the issue of such as should predecease their mother leaving issue surviving, and to the heirs at law of such as predeceased their mother, leaving no issue surviving, but that the period of partition and enjoyment in severalty of all shares is postponed to the death of the plaintiff.

Second. That the plaintiff do recover of the said executor the sum of $2,000 with interest thereon at six per centum per annum from July 27, 1862, with leave to issue execution thereon against said executor, to be levied de bonis testatoris, if any there be unadministered in his hands, and if not, then de bonis propriis, but not to be levied of any of the real estate devised under the said third clause of said will.

Third. That the plaintiff do likewise recover of said executor a sufficient sum of money to buy for her and daughters a carriage and horses, and to repair and renew the furniture in her present dwelling, with leave to issue execution to enforce payment upon the same terms as that above provided. And in order to ascertain said sum, it is hereby referred to the clerk of this court as special master to take testimony and report a suitable sum of money for these purposes, the master being disqualified.

Fourth. Leave is hereby given to any of the parties to this action to apply at the foot of this decree for the appointment of a receiver, with information as to the amount of the bond necessary to be given, and to the said special master it is referred to ascertain and report a suitable person to act as receiver of the said rents and profits and estate generally, and the proper amount of said bond.

Fifth. That the said rents, issues, and profits be applied to the payment of the amounts decreed herein to the plaintiff, in preference to any other claim, and to the costs of this action, in case the said executor be not able to pay the same, which he is hereby directed to do.

Sixth. That the parties interested have likewise leave to apply at the foot of this decree for further orders touching the lands in possession of those who hold under pretended titles from Thomas L. Boykin.

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*Seventh. That it be referred to the said special master to audit and report upon the accounts of the said Thomas L. Boykin, as executor as aforesaid, with leave to report upon any special matter in regard thereto, as well as in regard to any other matters arising under the pleadings in this action, and not herein finally and fully adjudicated.

From this decree the several parties appealed upon the grounds stated in the opinion of this court.

Mr. W. H. Lyles, for plaintiff.

Messrs. W. Z. Leitner, Buist & Buist, and De Saussure & Son, for creditors.

October 10, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. Burwell Boykin, late of Kershaw county departed this life in 1861, seized and possessed of a handsome estate, consisting, among other things, of nearly 5,000 acres of valuable land in one body on the east side of Wateree River. He left surviving him a widow, Sallie W., and seven children, Eugene, John, Thomas L., Mary L., now the wife of Everard B. Cureton, Harriet A. Boykin, Sallie W., now the wife of T. H. Clarke, and Flora Boykin, for whom he made liberal provision by will. He gave to each of his sons, except Thomas L., $200, and to each of his daughters $4,000, the latter to be raised out of any money due him, and belonging to his estate, not disposed of by the will, and in case there should not be a sufficiency for the purpose mentioned, then the same to be considered as a charge upon the lands. He then provided as follows:

"Section 1. I desire that my wife and children may dwell together in my dwelling house, where I now reside. * * *

"Sec. 2. To my wife, Sallie W. Boykin, for and during the period of her natural life, and no longer, and subject to the first section of this will, I devise the dwelling house where I now reside, and all the out-buildings attached thereto, together with all and singular the household and kitchen furniture, of every description, belonging to the premises, and also 200 acres of the tract of land whereon said dwelling house and out-buildings are

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*situated, to be admeasured, and the buildings thereon defined by my executors, to be hereinafter named. * * * And I hereby empower and authorize my said wife to divide the said furniture, by will or otherwise, among my children in any manner she pleases; but should she fail or refuse to do this, at her death I direct my executors to take and hold the same for distribution under the residuary clause of this will. And I hereby charge the expenses of all needful repairs of said dwelling house and out-buildings and repairs and renewals of furniture for the same upon my undivided estate, as it may be from time to time, when such repairs and renewals shall be directed by my executors, to be continued during the life of my said wife, but no longer.

"Sec. 3. I direct that all the rest of my real estate shall be kept undivided until the death of my said wife, to be worked by the slaves of my estate and those which I shall in this bequeath to my wife, under the control and management of my executors; and from and immediately after her death I devise the said real estate in this section re-

ferred to, to my sons, equally to be divided among them, share and share alike, to them and their heirs forever. If, however, I shall in the mean time by deed convey any portion of the said real estate to any of my sons, then the part so conveyed shall be taken and held by him as his portion of real estate to which he would otherwise have become entitled under the provisions of this section of my will. And should any of my sons die before the time herein appointed for the division of my real estate, and should leave issue living at that time, then I direct that such issue shall take among them, share and share alike, the same portion of real estate to which their parent would have been entitled if he had survived my said wife, to them and their heirs forever. And if any of my sons shall arrive at the age of twenty-one years before the death of my said wife, I direct that such son or sons shall be permitted to cultivate, each for himself, such a part of real estate as shall be allotted for that purpose by my wife and executors, until the final division, when he or they shall receive his or their own share, &c.

"Sec. 4. To my wife, Sallie W. Boykin, to her and her heirs forever, I give and bequeath the following named slaves, to wit:

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*Bremer and Tabby, Hester and Sandy, children of said Tabby, Isaac, Sandy, Peggy, and Bob Lord, with the present and future increase of the females among them, which said slaves may be worked on my general estate under the control of my executors, who shall, as long as she lives, pay to her annually out of the proceeds of my general estate the sum of six hundred dollars, in full compensation for the use, labor, and profits annually of said slaves.

"Sec. 5. To my wife, Sallie W. Boykin, to her and her heirs forever, I give and bequeath two thousand dollars ($2,000) in six per cent. state stocks of the State of South Carolina, and I hereby authorize and direct my executors to keep her supplied as long as she lives with suitable carriage and a pair of horses, to be purchased at the expense of my estate whenever they may deem it necessary, &c.

"Sec. 6. All the rights, privileges, devises, and bequests in this will and testament made and allowed to my said wife, Sallie W. Boykin, are intended, and by her must be taken, only in lieu of her right of dower in each and every portion of my real estate," &c.

The testator nominated his brother, A. H. Boykin, and his sons, Thomas L. Boykin and Burwell Boykin, as executors, but only Thomas L. Boykin qualified. He returned an inventory and appraisement of the estate, which showed that in round numbers, the negro slaves were valued at $60,000, the stock, plantation tools, &c., at $17,000, and the bonds and notes at $28,000. He paid the pecuniary legacies to the daughters as they came of age or married; but to enable him to do so, certain portions of the lands were assigned to the younger daughters, viz., tracts Nos. 1, 2, 3, and 4, aggregating 544 acres and a fraction, were assigned to Harriet A. Boykin, and tracts Nos. 5, 6, and 7, aggregating 332 acres, were assigned to Flora Boykin, in 1875. And in order to complete the payment of the daughters, also all the six per cent. state stock belonging to the estate, was sold, except the nominal amount of $1,000, which is still in the hands of the executor, but of no value.

The widow, Sallie W., accepted the provisions of the will in lieu of her right of dow-

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er in the lands, the 200 acres, including *the family mansion, were run off for her, the slaves bequeathed to her were employed on the undivided lands as directed, and the $600 paid to her annually; but at the end of the war, the slaves were emancipated, and the value of the choses greatly reduced, if not destroyed. The two younger sons, Eugene and John, died intestate and unmarried, and an arrangement was made by which the widow, Sallie W., disposed of her life estate in the 200 acres, and purchased a house and lot in the town of Camden, whither she removed.

It seems that the executor had never paid her the legacy of $2,000 in six per cent. state stocks, and now refusing even to continue the annuity of $600, and proper expenditures for renewal of furniture, carriage and horses, &c., she instituted these proceedings, alleging that all the available assets of the estate had disappeared, and praying that the executor should be required to pay her the $600 annually, the legacy of $2,000 in six per cent. state stocks, and money sufficient to renew her furniture and to purchase a carriage and horses as directed by the will; that the sums so ascertained to be due her should be paid out of the rents and profits of the undivided lands, which were to be kept together during her life, and were specifically charged with keeping up her establishment; and should that not be sufficient for the purpose indicated, then that the same should be adjudged to be a charge upon the said lands.

At this stage of the proceedings, it transpired that there were persons other than the devisees who claimed to have an interest in the lands; that Thomas L. Boykin, the executor, being involved, possibly insolvent, had undertaken to sell certain parcels of the undivided lands, and to mortgage other portions to secure his individual creditors; and thereupon these persons so claiming were made parties defendant, and the following state of facts, given in the most general terms, appeared:

On May 31, 1872, Thomas L. Boykin contracted with Louis D. DeSaussure for agricultural advances, and to secure the same

executed a mortgage of a certain tract of land described as containing 893 acres, with metes and bounds, &c. On January 8, 1873, he also contracted with Witte Brothers for advances to the amount of $9,000, and to se-

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cure the same executed a mortgage *of 2,000 acres of the estate lands, with metes and bounds, &c. On March 1, 1873, he also executed a mortgage of 500 acres of the said land to secure a debt of $600 due to Charles B. Taylor, assigned to A. H. H. Stuart. On May 16, 1874, he also gave to John A. Armstrong a note for $1,573.54, and to secure it executed a mortgage of "all his undivided interest in the estate of Burwell Boykin, in which his mother, S. W. Boykin, had a life estate," &c. He also gave other conveyances of portions of the lands; but it is unnecessary now to state them in detail, as the Circuit judge did not undertake to adjudge any question in the case except "the widow's rights and to interpret the will."

These creditors and alienees of T. L. Boykin made vigorous opposition to the claims of the widow, the plaintiff. The issues were referred to the master, who took the testimony and made his report. Upon exceptions to this report, the cause came on for a hearing by Judge Hudson, who held that the sons of Burwell Boykin took under the will vested interests in their respective shares of the land; that the widow was not now entitled to the annuity of $600; but that she was entitled to recover the legacy of $2,000 in state stocks, and directing its payment out of the rents and profits, but declining to make it a charge upon the lands. From this judgment all the parties appealed. We think all the grounds taken by the creditors of T. L. Boykin are embodied in the appeal of Louis D. DeSaussure, which are as follows:

"That it was error in the Circuit judge to hold: 1. That the legacy of $2,000 to the plaintiff is not a specific legacy. 2. That the sons of the testator, Burwell Boykin, do not take as a class, but directly. 3. That the lands must be rented out and a receiver appointed to take charge of the rents to meet the support of the plaintiff. 4. That the plaintiff is entitled to a future provision for carriage and horses, repairs of furniture, &c., upon the grounds following:

"First. That the $2,000 of state stocks was a specific legacy, and if a devastavit as to it has been committed, the plaintiff must look to the executor by whom the devastavit was committed, and not to the testator's estate.

"Second. That the third clause of the tes-

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tator's will, as inter*preted by the whole contents of the will, clearly evinces an intention on the part of the testator to provide for classes; and the third clause indicated his sons as the class to take his lands.

"Third. That the defendant, Thomas L. Boykin, being the survivor of the class designated in the third clause of the will takes all the real estate, and his mortgages or conveyances of such real estate will give priority over any and all claims of the plaintiff upon such real estate for support, according to the terms of the will and circumstances.

"Fourth. That the provision in the second clause of the will in relation to repairs and renewal of furniture was for repairs and renewals as to furniture to be used in the dwelling-house provided for the plaintiff in such clause, and her voluntary relinquishment of such dwelling-house was an abandonment of all claim for 'repairs and renewals of furniture for same.'

"Fifth. That the provision for a carriage and pair of horses for the plaintiff was dependent upon the discretion of the executors 'to be purchased at the expense of my estate whenever they may deem it necessary,' and the sole qualified executor having by his answer stated that such were furnished as long as he thought necessary under the circumstances, such provision, if now deemed necessary to be made, can only be at the expense of the whole estate, and by contribution among all the devisees."

Plaintiff's Exceptions.

1. "Because his honor held that the plaintiff is not entitled to the annuity of $600 bequeathed to her in the fourth clause of the will of Burwell Boykin, deceased.

2. "Because his honor held that plaintiff is entitled to interest only at the rate of six per cent. per annum on the legacy of $2,000 'in six per cent. state stocks' bequeathed to her in the fifth clause of the will.

3. "Because his honor did not hold that all of the legacies given to plaintiff by the will, being given and accepted in lieu and bar of dower, were chargeable by law and the terms of the will upon the real estate devised.

4. "Because his honor did not hold that

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the defendant, Thomas *L. Boykin, having exhausted the personal estate of his testator in the payment of the legacies to Mary L. Cureton and Sallie W. Clarke, inferior in grade to plaintiff's legacies as to the personalty, but charged upon the land, the plaintiff is entitled to be subrogated to the rights of Mrs. Cureton and Mrs. Clarke, and to have so much of the land devised sold as would be sufficient to satisfy her legacies.

5. "Because his honor did not hold that the plaintiff had a life estate in the whole of the real estate.

6. "Because his honor held that none of the land devised was subject to the payment of these legacies to the plaintiff, when he should have held that at least the interest of Thomas L. Boykin in said lands should be subject to the payment of said legacies, under the fi. fa. authorized against him de bonis propriis.

7. "Because his honor undertakes to decide and determine how the judgment authorized against Thomas L. Boykin for these legacies will rank with respect to prior judgments against him or conveyances and encumbrances made by him without a sufficiency of evidence to show how they stand, and without that question being before him or involved at this juncture of the proceedings."

The action was brought by Sallie W. Boykin, widow of Burwell Boykin, deceased, for the recovery of legacies and to enforce the execution of other provisions of his will in her favor. In the progress of the cause, questions arose between Thomas L. Boykin, the executor, and his creditors. While it was proper to hear these creditors in opposition to the claims of the widow, which touched the property disposed of by the will in which the said Thomas L. had an interest, the Circuit judge did not undertake to adjudicate the rights of the creditors or adjust equities between the defendants; so that there is no question before this court except as to the rights of the widow, and as incidental thereto the construction of the will of Burwell Boykin.

First. As to the devise of the lands in the third clause. The important words are as follows: "I direct that all the rest of my real estate shall be kept undivided until the death of my said wife, to be worked by the slaves of my estate, and those which I shall bequeath in this to my wife, under the control and management of my executors; and

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from and immediately after her death *I devise the said real estate in this section referred to to my sons equally, to be divided among them share and share alike, to them and their heirs forever." Two of the sons, Eugene and John, died unmarried and without issue during the life of the widow, and the question now is whether they took vested interests in the undivided lands which were transmitted to their respective heirs under the statute of distributions, or passed under the will to Thomas L. Boykin, their only surviving brother. The mother, at whose death the division was directed, is still living, and of course we can only give construction according to the facts as they exist at the present time.

The three sons, Thomas L., Eugene, and John, were in esse at the death of the testator, and there could be no difficulty in the construction of the clause if the lands had been given to the widow expressly for life, and "from and immediately after her death to my sons equally, to be divided," &c. It is admitted that if the terms had created an express life estate in the widow, they would have given a vested remainder in each of the sons to the extent of one undivided third. It is clear, therefore, that the alleged difficulty does not grow out of the words "to my sons equally, to be divided," and that the doctrine as to classes, in so far as it gives the right of survivorship, has no application to the case. Whatever interest was given was in severalty. 2 Jarm. Wills (1st Am. edit.), 162, and note.

It is contended, however, that the lands were not given to the widow or any one else during her life; that there was a chasm between the death of the testator and that of the widow, in which the lands were not given at all, or at least no such particular estate was created, as is necessary to support a vested remainder; that the devise from and after the death of the widow, was an effort to give lands in futuro, which could only take effect as an executory devise; in other words, that the devise was contingent upon the sons surviving the mother, and as a consequence, if the other son, Thomas L. Boykin, also should die before his mother, the whole devise would be defeated. We cannot accept this view, which, as it seems to us, would not only run counter to the manifest intention of the testator to dispose of his whole estate, but would violate the settled rules of construction applicable in such

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*cases. In the first place, it is not quite clear that the lands were not disposed of during the life of the widow. The will directs that they should "be kept undivided until the death of my wife, to be worked by the slaves of my estate, &c., under the management and control of the executors." This looks very much like a substantial devise to the executors during the life of the widow, for the purpose of carrying out the trusts indicated; but the provision is very peculiar, and we do not think it necessary to rest the judgment of the court on that construction.

We concur with the Circuit judge that the devise created vested interests in the sons living at the death of the testator, and only the division and possession were postponed to the death of Mrs. Boykin. Mr. Jarman says: "The law favors the vesting of estates, the effect of which principle seems to be, that property which is the subject of disposition, will belong to the object of gift immediately on the instrument taking effect, or as soon thereafter as the terms thereof will permit. As therefore a will takes effect at the death of the testator, it follows that any devise or bequest in favor of a person in esse simply (i. e., without any intimation of a desire to suspend or postpone its operation) confers an immediately vested interest. If words of futurity are introduced into the gift, the question arises whether the expressions are inserted for the purpose of protracting the vesting, or point merely to the deferred possession or enjoyment. It may be stated as a general rule that where a testator creates a particular estate and then goes on to dispose of the ulterior interest, expressly in an event which will determine the prior estate,

the words descriptive of such event occurring in the latter devise will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting." 1 Jarm. Wills (1st Am. edit.), 727. Where a testator devises lands to trustees until A shall attain the age of twenty-one years, and if or when he shall attain that age, then to him in fee, this is construed as conferring on A a vested estate in fee simple, subject to the prior chattel interest given to the trustees, and consequently on A's death, under the prescribed age, the property descends to his heirs at law, though it is quite clear that a devise to A if or when

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*he shall attain the age of twenty-one years, standing isolated and detached from the context, would confer a contingent interest only. Ib., 734.

There are directions in this will, that if any of the sons should come of age before the death of Mrs. Boykin, "such son or sons shall be permitted to cultivate, each for himself, such a part of the lands as shall be allotted for that purpose by my wife and executors until the final division, when he or they shall receive his or their own share." The devise also contains a provision that if any of the sons should die before the time appointed for division, leaving issue, "such issue shall take among them the same portion to which their parent would have been entitled," &c. Now one of the rules of construction adopted in this class of cases is, as it was tersely stated by Chancellor Kent: "A devise to A in fee, if or when he attains the age of twenty-one, becomes a vested remainder, provided the will contains an intermediate disposition of the estate or of the rents and profits during the minority of A, or if it directs the estate to go over in the event of A dying under age" (or before the event fixed for possession). 4 Kent, 205; Cadogan v. Ewart, 7 Adol. & Ell., 636; Rivers v. Fripp, 4 Rich. Eq., 298; Seabrook v. Gregg, 2 S. C., 78; Smither v. Willcox, 9 Ves., 233, 1 Jarm. Wills, *739.

This rule runs through all the cases which were quoted and discussed by Chancellor Dunkin in Rivers v. Fripp, and by Chief Justice Moses in Seabrook v. Gregg, supra, and we conceive it to be unnecessary to do more than quote what Chancellor Dunkin said in Rivers v. Fripp: "Although the reasons of this rule are various and more or less obvious, and, as might be supposed, have been received with more or less favor, the rule itself seems well settled. So from Boraston's case, 3 Rep., 19, down to the very recent case of Williamson v. Berry, 8 How., 495 [12 L. Ed. 1170] words seemingly creative of a future interest, have been frequently construed to refer to the futurity of possession, and not as designed to postpone the vesting of the estate. In Boraston's case there was a term of eight years devised to A and B, and after the said term the land to remain to executors for the performance of his will, till such time as H should accomplish his full age of twenty-

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*one years, and when the said H should come to his age of twenty-one, then to him and his heirs for ever. It was held by the court that the estate was vested in H; that the adverbs of time, when, &c., did not make anything necessary to precede the vesting of the remainder, but merely expressed the time when it should take effect in possession," &c.

But assuming that the interests were vested, another view is suggested, that, inasmuch as the will shows that the testator intended the lands for his sons as a class, the court can and should declare cross-remainders among them, in order to effectuate that intention. As before stated, the will does provide that if any of the sons should die before their mother, leaving issue, such issue shall then take the share of their parent; but the will does not provide for the case of sons dying before their mother without issue. As that event has occurred, can the court supply the alleged omission, and declare that the testator intended the interest of such deceased child to go to his surviving brothers, to the exclusion of his heirs at law generally? It seems to us that it would be an unauthorized liberty thus to add, from mere conjecture as to the intention of the testator, an important supplement to the provisions of his will. It is true there are such things as cross-remainders by implication, but such implication must be absolutely necessary. We fail to see in this will anything which requires such an implication. In the case of Baldrick & Weston v. White, 2 Bail., 442, cited at the bar, it was held that "where in a devise to two, their several shares are limited over to third persons on the failure of issue of either of them, cross-remainders will not be implied." In the case of Seabrook v. Mikell, Cheves Eq., 80, the words were, "in case my surviving son shall depart this life without issue," &c. The interests of the dead sons having vested, and, in the event which has occurred, not being limited over, must be distributed as other intestate property. See case of Smither v. Willcox, 9 Ves., 234, cited in the Circuit decree.

Second. As to the $600 to be paid annually to the widow, &c. After giving his widow certain slaves by name, the testator directed that "they may be worked on my general estate under the control of my executors, who

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shall, as long as she lives, pay to her *annually out of the proceeds of my general estate the sum of six hundred dollars, in full compensation for the use, labor, and profits annually of said slaves." We think this provision ended with the emancipation of the slaves. It was expressly stated to be "in compensation for the use, labor, and profits of the slaves," and must be regarded as one of the many losses which resulted from emancipation. But we agree with the Circuit

judge that the executor should have the household furniture of the widow repaired and renewed, and provide for her a suitable carriage and pair of horses. Manifestly the object nearest the testator's heart was to make his widow comfortable during her life. She promptly yielded her right of dower in a very large and valuable plantation in consideration of the provisions of the will. She lost by emancipation the $600 provided for her annually as compensation for the hire of her slaves, as well as the slaves themselves. Circumstances so changed that a change of residence became proper, to which it does not appear that the executor or any of the legatees objected. We do not see that the provision was made for the widow on condition that she continued to reside in the old family mansion, or that her change of residence absolved the executor or the estate from the legal as well as high moral obligation of providing for her in her old age as the will directs.

Third. As to the legacy of $2,000 in six per cent. state stocks, &c. It is in the following words: "To my wife, Sallie W. Boykin, to her and her heirs forever, I give and bequeath two thousand dollars ($2,000) in six per cent. stocks of the state of South Carolina." This was not a specific legacy of the stocks in the sense that the legatee was to have the very thing bequeathed, as a horse, or a ring, the destruction of which would simply be the loss of the legatee. What was given? Not stocks, but dollars; not so many particular dollars in a bag and capable of delivery, but dollars generally. One of the earliest and simplest tests of a specific legacy was to inquire whether the legacy would be adeemed if the testator, after the execution of his will, disposed of the thing given. Now, suppose Mr. Boykin, after he made his will, had disposed of all his state stocks, would that have been an ademption of this legacy? We should say not, for the reason that the thing given was not "stocks," but dollars.

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*Possibly it might have been an ademption if he had directed the given number of dollars paid in "my stocks now in my possession." But the provision is "in six per cent. state stocks of the state of South Carolina;" that is to say, in any stocks of the proper description, whether then in his possession or to be purchased or acquired in any other way by his executors. It does not even appear in the will that the testator owned such stocks, but if it had, that would have made no difference. "It must be observed that the mere possession of the testator at the date of his will of stocks of equal or of larger amount than the legacy will not make the bequest specific when it is given generally in particular funds without further explanation, for the testator might mean only to direct his executor to purchase with his general estate so much stocks in the fund described, and therefore that clear intention which is required for making a legacy specific does not here exist." 2 Wms. Exrs. (7th edit.), 1252.

The gift was in dollars; not in any particular dollars, earmarked and identified, but such a number of dollars; and that makes this what is called a demonstrative legacy. This kind of legacy, while it is specific in its nature, differs so much in effect from one properly specific that if the fund out of which it is to be repaid is called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; yet the legacy is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets. 2 Wms. Exrs., *1043, and notes, quoting the civil law: "If the testator devise ten quarters of corn, coming of the corn which shall grow in such a soil, or two tons of wine of his grapes in such a vineyard, or ten lambs of such a flock, though so much corn or wine or so many lambs do not arise of the things aforesaid, yet the heir or executor is compelled by law to make them good integraliter; because he may seem to have mentioned the soil, the vineyard, and the flocks rather by way of demonstration than by way of condition. Fulbecke's Parallele, p. 37, edition of 1618."

The statute of limitations is not interposed by the executor or legatees. It is, however, insisted that the widow was guilty of laches in demanding her legacy; that she stood by and without objection saw the assets destroyed or paid to her daughters, and

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*especially that she acquiesced in the delivery of the stocks, intended as alleged for her, to others. It is true she waited long, but it should be kept in mind that the testator died during the war, which soon after ended, reducing greatly the value of choses, and bringing upon the country general confusion and ruin. Besides, as we can well understand, there were other reasons which naturally made the widow hesitate to seek redress in the courts. As to the state stocks, we have just determined that they were not given to her specifically, and of course she had no more right to object to the executor using them than any other choses of the estate. The legacy must therefore be paid; but as in our view it might be discharged by the delivery of "six per cent. state stocks of the state of South Carolina" to the value of two thousand dollars, we concur with the Circuit judge that it should only bear interest at six per cent. per annum.

The legacy being given in lieu and bar of dower is, and should be, much favored in law. It was given for a consideration, and is therefore somewhat in the nature of a debt of the testator, but we agree with the Circuit judge that it was not charged upon the lands. The will certainly does not expressly make it a charge; and we do not think that

the widow is entitled to be subrogated to the rights of the daughters, whose legacies were charged upon the lands, upon the ground that they were paid in part by the state stocks. That claim can only stand upon the view that "the stocks" were specifically given to her, and their use in paying the legacies of the daughters gives her the right pro tanto to stand in their place and set up in her favor the right of charge given to them. The conclusive answer to this is our ruling that the state stocks were not specifically given to the widow. If the legacy were a debt of the testator pure and simple, and there were not assets to pay it, that of itself would not make it a charge upon any particular part of the estate specifically given to others, but would involve the question of general contribution by all the legatees and devisees. That question was not made in the proceedings, and we will not consider it now. The claim of the widow is so favored that it would not have to abate for the payment of debts of the estate; but it is a very differ-

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ent ques*tion whether the other legatees and devisees shall abate in order to pay her legacy.

The Circuit judge, in order to settle all rights as far as he could, declared in advance upon what property the execution on the judgment herein rendered might or might not be levied. There are many questions in reference to the claims upon these lands yet to be determined, and we think it premature to decide now how, when, or upon what property that execution may be levied. We prefer to reserve our judgment upon that question until the case arises and is regularly argued.

With this slight modification as to the manner of levying the judgment and execution, the judgment of this court is that the judgment of the Circuit Court be affirmed.

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21 S. C. 535

WILSON v. KELLY.

(April Term, 1884.)

[1. *Descent and Distribution* ⇐102.]

Where slaves were given to children by their father in his life-time, and he died intestate after emancipation, neither the value of such slaves nor their use can be charged as advancements under the statute of this state.

[Ed. Note.—Cited in Lanham v. Lanham, 38 S. C. 137, 16 S. E. 609.

For other cases, see Descent and Distribution, Cent. Dig. § 412; Dec. Dig. ⇐102.]

[2. *Descent and Distribution* ⇐102.]

If the slaves were lent to the children, or were hired to the husbands of intestate's daughters, the use of the slaves in such cases could not be charged as advancements.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 411, 412; Dec. Dig. ⇐102.]

3. Hughey v. Eichelberger, 11 S. C., 36, and Ex parte Glenn, 20 Id., 64, affirmed.

Before Hudson, J., Kershaw, February, 1883.

This was an action by Emily C. Wilson against Jane K. Kelly and others, distributees of the estate of Wiley Kelly, deceased, and against the administrator of said estate, for the settlement, partition, and distribution of the estate of said Wiley Kelly, who died in December, 1873. In making settlement and distribution of the personal estate among the distributees, an accounting for advancements became necessary, and in such accounting the question arose whether

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negro slaves received by *the several children of the intestate, before the war, were to be charged as advancements.

At June term, 1880, Judge Hudson held, under the authority of Hughey v. Eichelberger, that the slaves could not be charged for as advancements, but that the use of such slaves were advancements, and the master was directed to take an account of the value of such use. The master subsequently made a report of the value of such use to the children respectively. The cause came up again before Judge Hudson in February, 1883, on exceptions to the master's report, when his honor overruled the exceptions and confirmed the report.

From this decree some of the defendants appealed upon the ground "that his honor, the Circuit judge, erred in holding as matter of law and fact, that the hire of negroes, as reported by the master herein, should be charged against said defendants as advancements," and the plaintiff also gave notice of appeal from so much of the decretal order of June term, 1880, "as decides or determines that the value of the negro slaves given by Wiley Kelly, the intestate, to his children in his life-time and which were liberated before his death, cannot be charged as an advancement against said children."

Messrs. J. D. Kennedy and W. H. R. Workman, for plaintiff.

Messrs. J. T. Hay and W. D. Trantham, for defendants, appellants.

October 11, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. But two questions are raised by this appeal. 1st. Whether the value of the slaves given by the intestate, Wiley Kelly, who died in 1873, to certain of his children, shall be charged to such children as advancements. 2d. If not, whether the value of the services of such slaves should not be charged as advancements. It is true that some question has been raised as to whether any slaves were in fact given to the daughters of the intestate, the testimony tending to show that the intestate took notes for nominal sums from his sons-in-law for hire, but this seemed to be for the pur-

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pose of protecting the *slaves from the marital rights of the husbands, as the slaves all went into the possession of the parties prior to 1868. But for the purposes of this case we shall assume, as we understand the master to have found, that the slaves were really given to the daughters as well as to the sons. For if they were merely hired to the sons-in-law, there can be no question that neither their value, nor the value of their services, could be charged as advancements.

The first question has been decided adversely to the view contended for by the plaintiff by the case of Hughey v. Eichelberger, 11 S. C., 36, which has been recognized and affirmed in the subsequent case of Ex parte Glenn, 20 S. C., 64. This would ordinarily be conclusive of the question, but the counsel, probably not being aware of the subsequent decision in Ex parte Glenn, as it had not been published at the time the argument in this case was heard, contend that what was said in Hughey v. Eichelberger on the question was a mere obiter dictum, and have undertaken to show that such so-called dictum is not well founded, either in reason or authority. In that case there were two reasons given why the slaves could not be regarded as advancements. One was based upon the particular terms of the deed, and the other was that slaves having ceased to be property before the death of the intestate, it was impossible to ascertain their value under the rule established by the statute, as construed by the decisions in this state, and therefore it was impossible to charge them as advancements. We do not see why one of the reasons given should be regarded as obiter dictum any more than the other.

But waiving this, and waiving the further fact that the question has been distinctly decided in the subsequent case of Ex parte Glenn, we will proceed to consider the question. It is quite certain that property which has no value cannot be charged as an advancement, and it is equally certain that, at the death of the intestate in this case, slaves had no value. If, therefore, the rule prescribed by the statute, as construed by the decisions, is that the property claimed to be an advancement must be charged at the value which it bears at the time of the death of the intestate, relation being had to its condition at the time of the gift, and if slaves then had no value, it follows neces-

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sarily that there was *nothing to be charged as an advancement. It is contended, however, that such is not the rule, but that at the death of the intestate is the time when the inquiry is to be made as to what was the value of the property when it was given. To use the language of counsel in his argument: "The idea is that at the death is the time when an estimate is to be made of the value of the advances. Not that the value of the advances at the death is what the party receiving them is to be charged for then, but the estimate that shall be made at the death of what that value has been."

This, we think, is in direct conflict with the terms of the statute, and the construction given to it by the decisions. The language of the statute upon this point is: "The value of which portion being estimated at the death of the ancestor, but so as that neither the improvements of the real estate by such child or children, nor the increase of the personal property, shall be taken into the computation." This clearly shows that the intention was to charge the value of the property at the time of the death of the ancestor, discarding any increased value which may have been imparted to it by natural causes or by artificial improvements, and not that the estimate was then to be made of what had been the value; for if such was the intention, then there would have been no necessity for the provisions that the improvements and the natural increase should not be taken into consideration.

But the decisions leave this point in no doubt. In McCaw v. Blewit, 2 McCord Ch., which is conceded to be a leading case on the point, the language of the court, at page 104, is as follows (italics being ours): "That part of the estate which has been given is to be estimated at *what it is worth at the death*, relation being had to its situation at the time of the gift. Thus a father gives one of his sons a healthy negro boy of twelve years of age, and ten years after the gift the father dies. If this boy be brought into *hotchpot*, his value will be estimated as that of a boy twelve years old; and whatever such a boy *would then bring*, the child is to be charged with as an advancement."

In Youngblood v. Norton, 1 Strob. Eq., 122, the language above quoted from McCaw v.

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Blewit is quoted with approval, *and it was held that the advancement must be charged at what the property was worth at the time of the death of the intestate, although the father and son had agreed upon a higher valuation at the time the property went into the possession of the son.

The same rule was announced and acted upon in Ison v. Ison, 5 Rich. Eq., 15, the language of the court being: "Certainly, in ascertaining the amount of this advancement, reference should be had to the description of the horse at the time of the gift, and the value of a horse of that description at the death of the intestate." So in Manning v. Manning, 12 Rich. Eq., at page 428, it is said: "The period for fixing the rights of the parties is the death of the decedent. The value of the property to be divided is to be estimated as of that day, and so of the property which had been given off to the children,

taking that property in the plight and condition it was when received by the children." The same rule was recognized and acted upon in Rickenbacker v. Zimmerman, 10 S. C., 110 [30 Am. Rep. 37].

So we think it clear, that the position contended for cannot be sustained, but on the contrary, that the well-settled rule is, in ascertaining the amount at which an advancement should be charged, to inquire what is the value of the property at the time of the death of the intestate; what would it then bring, assuming it to be in the condition in which it was at the time of the gift?

Again, it is contended by another of the counsel that although slaves were not property at the time of the death and therefore then had no value, yet as the rule requires that reference should be had to the condition of the property at the time of the gift, and as the slaves, in this case, were then property and had a value, the estimate must be made as if their then condition as property still continued and as if they were still property, having a value. But this is manifestly impossible. Any estimate placed upon what would be their value in 1873, if they had continued to be property, would be purely conjectural, for there would be no standard by which such an estimate could be made. The law deals only with facts susceptible of proof by competent evidence, and courts cannot undertake to apply its principles to purely conjectural cases.

We are not insensible to the fact that

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these views will, in some *cases, and perhaps in this, lead to injustice, but as has been well said by Lesesne, Ch., in Manning v. Manning, supra: "While it is especially the province of this court to do complete justice, it must not lose sight of settled principles, and cannot obviate or remedy the mischances incident to human affairs." It would not only be dangerous to the best interests of society for courts to depart from or disregard settled principles of law, but they have no authority so to do. Courts administer justice according to law, and not according to what a judge may think is abstract justice in a particular case.

The second question, as to whether the value of the services of the slaves or their hire, should not be charged as advancements, was expressly reserved in the case of Hughey v. Eichelberger, supra, and no opinion upon it was there intimated. We think, both on principle and authority, that this question must be answered in the negative. If the slaves were given to the children, then, of course, they became the property of the children from the time of the gift, and there would be no more propriety in holding them accountable for hire, than there would be in charging them with the hire of any other slaves which had become their property either by purchase or otherwise. After the slaves were given to the children their hire constituted no part of the intestate's estate, but belonged exclusively to the children, and could not, therefore, be considered as advancements. If, on the other hand, the slaves were not given to the children by the intestate, but simply loaned to them for use, then under the authority of the case of Ison v. Ison, 5 Rich. Eq., 15, it is clear that the value of such use cannot be charged as an advancement.

In that case one of the questions was whether certain distributees who had been permitted by the intestate to use and occupy portions of his land, should be charged with the rent as advancements. The court held that they were not so chargeable, saying: "If they owed him for the rent, it was a debt. If he charged nothing for the occupancy (as was the fact), the permission to occupy was a mere accommodation, and no advancement. An advancement always embraces the idea that the parent has parted from his title in the subject advanced. But if the intestate, in this instance, had actual-

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ly given the land, the statute express*ly exempts the donee from accountability for the rent; much more are the parties exempt where the whole matter was simply permissive, and the object was mere accommodation."

We can see no reason why the principle, thus established as to rent of land, does not apply with equal force to the hire of slaves. If, however, the transaction between the intestate and his sons-in-law, by which he took notes from them for nominal sums, be regarded as a hiring by him to them, then it is quite clear that there would be no ground whatever for charging such hire to the daughters as advancements. It seems to us, therefore, that in no view of the case can the value of the slaves or their hire be charged as advancements.

The judgment of this court is that the judgment of the Circuit Court, allowing the value of the hire of certain slaves to be charged as advancements to certain of the children of intestate, be reversed, and that the case be remanded to that court for such further proceedings as may be necessary.

21 S. C. 541

HOOPER v. COLUMBIA AND GREENVILLE R. R. COMPANY.

(April Term, 1884.)

1. The rule laid down in Snow v. Housatonic Railroad Company, 8 Allen, 444, as to the duties of a railroad company towards its employés, approved.

[Ed. Note.—Cited in Evans v. Chamberlain, 40 S. C. 107, 18 S. E. 213.]

[2. *Master and Servant* ⇐113.]

Quere: Where a railroad company requires a brakeman to ride upon the top of its train, and at the same time maintains a bridge with a top too low for such employé to pass through in safety without stooping, is this a danger incident to the employment of a brakeman, and is there a full performance of the duty imposed upon the company in regard to the safety of their employés?

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 225; Dec. Dig. ⇐113.]

[3. *Master and Servant* ⇐217.]

But an employé may waive the right to exact of his employer such appliances as the law requires, and, as a general rule, the acceptance or retention of service without complaint, after full knowledge of a permanent patent defect amounts to a waiver of such defect.

[Ed. Note.—Cited in Adkins v. Atlanta & C. A. R. Co., 27 S. C. 75, 2 S. E. 849; Powers v. Standard Oil Co., 53 S. C. 363, 31 S. E. 276; Mew v. Charleston & S. Ry. Co., 55 S. C. 103, 32 S. E. 828; Youngblood v. South Carolina & G. R. Co., 60 S. C. 18, 38 S. E. 232, 85 Am. St. Rep. 824; Bodie v. Charleston & W. C. R. Co., 61 S. C. 478, 39 S. E. 715; Wood v. Victor Mfg. Co., 66 S. C. 486, 45 S. E. 81; Montgomery v. Seaboard Air Line Ry., 73 S. C. 508, 53 S. E. 987; Pinckney v. Atlantic Coast Line R. Co., 92 S. C. 557, 75 S. E. 964.

For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. ⇐217.]

[4. *Master and Servant* ⇐220.]

Therefore, where a brakeman on top of a train, in full daylight, was struck on the back of the head and killed by the top of a bridge through which he had passed daily for three months, and always stooped to avoid injury, the

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railroad company are not liable in *damages to his administrator for negligence in permitting this bridge to remain as it was, and in failing to have danger-signal cords; and no special negligence in this case being shown, a nonsuit was properly ordered.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 633; Dec. Dig. ⇐220.]

5. This case distinguished from Lasure v. Graniteville Manufacturing Company, 18 S. C., 276.

[6. *Trial* ⇐139.]

The proof by plaintiff not authorizing a reasonable inference of negligence on the part of the railroad company, the non-suit was proper.

[Ed. Note.—Cited in Couch v. Charlotte, C. & A. R. Co., 22 S. C. 563; Kaminitsky v. Northeastern R. Co., 25 S. C. 59; Simms v. South Carolina Ry. Co., 26 S. C. 494, 2 S. E. 486; Madden v. Port Royal, etc., Ry. Co., 35 S. C. 383, 14 S. E. 713, 28 Am. St. Rep. 855; Hicks v. Sumter Cotton Mills, 39 S. C. 43, 17 S. E. 509; Walling v. Congaree Const. Co., 41 S. C. 391, 19 S. E. 723; Madden v. Port Royal & W. C. Ry. Co., 41 S. C. 454, 19 S. E. 951, 20 S. E. 65; Wofford v. Clinton Cotton Mills, 72 S. C. 349, 51 S. E. 918; Lyon v. Charleston & W. C. Ry., 77 S. C. 343, 58 S. E. 12.

For other cases, see Trial, Cent. Dig. §§ 332–333, 338–341, 365; Dec. Dig. ⇐139.]

[This case is also cited in Agnew v. Adams, 24 S. C. 89, without specific application, and in Garrick v. Florida Central & Peninsular R. R., 53 S. C. 449, 31 S. E. 334, 69 Am. St. Rep. 874, and distinguished therefrom.]

Before Kershaw, J., Oconee, November, 1883.

The opinion gives a full statement of the case.

Messrs. S. P. Dendy and M. F. Ansel, for appellant.

Mr. John C. Haskell, contra.

November 14, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action by J. J. Hooper, as administrator of his son, Nelson T. Hooper, against the Columbia and Greenville Railroad Company for damages, on account of the death of said intestate, while in the service of said company as brakeman, which as alleged was caused by their wrongful act, default, and negligence in keeping up, at Felton's Crossing, on their road, a bridge which was defective in being too low, and by the over-head arches of which he was killed, while in the discharge of his duty. The action was brought by the administrator for the benefit of himself as the father and the other distributees of the intestate, under the act of the legislature on that subject. The defendant corporation answered, admitting the death, but insisting that there was no defect in the bridge at Felton's Crossing; and that if so, such "defects were well known to the said Nelson T. Hooper, both before and up to the time of his death, and that he continued in such service for a number of months before his death for valuable consideration paid by defendants, knowing the said bridge, and if there was any danger attached to the passage of said bridge by the trains of the de-

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fendants, the said Nelson *T. Hooper assumed all the risks and perils incident thereto; and these defendants deny that they are responsible for the injuries arising from any defect in said bridge, which was known to said Hooper and unknown to these defendants," &c.

The case came on for trial before Judge Kershaw. It was admitted that plaintiff's intestate was struck by the over-head timbers of the bridge at Felton's Crossing, on the defendants' road, and that the injuries received produced his death. It appeared from the evidence that the intestate, Nelson T. Hooper, was a brakeman on a freight train on the defendants' road, and had been for about three months, which was his first experience on a railroad; that on the morn-

ing of November 7, 1881, in a storm of wind and rain, the train, running at maximum speed, passed under the bridge at Felton's Crossing, and soon after the conductor heard that Hooper was hurt, and stopped the train. He was found dead, his face bloody; he lay across the car, and head on arms, feet towards the side of the car on right, face turned towards the front, hands in his overcoat pockets; he was found mid-way of the car, just over the door. There was a considerable cut on the back of the head just at the edge of the hair; it was a considerable gash.

It further appeared that it was the duty of a brakeman to be on the top of the cars. Top-brakes were not used until Colonel Doddamead was superintendent (about 1870 or 1871); before that the brakeman was on the inside of the car. The bridge at Felton's was built originally in 1857, and renewed since the war. The bridge was sixteen feet from top of rail, and the height of a South Carolina railroad car (kind in use that day) is a little over eleven feet—stated by Mr. Magee, who measured one, to be eleven feet and three and one-fourth inches—leaving between the top of the cars and the timbers about four feet and eight and three-fourths inches; "a moderate stoop would pass a man under the bridge, a sitting posture would do so, but one could not stand without being knocked off." At that time there were no danger-cords to give warning of approach to the bridge; a negro man once before had been killed at the same place. He was not a train hand; got on the cars, stood up, and was killed. It also appeared that the intestate was reared in the neighborhood, and

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*lived with his father, the family furnishing him with clothes; that he was only about a month over twenty-one years of age, and when not engaged on the road worked for his father; that after going on the road, he had not assisted his father much in money matters, but had let him have some. He spent most of his wages for clothing, was an obedient, industrious, sober boy, getting a dollar a day as brakeman.

The company offered no evidence, but upon the close of plaintiff's, moved for a non-suit, which the judge granted, among other things saying: "The evidence for the plaintiff showed this bridge had been in the position it then was for thirty years without any change in point of height or construction from its original place and location. I cannot see under the evidence any proof that defendants have been guilty of negligence in the building of this bridge, or in maintaining it as originally constructed by the builders of the road. On the other hand, the evidence appears to point clearly to the negligence of the deceased as at least contributory, both from his certain knowledge of the bridge from passing beneath it daily, and every time being required, in order to avoid danger, to incline his body, and from the fact that his face, from the location of the injury, was directed to the rear. Upon the familiar principles of law, that one who enters the service of another takes upon himself the ordinary risks incident to the employment, and that one who has contributed to the cause of the danger of which he complains cannot recover against another who also contributed to the same causes, either or both, and I cannot, from the evidence on the part of the plaintiff, avoid the conclusion that the non-suit should be granted. * * * As to the fifth and sixth grounds of the motion for non-suit, they are refused. I am not prepared to be the pioneer in this state in announcing as a principle of law that a parent has no beneficial interest in the life of a child after the majority of such child, or to say that in this particular case there was such a failure of proof of beneficial interest as to take the case for this reason from the jury," &c.

From this order of non-suit, the plaintiff appealed upon the following grounds:

1. "Because where there is any proof to sustain the allegation of the complaint, the question must go to the jury.

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*2. "The question of negligence was a mixed question of law and fact, and should have been submitted to the jury.

3. "The question of negligence should have been submitted to the jury, because it was proved that the company had notice, and knew, or ought to have known, that their bridge at Felton's Crossing was too low, and dangerous to its servants and employés.

4. "The proof showing that said bridge was too low, the defendant company was liable for injuries to its employés occasioned by improper and dangerous structures if the employé was in the discharge of his duty.

5. "Under the proof, the defendant company was liable to the administrator, plaintiff, for the death of his intestate.

6. "That his honor erred in holding that the deceased was chargeable with knowledge of the dangerous condition of the bridge, it being in proof that he was young and inexperienced, and had only been in railroad service about three months, and no evidence that he was ever notified of the dangerous condition of the bridge.

7. "The question of contributory negligence, and whether the plaintiff's intestate was chargeable with knowledge of the defect in the bridge, was a question for the jury, and should have been so submitted," &c.

At common law, a right of action for a personal injury dies with the person: actio personalis moritur cum persona. If death is instantaneous with the injury, no right of action accrues which can survive, according to the ancient principle that "in a civil court the death of a human being cannot be complained of as an injury, whether it results from the felonious assault or the careless-

ness of the party causing it." This was considered a defect in the law, and most of the states of the Union have passed laws upon the subject, more or less similar to the first English precedent, known as Lord Campbell's act. Our law provides as follows:

"Section 2183. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party in-

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jured to maintain an action and *recover damages in respect thereof, then and in every such case the person or corporation who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony.

"Section 2184. Every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death shall have been so caused, and shall be brought by or in the name of the executor or administrator of such person; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought, and the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate," &c.

The right of the administrator to recover is precisely the same as if Nelson T. Hooper had not been killed outright, but injured, and he were now suing the company for damages. In that view, did the Circuit judge commit error in granting the non-suit? That must depend upon the proper application of the doctrines of negligence, which most of the text writers say is not a fact, but an inference from facts considered in connection with the law. The intestate, Hooper, was in the employment of the company as a brakeman. In such case the rule is that "while it is true, on the one hand, that a workman or servant, on entering into an employment, by implication agrees that he will undertake the ordinary risks incident to the service in which he is engaged, it is also true, on the other hand, that the employer or master impliedly contracts that he * * * will also take due precaution to adopt and use such machinery, apparatus, tools, appliances, and means as are suitable and proper for the prosecution of the business in which his servants are engaged with a reasonable degree of safety to life and security against injury." Snow v. Housatonic R. R. Co., 8 Allen, 444.

Taking this as a proper expression of the

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rule, we agree with *the Circuit judge that when the road was built, the bridge at Felton's Crossing was a suitable "appliance," in so far as the safety of the employés was concerned, for there was ample room to pass the train in safety, and at that time it was not made the duty of any of the employés to be on the roof outside of the cars; but in 1870 or 1871, after the bridge was built, the company required the brakeman to be on the top, and a height of bridge which was ample before might not be a suitable "appliance" under the new conditions. We are not quite sure that maintaining the bridge at its former height afterwards, making it necessary for the brakeman to bend his body in order to escape injury, every time the train passed under it, was a full performance of the duty imposed upon the company in regard to the safety of their employés, or was one of the ordinary risks of the employment.

But there is another principle which applies here. We think it is settled that an employé may waive the right to exact of his employer such appliances as the law in its strictness might require, and that as a general rule the acceptance of service, or remaining in the service without complaint after full knowledge of a permanent patent defect, amounts to such waiver as to that particular defect. After the change in the position of the brakeman, the bridge remained unchanged for ten years to 1881, when the intestate entered the service of the company as a brakeman, and after full knowledge of the condition of the bridge, continued in that service without complaint for three months before the accident occurred.

The principle is thus stated in Pierce on Railroads at page 379: "A servant who before the injury had knowledge of the defect in the road or machinery, or who having a reasonable opportunity to inform himself, ought to have known such defects, is presumed, by remaining in the company's service, to have assumed the risks of such voluntary exposure of himself, and cannot recover for an injury resulting therefrom; and his knowledge has the same effect whether the company or master was informed or ignorant of such defect. This rule applies with special force, where the defect or danger is obvious to the senses. A servant who knows the defect and peril takes the risk of

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dangerous imple*ments, * * * or of services of peculiar peril which he undertakes, and dangerous practices in which he participates; or of injuries resulting from the projecting roof of a station-house, or from bridges which are too low to allow him to ride standing upright on the top of the train, and he is ordinarily chargeable, from the fact of his entering the employment with knowledge of the height of such bridge, without notice or warning from the company,"

&c., citing the cases of Owen v. N. Y. Cent. R. R. Co., 1 Lans., 108; Baltimore & Ohio R. R. Co. v. Stricker, 51 Md., 47; Devitt v. Pacific R. R. Co., 50 Mo., 302; and Pittsburg & C. R. R. Co. v. Sentmeyer, 37 Leg. Int., 194.

This is certainly the general rule, but there are well recognized exceptions, in which such conclusion will not "necessarily follow," as in our own case of Lasure v. Graniteville Manufacturing Company, 18 S. C., 278, which was an action by a laborer in the employment of the defendant company for damages on account of personal injuries received in the fall of an elevated tramway, over which he was rolling cotton from the warehouse to the mill of the defendants. The distinction is thus stated by Mr. Pierce on the page before cited: "The knowledge from which it will be presumed that the servant took the risk must be such as will put him on his guard, and mere knowledge of a defect which does not inform him of the hazard is not conclusive that he assumed the risk or was negligent. The servant has been held not to be affected with such knowledge where he had a right to suppose the defect to be temporary in its character," &c. Snow v. Housatonic R. R. Co., supra. In this case the lowness of the bridge was permanent, patent, and certainly informed the intestate of the hazards incident to it.

Assuming then that the intestate took the risks incident to the condition of the bridge by his entering into the service of the company as a brakeman, and remaining in that service after he had full knowledge upon the subject, was there any proof of particular negligence on the part of the company or its agents at the time of the unfortunate accident, and which caused the same? We do not understand it to be claimed that at the time of the accident there was any such special act of negligence; and in that view there was no evidence to charge the com-

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pany, whether *there was or was not any want of proper care on the part of the intestate himself. It is true the train was running fast, not, however, at greater speed than the maximum allowed (15 miles an hour) on the T rail. It was running from Belton towards Walhalla, in the face of a northeast storm of wind and rain. The intestate, as brakeman, was on the top of the cars without shelter, where his duty required him to be in foul as in fair weather, and the proof seems to indicate that, exposed as he was, and probably overlooking the fact that they were approaching Felton's Crossing, he put his hands in his overcoat pockets, turned his back to the pelting storm, and was dashed to death by the timbers of the bridge striking him on the back of the neck. However much to be regretted, we do not see, under all the circumstances, that it can be considered as other than a sad accident, the proximate cause of which was the failure of the intestate to observe the bridge, occasioned probably by his position in protecting himself from the storm.

It is, however, strongly pressed upon the court that there were facts involved, and they should have been left to the jury. It is true, as this court has often ruled, that a non-suit for want of evidence should not be granted where there is any evidence to go to the jury, whose exclusive province it is to decide upon the weight of conflicting testimony. But we do not understand that the meaning of this rule is, that every question involving a fact must go to the jury, whether there is or is not proof to support it. If there is no conflicting evidence, and all is on one side, it may be the duty of a judge to direct a non-suit, as it would be a nugatory thing to send such an unsupported case to the jury. Brown v. Frost, 2 Bay, 126 [1 Am. Dec. 633]; Hopkins v. De Graffenreid, Ibid, 441; McCall v. Cohen, 16 S. C., 448 [42 Am. Rep. 641]. A high authority expresses the principle in this form: "The judge has to say whether any facts have been established by evidence, from which negligence may be reasonably inferred: the jurors have to say whether, from these facts, when submitted to them, negligence ought to be inferred. The relevancy of evidence, and whether any exist which tends to prove, or is capable of proving, negligence, is for the court." Pierce, 312.

There were no facts in the case, except as

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to the height of *the bridge and the absence of danger cords, the employment of the intestate as brakeman on the road, and as to his knowledge of the condition of the bridge. We agree with the Circuit judge, that the proof bearing upon these facts did not, in favor of the intestate, authorize a reasonable inference of negligence on the part of the company. As to the condition of the bridge and the employment of the intestate as brakeman there could be no doubt, and it seems to us, after making all proper allowance on account of his youth and inexperience, there could be as little as to his knowledge of the height of a bridge under which he had passed every day for three months.

This view makes it unnecessary to consider the other question, which was so fully argued at the bar, as to whether, under our statute, a parent can recover damages resulting from the death of a son, who is over the age of twenty-one years, and acting for himself. As that question is not involved in the case, we prefer to reserve our opinion.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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ALTEE v. SOUTH CAROLINA RAILWAY COMPANY.

(April Term, 1884.)

[1. *Master and Servant* ⟸272.]

In action by an employé against a railroad company to recover damages for an injury sustained while in its service, the complaint alleged negligence in the employment of plaintiff's co-laborers. *Held*, that evidence of the quality of such co-laborers was admissible as a link in the chain of evidence, and as such could not be objected to at the time when offered, even though it afterwards appeared that the injury had not resulted from any unfitness on the part of such co-laborers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 933–935; Dec. Dig. ⟸ 272.]

[2. *Master and Servant* ⟸113.]

Plaintiff having been struck and injured by the roof of a bridge while acting as brakeman on top of defendant's train, brought his action for damages. There being some evidence that he was put in such position by his employer, the railroad company; that the bridge was known to the defendant to be too low to permit a person to stand erect with safety on top of a passing car; and that plaintiff was uninformed and unwarned of this danger, the Circuit judge did not err in refusing to grant a non-suit or to direct a verdict for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 225; Dec. Dig. ⟸113.]

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*3. This case distinguished from Davis v. Railroad Company, ante 93.

[Ed. Note.—Cited in Carter v. Oliver Oil Co., 34 S. C. 216, 13 S. E. 419, 27 Am. St. Rep. 815.]

[4. *Trial* ⟸139.]

A judge may not order a verdict for defendant unless there has been a total failure of proof as to an essential allegation of the complaint, or where the facts proven do not constitute a cause of action. The distinction between directing a verdict and granting a new trial explained.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. ⟸ 139.]

[5. *Appeal and Error* ⟸110.]

There is no appeal from an order refusing a new trial, except where such refusal involves an error of law.

[Ed. Note.—Cited in Webber v. Ahrens, 36 S. C. 587, 15 S. E. 732.

For other cases, see Appeal and Error, Cent. Dig. §§ 740–748; Dec. Dig. ⟸110.]

[6. *Appeal and Error* ⟸987.]

[The Supreme Court has no jurisdiction to review errors of fact.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3893; Dec. Dig. ⟸987.]

[This case is also cited in Agnew v. Adams, 24 S. C. 89, without specific application.]

Before Aldrich, J., Richland, November, 1883.

This was an action by Oscar E. Altee against the South Carolina Railway Company, commenced in February, 1883, to recover $25,000 for the loss of an arm and other injuries sustained by him in being knocked from the top of a freight train, in the early morning of November 7, 1882, by the roof of a bridge, through which the train was passing, he being at the time an employé of the company and in his proper position as brakeman. The jury rendered a verdict for plaintiff for $5,000, and judgment was accordingly entered.

The presiding judge, in refusing a motion for new trial, said:

Believing, as I do, that twelve sensible men of business, selected for their integrity, are quite as apt to be right on a question of fact as one judge, I am very loath to assume such a responsibility. It is true, where a verdict is rendered from prejudice or passion, against the evidence, I would not hesitate to grant the motion; yet, if there is evidence to support it, I am very unwilling to set up my individual judgment against the sworn verdict of the twelve men, who know the witnesses and are much better qualified to judge of the credit to be given to each and all than I possibly can be.

It is true, in this case there is but one witness who testifies to the facts connected with the injury for which the plaintiff claims damages—the plaintiff himself. This point was very earnestly and ably urged in the argument, but in the very nature of the case it could not be otherwise; the conductor and the other two brakemen were on the engine. The plaintiff was sent to the top of the train to see that the brakes were off, and to flag down an approaching train to avoid a

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collision. In the performance of *this duty he was knocked off and received the injuries of which he complains. I see and fully appreciate the argument that the defendant railroad may be put to disadvantages if the story of the injured employé is held to be conclusive against the corporation, yet, if the rule prevailed that the injured employé cannot recover unless his statement is supported by other witnesses, he would be without redress in cases like the present, although the railroad defendant may be guilty of the grossest negligence. It is for this very reason that the verdict of the jury is entitled to the very highest consideration, when it is supported by facts and circumstances. They know the witnesses, who have been examined in their presence, and can much better judge of their credibility and the motives prompting them in making their statements than the presiding judge.

Now, what are the facts here? The covering to the bridge was too low. The defendant railroad knew it, and had known it for sixteen years. They also knew that the law requires them to supply safe appliances for the protection of their employés. They failed to warn the plaintiff of the danger of passing under that bridge standing erect on a freight car, contenting themselves with the

position that every employé takes the risk of the employment; and further, that this defect of construction was so patent that every man of common sense and ordinary observation was bound to see and know it; that the plaintiff did know it, and contributed to the injury by his reckless and careless conduct.

The plaintiff says: I did not know it; I was not warned of the danger; I complained of the brakemen who were sent out on the train with me, that they were green hands; the night was dark, and a heavy fog at the river; I was sent up there to put off brakes, and signal the approaching train to avoid a serious collision, and while thus engaged, was knocked off, my right arm torn from my body, my skull fractured, and received other injuries, which greatly endangered my life, and from which I suffered much physical pain and mental anxiety. Now, it is true, this plaintiff was contradicted by two witnesses, who say that he did know of the danger, for on that very night he had warned one of the green hands not to stand erect

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passing over the bridge. But one of *these witnesses was directly contradicted in a very important statement. The plaintiff was recalled, and swore most emphatically that he never made the statement, for he was ignorant of the danger until he was struck in the head. This is the case as it was given to the jury on a very favorable charge from the court, every one of the defendant's requests to charge was allowed, and the jury was emphatically instructed as follows:

"The question for you is: Did not the plaintiff know of the structure of that bridge from previous experience? Did he warn his co-brakeman at Jamison's that there was danger of being knocked off, standing erect? These are questions for you. Is it incumbent on the defendant railroad to go to the expense of raising all its bridge coverings, so as to enable brakemen to stand erect, when it is known to them by actual experience that they cannot go under without stooping? If this fact was known to the plaintiff, and he had been acting under that knowledge for ten weeks, however you may sympathize with him in his misfortune, you must ask yourselves, did he not contribute to his injury by his own negligence? If you come to that conclusion, your verdict will be for the defendant. Did the plaintiff use ordinary care on that occasion?

"You will consider that this bridge is over the main track; that it is permanent; that it has been there sixteen years, and if any man of ordinary prudence and care could not see and know it is dangerous to stand erect on a freight train passing over it. The bridge having been there so long, and suitable for the traffic of the road, it is not obligatory on the railroad company to pull it down and erect an uncovered bridge. The defendant is not bound to adopt all the modern improvements. Did the plaintiff, then, know of the structure and condition of this bridge when he re-entered the service of the defendant? He had been on the road before: did he have the opportunity to know? If he did know, or had the opportunity to know, the defendant is not liable.

"The case is before you: the plaintiff asks for a verdict for $25,000 on his own statement. The witnesses on the part of the defendant railroad, at Jamison's, swear positively and emphatically that he did know of the danger. It is argued these are interested witnesses, because they are employed

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by the defendant *railroad. It is for you to balance this interest and say if the plaintiff is not equally interested in maintaining his side of the case."

To grant this motion, I must conclude that this verdict is without evidence, or manifestly against the weight of the evidence. If the evidence of the plaintiff is rejected, it is without evidence. If the testimony of the brakemen is received, it is manifestly against the weight of the evidence. That was the very question submitted to the jury. By their verdict they respond: We believe the plaintiff Altee; we do not believe the witnesses who contradicted him. I will not set up my opinion against theirs; the motion is refused.

Other matters are stated in the opinion. The defendant appealed upon the grounds there stated.

Messrs. W. H. Brawley and John T. Rhett, for appellant.

Messrs. Abney & Abney, contra.

November 14, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The respondent, while in the employment of the South Carolina Railway Company as brakeman, received the injury complained of, and for which the action below was brought. His proper place as brakeman was on top of the cars, and while standing erect on a box car, as it passed over the Congaree bridge on the morning of November 7, 1882, the overhead structure being too low for him thus to stand erect, he was struck by the timbers thereof and severely injured.

At the close of the plaintiff's testimony, a motion was made for non-suit on various grounds, which was refused, and at the close of the testimony on both sides, a motion was made by the defendant, that the court instruct the jury to find a verdict for the defendant on several grounds, which was also refused. The case then went to the jury, under the charge of the judge, the defendant having submitted fourteen requests, all of which were granted, except the latter part of the first. The jury found a verdict for the plaintiff for $5,000.

The defendant moved for a new trial, which being refused, the defendant has appealed upon the following five exceptions:

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"1. *Because the Circuit judge erred in admitting testimony of plaintiff Altee as to the inefficiency of his fellow-brakemen, and as to the train being behind its schedule time. 2. Because the Circuit judge erred in refusing to grant the motion for non-suit on grounds submitted at the trial. 3. Because the Circuit judge erred in refusing to instruct the jury to find a verdict for the defendant on grounds submitted at the trial. 4. Because the Circuit judge erred in refusing to grant a new trial on grounds submitted at trial. 5. Because the Circuit judge, in determining the motion for a new trial, did not exercise his discretion in weighing the testimony as required by law."

The questions of law raised in the appeal are: First, should the testimony of Altee (the plaintiff), referred to, have been excluded? Second, should a non-suit have been granted? Third, should the judge have directed a verdict for the defendant? and Fourth, should a new trial have been ordered?

The complaint alleged negligence to the defendant under two specifications: 1st. For carelessness and negligence in the employment of unfit and incompetent servants to serve as brakemen with the plaintiff, the incompetency and unfitness of said brakemen being known to the defendant, and in consequence of whose unfitness the plaintiff was exposed to more than ordinary risk and danger, from which his injury resulted. 2nd. For negligence in requiring him to discharge a duty on top of the box cars, which had to pass the Congaree bridge, a structure too low for him to stand erect on said cars in safety while passing, a fact which though known to the defendant was yet never communicated to the plaintiff, and of which he was entirely ignorant.

1st. The plaintiff was the first witness examined, and after a few questions propounded he was asked, "What sort of hands were Herron and Kinsman?" To this question the defendant objected, on the ground that any testimony as to the character of the employés of the company, or any other matter, unless it could be shown that their alleged inefficiency, or other matter, was one of the proximate causes of the injury, was incompetent. This objection was overruled, and this is the foundation of the first exception above. It appears to us that this objection was entirely premature, and was properly overrul-

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ed at the time it was *made. One of the allegations in the complaint involved a charge of negligence in the employment of co-laborers with the plaintiff, and it was certainly pertinent to that issue to prove the "sort" of hands employed. The Circuit judge could not at this early stage of the case anticipate the future testimony, or a failure on the part of the plaintiff to follow up the testimony given, with evidence that these hands through their unfitness had caused the injury. In fact, the objection itself, or rather the ground of the objection, implies that such testimony would be competent in the event that the inefficiency of these servants constituted one of the proximate causes of the injury. It is true that in the progress of the case it was ascertained that this charge of negligence could not be sustained, and the case ultimately turned upon the second specification, as appears from the charge of the judge, the requests made to charge, and the grounds upon which the motion for a new trial was based. But at the time this testimony was introduced, it seems to us that it was pertinent and competent, and therefore there was no error in admitting it.

2nd. As to the non-suit. "A non-suit is proper only where there is a total failure of testimony by the plaintiff as to his whole case, or to some material and essential part thereof." Carrier & Harris v. Dorrance, 19 S. C., 32, and the cases there cited. Now, here the negligence charged to the defendant was the fact that the plaintiff had been placed in a position where he was exposed to a danger of which he knew nothing, and of which he was not informed by the defendant, or furnished with any means or guards to warn him of its presence, although said danger was known to the defendant when the plaintiff was employed and placed in said position. Was there a total failure of testimony as to either of these allegations? We think not. On the contrary, the slightest examination of the evidence as reported will show that there was evidence as to all of them. There was evidence as to the place of the plaintiff as brakeman. There was evidence as to the fact that the Congaree bridge was too low to allow one to stand erect on the top of a car in safety as it passed said bridge. There was evidence as to the fact that the defendant knew the height of the bridge and the danger of plaintiff's position. And there was evidence that plain-

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tiff was uninformed *as to this danger; certainly that the defendant had given him no information on the subject. These were the material allegations in the complaint, and we do not see how the Circuit judge could have granted a non-suit in the face of the testimony without invading the province of the jury as to the facts.

The case before the court is a very different case from Davis v. Columbia and Greenville Railroad Company (ante, page 93), recently heard and decided by this court, in the character of the negligence alleged and of the testimony introduced. There the negligence complained of was a failure on the

part of the company to furnish the brakeman with safe lanterns while in the discharge of his duty, and in negligently erecting a tank too close to the track. The plaintiff was non-suited by the Circuit judge because in his opinion the plaintiff failed entirely to introduce any testimony bearing upon the negligence alleged, and this court affirmed the judgment of the Circuit Court. Here, however, the negligence is of a different character. It consisted in exposing the plaintiff to a danger known to the defendant, but unknown to the plaintiff, and without any information or warning to him of the presence of such danger. This was the allegation in the complaint. It was the gist of the action, and the question before the court on the motion for non-suit was, is there any testimony as to these facts? The Circuit judge found that there was; he therefore refused the non-suit, and we think it was properly refused.

3d. Was it error on the part of the Circuit judge to refuse to instruct the jury to find a verdict for the defendant? We do not know any class of cases where a Circuit judge would be warranted in directing a verdict for the defendant, except where there has been a total failure of evidence as to any or all of the essential allegations in the complaint, or where, admitting the facts alleged, yet they do not constitute a cause of action; in other words, in cases where either a nonsuit for total absence of testimony would be proper, or where a demurrer for the want of a cause of action would be sustained. Should a clear case, in either of these categories, by some strange accident or oversight reach the jury, we see no reason why the Circuit judge should not direct a verdict for the defendant as matter of law.

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*The case before the court does not fall under either of these classes. It will not do to say that because a Circuit judge under our system is invested with power to grant new trials, that it follows he is also invested with power to direct a verdict in cases where, if the verdict should be in one way, he would feel compelled to grant a new trial. The power to grant a new trial is very different from that of directing a verdict. A verdict concludes the parties as to the facts of the case; whereas a new trial merely places them back as they stood originally, with the right of further investigation and the opportunity of having any errors corrected by a second trial. A verdict settles the facts, and is final; a new trial reopens the issue without prejudice. The first belongs to the jury; the second is under the control of the court.

4th. Was there error in refusing the motion for a new trial? It must be remembered that this court in cases at law has jurisdiction only as to the questions of law involved. It has no jurisdiction as to the facts, and its power on appeal extends in such cases only to the errors of law assigned. So that, in order to sustain an appeal in such cases, some error of law must be presented and shown to have been committed below. What error of law did the presiding judge commit here in refusing the motion for a new trial? Formerly, before the adoption of the constitution of 1868, the power to grant new trials belonged to the Appeal Court; since the adoption of the constitution, however, the Supreme Court organized thereunder has been denied the power of hearing such motions as an original proceeding, but this power has been conferred by act upon the Circuit Courts, to be exercised by such courts "in all cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of the United States." This power has been invoked in the Circuit Courts most usually upon the facts; as, for instance, where the preponderance of the testimony has been the one way or the other, for excessive damages, and the like. In such cases, the judgment of the Circuit Court is final, and it cannot be reviewed here, because no question but one of fact is involved. Brickman v. S. C. Railroad Company, 8 S. C., 173; Steele v. C., C. & A. R. R. Co., 11 Id., 591.

Where the court below, however, declines

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to exercise this *power, on the ground that it has not been invested with it, his refusal is appealable, and his judgment may be reviewed, because here would be a question of law, to wit, the existence of the power. State v. David, 14 S. C., 428, and Wood v. Atlanta and Charlotte R. R. Co., 19 Id., 582. And also where the jury refuses to take the law from the court and finds a verdict in direct conflict with the charge of the judge as to some legal proposition laid down governing the case; for the same reason as above, a refusal of a new trial in such a case would be subject to review by this court. Dent v. Bryce, 16 S. C., 1. The case before the court does not involve either of these questions.

Nor does it, as far as we can see, present any error of law connected with the refusal of the new trial. The Circuit judge, after rendering an oral decision upon this motion, filed a written opinion therein, giving his reasons fully for the refusal. There being no controversy as to the law of the case as laid down by the judge, and all the requests to charge having been in the main granted, there was nothing left but the facts, and the jury having found these in favor of the plaintiff, the judge did not feel at liberty to arrest the verdict; and involving, as the motion did, questions of fact only, or at least substantially, its refusal is unappealable.

No exception having been taken to the charge of the judge, nor any error assigned because of omission on his part to charge defendant's requests, the case here has been free from those important questions of neg-

ligence, contributory or otherwise, usually introduced in such cases. We have, therefore, not found it necessary to discuss such questions. On the contrary, the appeal having been based mainly upon the refusal of the non-suit, the refusal to direct the verdict and to order a new trial, and therefore involving only questions of law governing such motions, we have confined ourselves to the questions thus involved, and finding no legal principles applicable to such motions violated in the judgment below,

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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*WHALEY v. GAILLARD, County Treasurer. DE SAUSSURE v. SAME.

(April Term, 1884.)

[1. *States* ⟸113.]

The legislation of this state in relation to the public debt, beginning with the joint resolution of June 8, 1877, was designed to ascertain judicially, by the rules and principles of law that regulate contracts between individuals, what was the valid debt of the state, and to make ample provision for the punctual payment of interest thereon.

[Ed. Note.—For other cases, see States, Cent. Dig. § 112; Dec. Dig. ⟸113.]

[2. *Constitutional Law* ⟸142.]

The state having by statute constituted a special court for the purpose of determining the validity of any of her obligations declared by the bond commission to be invalid, and having permitted herself to be sued therein, and suits having been then brought against the state by certain persons claiming to be her creditors and representing every class of the securities so reported to be invalid, and an adjudication having been made by the Supreme Court of this state, and no writ of error taken to the Supreme Court of the United States, as was authorized by such statute, the state by subsequent legislation provided a mode by which the percentage of invalidity in its outstanding bonds under this decision of the court should be ascertained, and then directed other bonds to be issued by the state treasurer for so much of the outstanding bonds as were found to be valid, and in exchange therefor, and prohibited county treasurers from receiving any coupons in payment of taxes, except those of such new issue of bonds. *Held*, that this legislation did not impair the obligation of a contract by the state with her bondholders, whereby she had agreed to receive the coupons of her bonds in payment of taxes, but only provided a mode by which it would be definitely and easily ascertained whether a coupon so offered represented any portion of her valid debt, and was therefore receivable in payment of taxes.

[Ed. Note.—Cited in McLure v. Melton, 24 S. C. 567, 58 Am. Rep. 272.

For other cases, see Constitutional Law, Cent. Dig. § 323; Dec. Dig. ⟸142.]

[3. *States* ⟸191.]

The state having permitted herself to be sued in a prescribed mode, and having invited all persons asserting certain claims against her to appear and establish them, a person holding such claims but neglecting to appear and litigate them cannot afterwards maintain an action against the state by another proceeding not permitted by the state; nor can he maintain an action against the officers of the state for refusing to do that which the laws of the state forbid.

[Ed. Note.—For other cases, see States, Cent. Dig. § 184; Dec. Dig. ⟸191.]

[4. *Taxation* ⟸527.]

The act entitled "an act to facilitate the collection of taxes," (16 Stat., 785) was not designed to afford the bondholders a means of reopening the question of what is the valid debt of the state (which has been otherwise finally determined), and does not, therefore, apply to cases where coupons of bonds issued by the state are tendered in payment of taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 970–978; Dec. Dig. ⟸527.]

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[5. *Taxation* ⟸527.]

*Besides, such act afforded a remedy only where the treasurer illegally and wrongfully refused to receive payment of taxes in the "funds and moneys" tendered; and refusal by such officer to receive coupons declared by the Supreme Court of this state to be invalid is not an illegal or wrongful refusal. And if such decision of the Supreme Court should now be reversed, such reversal could not make illegal the acts of an officer previously done under a statute of the legislature passed in accordance with the decision of her court of last resort.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 977; Dec. Dig. ⟸527.]

[6. *Constitutional Law* ⟸49.]

A statute which conflicts with any provision of the constitution is a nullity, although there are other provisions with which it does not conflict. Therefore, where this court decided that the "act to authorize a loan for the relief of the treasury" (14 Stat., 182) did not violate the last two clauses of art. IX., § 7, of the Constitution (Morton, Bliss & Co. v. Comptroller General, 4 S. C., 430); and afterwards decided (Bond Debt Cases, 12 S. C., 200) that this act was null and void, because in conflict with two other clauses of this same section of the constitution, bonds issued under this act which were acquired between the filing of these two decisions are affected by the later decision, and are not valid claims against the state.

[Ed. Note.—Cited in City Council of Anderson v. Fowler, 48 S. C. 16, 25 S. E. 900; State v. Tucker, 56 S. C. 523, 35 S. E. 215.

For other cases, see Constitutional Law, Cent. Dig. § 47; Dec. Dig. ⟸49.]

[7. *States* ⟸119; *Statutes* ⟸119.]

This act for the relief of the treasury attempted to create a public debt which was not for the purpose of defraying any "extraordinary expenditures of the state," nor was it authorized "for some single object," nor was such object "distinctly specified therein." The act, therefore, was in conflict with art. IX., § 7, of the constitution, and null and void.

[Ed. Note.—Cited in State v. Town Council of Chester, 39 S. C. 317, 17 S. E. 752; McCullough v. Brown, 41 S. C. 243, 19 S. E. 458, 23 L. R. A. 410.

For other cases, see States, Cent. Dig. § 118; Dec. Dig. ⟸119; Statutes, Cent. Dig. §§ 164–167; Dec. Dig. ⟸119.]

[8. *Constitutional Law* ⟸70.]

Whether the expenditure to be defrayed is "ordinary" or "extraordinary" is not left exclusively to the determination of the legislature, but will be adjudicated by the courts when the question is raised.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129–132, 137; Dec. Dig. ⟸70.]

[9. *States* ⟸119.]

Under an act which authorized the governor to borrow $1,000,000 on coupon bonds of the state, $1,000,000 in bonds were issued, and subsequently there was a second issue of like amount. *Held*, that the bonds of this second issue were invalid; for the act did not authorize the substitution of new bonds for the debt incurred by the issue of the first bonds, nor did it authorize a new and additional debt to be created by a second or other issue.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118; Dec. Dig. ⟸119.]

[10. *States* ⟸113.]

The consolidation act (15 Stat., 518) was not passed as is required by the Constitution where a public debt is to be created, and, therefore, did not make anything a public debt that was not at that time a valid obligation of the state.

[Ed. Note.—Cited in Feldman & Co. v. City Council of Charleston, 23 S. C. 66, 55 Am. Rep. 6.

For other cases, see States, Cent. Dig. § 112; Dec. Dig. ⟸113.]

[11. *States* ⟸113.]

An act of the Legislature cannot create a public debt of the state unless the constitutional requirements are complied with, notwithstanding the fact that the effect of such act as a whole reduces the volume of the public debt.

[Ed. Note.—For other cases, see States, Cent. Dig. § 112; Dec. Dig. ⟸113.]

[12. *States* ⟸113.]

The Legislature cannot contract a debt ex-

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cept as authorized by the *Constitution, and the consolidation act not having been so passed as to create a debt, any contract, whether by compromise or otherwise, attempted by that act was without authority and not binding upon the state.

[Ed. Note.—For other cases, see States, Cent. Dig. § 112; Dec. Dig. ⟸113.]

[13. *States* ⟸147.]

This consolidation act was a proposition addressed to bondholders individually, and not to them as a class, nor did it require from any person a surrender of all his bonds in order to be entitled to an exchange of any of them. It cannot, therefore, be called a composition by the state with her creditors. This case distinguished from Lost Bonds Case, 15 S. C., 224.

[Ed. Note.—For other cases, see States, Cent. Dig. § 156; Dec. Dig. ⟸147.]

14. Bond Debt Cases (9, 11, 21, 29), 12 S. C., 200, affirmed.

[This case is also cited in Robertson v. Tillman, 39 S. C. 304, 305, 17 S. E. 678; Ehrlich v. Jennings, 78 S. C. 277, 58 S. E. 922, 125 Am. St. Rep. 795, and distinguished therefrom.]

Before Kershaw, J., Charleston, February, 1883.

These were two actions, under the act of December 24, 1878 (16 Stat., 785), to recover money paid for taxes, one being by B. J. Whaley against P. C. Gaillard, treasurer of Charleston county, and the other by L. D. DeSaussure against the same defendant. They were tried together.

The plaintiffs requested the presiding judge to charge as follows:

1. That the provisions of the act of December 22, 1873, were in the nature of proposals to the creditors of the state, and when the consolidation bonds were issued under said act and taken by the creditors, a contract was consummated between them and the state as fully as if all the provisions of the act had been embodied as express stipulations in the most formal instrument signed by the parties.

2. That the pledge that the coupons of the bonds so issued should be received in payment of all taxes due the state during the year in which they matured, except for the taxes levied for the public schools, formed a part of the contract, and was the security offered to the creditors. That the act of the legislature of South Carolina, entitled "an act to raise supplies and make appropriations for the fiscal year commencing November 1, 1881," in so far as it prohibited the county treasurer from receiving the coupons of the consolidated bonds referred to in the complaint in payment of the taxes levied by said act, is null and void, as repugnant to article I., section 10, of the constitution of the United States.

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*3. That the validity of the bonds for the relief of the treasury, issued under the act of 1869, which were surrendered to the state by the Yonkers Savings Bank in May, 1875, must be determined according to the law as it was judicially construed to be in the case of Morton, Bliss & Co. v. The Comptroller General, and were valid obligations of the state. That the decision subsequently made by the Supreme Court of the state in the State Bond Cases cannot receive a retroactive effect without impairing the obligation of contracts long before entered into.

4. That by the act of August 26, 1868, the governor of the state was authorized to borrow on the credit of the state, on coupon bonds, within twelve months from the passage of the act, a sum not exceeding $1,000,000, or as much thereof as he might deem necessary to pay interest on the public debt. That the governor was invested with full discretion, and was clothed with full authority, in determining the necessity for the issue of the bonds, the mode of their issue, and the amount of bonds to be issued in order to raise the sum of money required; and bona fide holders for value of the bonds issued by him, or of the coupons of such bonds, had no means of knowing in what manner the governor exercised this discretion, and they cannot be affected by any abuse of authority by him. That by the recital on the face of the bonds that they were issued under the act approved August 26, 1868, the state, as against a bona fide holder for value, was estopped from disputing the truth of such representation.

5. That the legislature having, with a full knowledge of all the facts connected with

the alleged over-issue of the bonds for the payment of interest on the public debt, authorized the funding of the said bonds, has waived said objections and validated the bonds.

6. That the settlements made between the state and the Yonkers Savings Bank of New York, in May, 1875, and between the state and Levy & Borg, on October 13, 1875, were such compromises of doubtful rights as are sufficient foundation for an agreement and consideration for a contract; and the validity of the new bonds issued to the Yonkers Savings Bank and to Levy & Borg rests upon these contracts and compromises, and not upon the validity of the surrendered and cancelled securities.

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*7. That the settlement made in May, 1875, between the State of South Carolina and the Yonkers Savings Bank was a unity, and the state cannot set it aside in part while it retains the Land Commission bonds surrendered by the Yonkers Savings Bank at the time said settlement was made, and the same rule applies to the settlement between the state and Levy & Borg, of October, 1875.

These requests were all refused, and the judge then charged the jury as follows:

"Gentlemen of the Jury: Under the present condition of the law affecting this case, as determined by the Supreme Court, and the legislation connected therewith, you are directed, on the pleadings and the evidence submitted, to find a verdict for the defendant."

Verdict for defendant and judgment entered accordingly.

The plaintiffs appealed upon exceptions alleging error in the judge's charge and in his refusal to charge as requested.

Messrs. Lord & Inglesby, Buist & Buist, Simonton & Barker, Simons & Seigling, and T. M. Mordecai, for appellants.

As an appeal lies in these cases to the Supreme Court of the United States, it is important to examine the questions presented in the light of the decisions of that court—12 S. C., 271. The coupons tendered are void under the decision in the Bond Debt Cases, but we ask a reconsideration of that decision. As to the bonds for the relief of the treasury, we contend that the decision in 4 S. C., 430, applied to all bonds of the class there considered; and at the session of the legislature next succeeding, the act was passed under which these consols were issued; the bonds were thus acquired under the law as then declared, and cannot be affected by subsequent statutes or decisions. 12 S. C., 282. The objections now urged are different from those then urged, but were as apparent then as now. 101 U. S., 677. As to the second issue of bonds to pay interest, we submit that the act did not limit the governor to a single issue, but that he had authority to borrow $1,000,000 within twelve months. He had full discretion and authority to determine the necessity, the mode, and

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*the amount of issue. 12 S. C., 275; 103 U. S., 696. If he has been guilty of irregularity, or even of fraud, the state must be the loser, and not an innocent holder. Dixon County v. Field, 111 U. S., 83. With full knowledge of all the facts, the legislature has waived all objections and validated the bonds by directing them to be funded. 4 S. C., 430. The consolidation act was a compromise and composition made by the state with her creditors. 105 U. S., 278; Story Cont., § 449; Story Eq. Jur., 129–131; 6 Cl. & Fin., 911; 4 Ves., 840; 5 Peters, 99; 4 Metc., 270; 2 Strob. Eq., 258; 15 S. C., 232. The consolidation act did not require a two-thirds vote, to be recorded by yeas and nays, because it did not create a further debt, nor was it for an extraordinary expenditure, nor the appropriation of money needing a new tax levy. It provided for a reduction of the ascertained debt of the state, and for its reduction, liquidation, and redemption. It reduced the public debt by several millions of dollars.

Mr. Clarence A. Seward, same side.

The Attorney General, contra, argued that the decision in the Bond Debt Cases was correct. He further contended that the contract of the state was only to receive coupons of valid consolidation bonds in payment of taxes. There are coupons outstanding of invalid bonds having the similitude of valid bonds. Whether valid or invalid, the county treasurer cannot determine, and therefore he is required to receive coupons of the recognized valid or brown bonds. The state can protect herself, by reasonable requirements, from receiving invalid coupons; and she does not thereby impair the obligation of her contract. These requirements constitute a part of the remedy provided by the state, and the only limitation upon the state is that there must be an adequate and efficacious remedy. The remedy provided is analogous to that given by the act of 1877 (16 Stat., 302), approved in 101 U. S., 437. See too 107 U. S., 769. In those cases, the proceedings to determine the validity of the bills or coupons tendered were to be taken after tender, while here they are to be taken before tender; but the principle is the same.

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The validity *of the seventh section of act of 1882 must be determined by the law as declared when these coupons were tendered. Under the act to facilitate the collection of taxes, only such amount can be recovered as was wrongfully and illegally collected. The county treasurer is bound to obey the law as declared by the courts; the law forbade him to receive these coupons. 107 U. S., 712. The plaintiffs here have another and full remedy—they can demand brown consols from the state treasurer in exchange for their green bonds; and if that officer refuses,

they can apply for a writ of mandamus, and thus have the question of their validity determined. 107 U. S., 781.

Mr. L. F. Youmans, same side.

November 14, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. These two cases, involving as they do similar general principles, were heard and will be considered together. The plaintiffs tendered to the county treasurer in payment of their taxes certain coupons of bonds, alleged to have been issued under the provisions of an act entitled "an act to reduce the volume of the public debt and provide for the payment of the same," approved December 22, 1873 (15 Stat., 518), which were refused by him upon the ground that said coupons had been adjudged by the decision of this court, in the Bond Debt Cases (12 S. C., 200), not to be valid obligations of the state, and their receipt in payment of taxes had been forbidden by law. Thereupon these actions were instituted to recover the amounts mentioned in said coupons, the plaintiffs claiming a right so to do, under the provisions of an act entitled "an act to facilitate the collection of taxes," approved December 24, 1878 (16 Stat., 785), and incorporated in the general statutes of 1882, as sections 268, 269, and 270, the avowed object being to obtain from this court a reconsideration of its former decision in the Bond Debt Cases, supra, with the view of carrying the question involved to the Supreme Court of the United States; but whether this object can be attained by these proceedings will be hereinafter considered.

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*The legislation of this state, a brief abstract of which is given in the pleadings, beginning with the joint resolution adopted June 8, 1877, was manifestly designed to ascertain judicially by the rules and principles of law which regulate contracts between individuals, what was the valid debt of the state, and to make ample provision for the prompt and punctual payment of the interest on the debt so ascertained. In pursuance of this manifest design the legislature first directed a committee of its members, usually called the "Bond Commission," to make a thorough investigation of the debt of the state, and report all the facts, together with their conclusions, to that body. When that report was made, the legislature, without undertaking to decide for itself the various questions raised in said report, as to the validity of a large portion of the alleged debt of the state, and notwithstanding the fact that the state could not be sued without its consent, voluntarily threw down the barriers which exempted it from suit, established a special court, consisting of three of the Circuit judges of the state, called the "Court of Claims," invested it with jurisdiction "to hear and determine any case or cases brought to test the validity" of any of the bonds or other obligations of the state reported by the "Bond Commission" as invalid, and provided for a right of appeal to the Supreme Court of the state, together "with a right of appeal by writ of error or otherwise, as provided by law, to the Supreme Court of the United States." Joint resolution, approved March 22, 1878, 16 Stat., 669.

Several of those holding bonds or coupons, reported as invalid by the "Bond Commission," embracing all of the various classes so reported, brought suits thereon against the state in the Court of Claims, and from the judgment of that court in favor of the state, appeals were taken to the Supreme Court of the state, which court, on September 29, 1879, rendered its decision, adjudging all of the various classes of bonds there brought in question to be valid obligations of the state, except those issued under an act entitled "an act to authorize a loan for the relief of the treasury," approved February 17, 1869 (14 Stat., 182), and the second issue of bonds under an act entitled "an act to authorize a state loan to pay interest on the public debt," approved August 26, 1868 (14 Stat., 18), which, together with the consolidation

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*bonds, issued in exchange therefor, under the act of December 22, 1873, cited above, and usually designated as the "consolidation act," were declared invalid. The coupons in question in these cases belong to the classes so declared to be invalid. From this decision no appeal was taken, either by writ of error or otherwise, and so far as we are informed, from the time when it was rendered, September 29, 1879, to the time of the commencement of these actions, December 5, 1882, and January 3, 1883, no person claiming to be a creditor of the state has instituted any proceedings to ascertain or enforce any liability on the part of the state on either of the two classes of bonds thus adjudged to be invalid, or any consolidation bond issued in exchange therefor.

After the judgment of the Supreme Court of the state, above mentioned, was rendered, there being no intimation of any appeal therefrom, the legislature of the state passed an act entitled "an act to provide for the settlement of the consolidated debt of the state, in accordance with the decision of the Supreme Court of South Carolina," approved December 23, 1879 (17 Stat., 104), which, with an amendment thereto, approved February 19, 1880 (17 Stat., 240), provided, amongst other things, for the appointment of a special commissioner, whose duty it should be to eliminate from the original consolidation bonds, presented for that purpose, so much thereof as had been adjudged to be invalid, reporting his action in the premises from time to time to the state treasurer, and for a new issue of consolidation bonds of a different color from the original, represent-

ing so much of the debt as had been adjudged to be valid.

In pursuance of these provisions a very large amount of the original consolidation bonds, which were colored green, and are usually designated as "green bonds" or "green consols," were exchanged for the new consolidation bonds, colored brown, and are usually designated as "brown bonds" or "brown consols," and represent the valid unquestioned debt of the state, the coupons on which are received for taxes, or are promptly paid on presentation. But as it was impossible to tell whether a "green bond" represented in whole or in part, and if so what part, any portion of the valid debt of the state, without an examination of the records of the office of the treasurer of the state, where

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the *various reports of the special commissioner above mentioned were filed, the various county treasurers of the state are not allowed to receive the coupons of the "green bonds" in payment of taxes until they have been examined, and any invalidity which they may contain eliminated and the valid portion converted into "brown bonds."

It seems, therefore, that the scope and effect of this legislation was not to impair the obligation of any contract entered into by the state with its bondholders, whereby the state had agreed to receive the coupons of certain bonds in payment of taxes, but was simply to provide a mode of proceeding by which it could be definitely and easily ascertained whether a coupon offered in payment of taxes represented any portion of the valid debt of the state; for, unless it did, there certainly was no contract on the part of the state that it should be received in payment of taxes. It was in close analogy to the proceeding prescribed for ascertaining whether bills of a bank owned and controlled by the state, and which had been declared receivable in payment of taxes, were valid obligations of the state, and as such entitled to be received for taxes. Tennessee v. Sneed, 96 U. S. 69 [24 L. Ed. 610].

As is said by Waite, C. J., in South Carolina v. Gaillard, 101 U. S., at page 437 [25 L. Ed. 937], in speaking of similar legislation: "It does no more than provide a way of determining whether bills offered in payment of taxes are binding on the state." It certainly cannot be pretended that because a taxpayer tenders in payment of his taxes a coupon of a bond purporting to be a consolidation bond of the state, colored green, that the state and its fiscal officers are bound to receive it without question as to whether it is valid or invalid; and as the state cannot be sued except with its own consent, and then only in the mode which it permits, it follows necessarily that the only mode by which the validity of the coupon so offered in payment of taxes can be tested is that which has been prescribed by the state.

It is contended, however, that the plaintiffs in these actions were not parties to any of the actions instituted in the Court of Claims, and are, therefore, not bound by any adjudication therein. This position might possibly be very well maintained if the defence here was based simply on the doctrine of

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res adjudicata; but that *is not the ground upon which the defence rests. The true ground is, that as the state could not be sued except with its own consent, and then only in the mode which it had seen fit to prescribe, and as the state did prescribe a mode by which it could be sued, and the validity of its debt tested upon the same principle by which the contracts of individuals are tested, and having invited all persons having claims against it, whose claims were disputed, to come in and assert and establish their claims, one who has failed to avail himself of the opportunity thus offered, cannot afterward, in another proceeding, not permitted by the state, maintain an action against the state, or against any of its officers, for refusing to do that which the laws of the state forbid. Louisiana v. Jumel, 107 U. S., 711 [2 Sup. Ct. 128, 27 L. Ed. 448]; Antoni v. Greenhow, 107 U. S. 769 [2 Sup. Ct. 91, 27 L. Ed. 468].

But appellants contend that the act of 24th December, 1878, entitled "an act to facilitate the collection of taxes" (16 Stat., 785), expressly authorizes the plaintiffs to bring these actions against the county treasurer when their coupons have been tendered for taxes and refused. This position is, we think, based upon a total misconception of the true meaning of that act. It certainly never was designed to afford an opportunity to a bondholder to reopen the question as to the validity of any portion of the state debt, which it was supposed had been determined by the decision of this court in the Bond Debt Cases, from which no intimation of appeal had been given. The very object of the legislation of the state hereinbefore considered, was, as we have seen, to obtain a final determination of the question of the validity of the state debt; and certainly the legislature, by an act passed nearly a year before such final determination was reached, never intended to afford the means of reopening any of the questions thus finally determined. In addition to this, the phraseology of the act shows that it was never designed to afford a remedy to the bondholder in case his coupons were refused when tendered for taxes, but was intended solely to afford a remedy in case bills of the bank of the state were refused when tendered for taxes.

But even if it should be conceded that the terms of the act to facilitate the collection of taxes were broad enough to cover a case in which coupons of bonds purporting to be

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bonds of the state *are refused when tendered for taxes, as well as a case in which taxes are tendered and refused in other "funds

and moneys" than the collecting officers are authorized, by the act levying such taxes, to receive, we do not see how these actions can be maintained. By the express terms of the act it must be made to appear that the county treasurer has illegally and wrongfully refused to receive payment of the taxes assessed against the plaintiff, in anything else but "gold and silver coin, United States currency, national bank notes, and coupons which shall become payable during the year 1882, on the valid consolidation bonds of this state known as 'brown bonds,'" as required to do by the 7th section of the "act to raise supplies and make appropriations for the fiscal year commencing November 1, 1881," approved February 9, 1882, 17 Stat., 1070. Practically this last mentioned act forbids county treasurers from receiving in payment of taxes any coupons of bonds which have not been ascertained in the manner prescribed by the legislation hereinbefore mentioned to be valid obligations of the state.

Now if, as we have seen, the state had the right to prescribe the mode by which the validity of any bond purporting to be an obligation of the state should be tested and determined, and if, as we have also seen, such mode was prescribed, and the validity of all the various classes of bonds purporting to be obligations of the state was passed upon and finally determined, it would seem to follow necessarily that the state had a perfect right to forbid its officers, charged with the collection of its revenue from receiving in payment of taxes any coupons or other form of obligation which had not only not been adjudged to be a valid obligation of the state, but which, on the contrary, had been expressly adjudged to be invalid. There certainly can be nothing illegal or wrongful in an officer of the state yielding obedience to a law of the state passed in the usual form, in pursuance of a judgment of its highest judicial tribunal, from which there had been no appeal to the tribunal of last resort, although express provision had been made for such appeal.

Even, therefore, if it be conceded that the language of the act to facilitate the collection of taxes could, by a liberal construction, be regarded as broad enough to cover a case in

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which cou*pons had been refused when tendered for taxes prior to the adjudication of the validity of the state debt, or in a case which might subsequently arise in which coupons of the "brown bonds" should be refused when tendered for taxes, if the legislature should hereafter see fit to prohibit the reception of such coupons for taxes, yet it is very clear that it cannot apply to the present case, in which the coupons refused have already been adjudged invalid. The decision in the Bond Debt Cases, whether right or wrong, settles the law of the state until it is reversed or overruled by competent authority, and until that is done any act passed by the legislature in pursuance of the principles there determined must be regarded as the law of the land to which every officer is bound to yield obedience, and his act in doing so cannot be characterized as either illegal or wrongful.

We do not see, therefore, how the correctness of the principles determined in the Bond Debt Cases can be brought under review in these cases, so as to determine their decision. For even if it should now be determined that there was error in that decision in holding that the second issue of bonds to pay interest on the public debt, and the bonds issued for the relief of the treasury, together with the bonds issued in exchange therefor under the provisions of the "consolidation act" of 1873, were not valid obligations of the state, and that the coupons tendered by the plaintiffs in payment of their taxes are valid obligations of the state, we do not see how this could affect the result in the present actions. At the time the coupons were tendered and refused, the law, as it was then settled, justified such refusal, and any subsequent change in the law, either by statute or judicial decision, cannot affect a transaction occurring before such change in the law. Ohio Life Insurance and Trust Company v. Debolt, 16 How., 432 [14 L. Ed. 997]; Gelpeke v. Dubuque, 1 Wall., 206 [17 L. Ed. 520]; Lee County v. Rogers, 7 Wall. 181 [19 L. Ed. 160].

But was there any error in the decision in the Bond Debt Cases? According to the proper practice appellants applied for and obtained leave to be heard against some of the points determined in that case, and the questions involved have been ably and elaborately argued on both sides. We must say, however, that the additional light thus thrown

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upon these questions only *serves to convince us more fully of the correctness of the former decision. We do not propose to go over the ground covered by the former opinions, which will be found at page 263 and page 294 of 12 South Carolina Reports, but shall confine our attention to those points which it is supposed, erroneously however, were not fully considered before; for although some of the points now relied upon may not have been discussed in either of the former opinions, yet the most, if not all of them, were carefully considered in reaching our conclusion.

First, it is contended that the act to authorize a loan for the relief of the treasury had been adjudged to be constitutional by the decision of the Supreme Court of this state in the case of Morton, Bliss & Co. v. Comptroller General, 4 S. C., 430, and that the subsequent decision in the Bond Debt Cases, holding this act to be unconstitutional, cannot affect the rights of those who acquired their bonds issued under that act and funded them in consolidation bonds under the act of 1873, as they "must be regarded as having acquired the bonds so surrendered

upon the faith of the law as it was then declared to be, and their rights cannot be affected by any subsequent change in the law, whether such change be effected by statute or by judicial decision."

The decision in Morton, Bliss & Co. v. Comptroller General was rendered August 27, 1873, and the facts as gathered from the records in these cases are: That Whaley acquired the coupon upon which his action is based about November 9, 1882, from Eames & Moore, who had funded bonds under the consolidation act on October 14, 1874, but when they acquired the bonds which they then funded, whether before or after the decision in Morton, Bliss & Co. v. Comptroller General, does not appear. The other plaintiff, DeSaussure, acquired the coupons upon which his action is based on March 11, 1878, from Levy & Borg, and from the Yonkers Savings Bank, who had funded bonds under the consolidation act, the one in May and the other in October, 1875; but it does not appear whether they, or either of them, acquired the bonds so funded before or after the decision of the case of Morton, Bliss & Co. v. Comptroller General.

It seems, therefore, that Whaley acquired his coupon after the change in the law (as

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it is called) by the decision in the Bond *Debt Cases, and DeSaussure acquired his after the investigation into the validity of the state debt had been announced, and after the report of the bond commission had been made (February 7, 1878), by which the bonds from which his coupons were taken had been reported as invalid, and were soon after so adjudged to be. So that the doctrine relied upon cannot apply to these cases.

But in addition to this the position of the plaintiffs cannot be maintained, because, conceding the correctness of the abstract proposition of law upon which it rests, it is based upon an entire misconception of the scope and effect of the decision in the case of Morton, Bliss & Co. v. Comptroller General. That case did not decide that the "act to authorize a loan for the relief of the treasury," was constitutional, but it simply decided that the objections to the constitutionality of that act, which were interposed in that case, were not tenable. The only objections there urged were, 1st, that the act was in violation of that clause of the constitution which required that no law providing for the contracting of a public debt should take effect "until it shall have been passed by the vote of two-thirds of the members of each branch of the general assembly," and 2d, the clause which declared that "every such law shall levy a tax annually sufficient to pay the annual interest of such debt," and the construction there given to these two clauses was recognized and followed in the Bond Debt Cases.

But when the question was presented, in the last mentioned case, whether the act in question was in conflict with two other distinct and separate clauses of the constitution, neither of which was construed, or considered, or even mentioned in the former case, it was clearly the duty of this court to construe those two clauses, and determine whether the act in question was in conflict with both or either of them. It is perfectly manifest from the language used by the court in Morton, Bliss & Co. v. Comptroller General, that they did not undertake to decide anything whatever, except whether the objections there urged to the constitutionality of that act were well founded. At page 462 of 4 S. C. Reports, the language is: "The objection of the respondent to the constitutionality of the acts in question, on the

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*ground that no such provision was made by tax for the payment of annual interest, is not well taken." Again, at page 467: "It must, therefore, be concluded that a vote of two-thirds of the members present at the time the vote was taken, satisfies the requirements of the constitution. The respondent's objections, in this respect, are not well taken." And again, on the same page: "We have now considered all the objections urged by the respondent involving the question of the constitutionality of the five acts of the legislature, set forth in the relator's petition, and find that they present no just ground of objection to the validity of either of such acts."

This language of the court, thus carefully confining their decision to the points made in that case, was well calculated to put the bondholders, as well as the general public, upon their guard, by showing that the court did not intend to pass upon the general question of the constitutionality of the several acts there considered, but simply to determine whether the objections there urged were well founded. Finally, the language of Willard, C. J., who had prepared the opinion of the court in Morton, Bliss & Co. v. Comptroller General, in the concluding paragraph of his separate opinion in the Bond Debt Cases, shows conclusively that he did not understand that the general question of the constitutionality of the act to authorize a loan for the relief of the treasury was considered or determined in the case of Morton, Bliss & Co. v. Comptroller General.

The cases of County of Cass v. Johnston, 95 U. S., 360 [24 L. Ed. 416], and Douglass v. County of Pike, 101 U. S. 677 [25 L. Ed. 968], are relied upon by appellants to sustain their position upon the point which we have just been considering, but we think an examination of those cases, in connection with the previous case of Harshman v. Bates County, 92 U. S. 569 [23 L. Ed. 747], will show that they do not sustain their position. In those cases it was the same clause of the constitution of Missouri, which at different times had received different construction, and while it may well be that, when the construction of

a particular clause of the constitution of a state has been settled by the highest judicial tribunal, rights accruing under such a construction cannot be impaired or affected by a subsequent change of such construction.

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it does not by any means *follow that rights claimed under a statute which is in conflict with any provision of the constitution, can be enforced by the courts, simply because it has been adjudged that such statute did not conflict with some other distinct clause of the constitution.

A statute which conflicts with any provision of the constitution is a dead letter, an absolute nullity, and the fact that the courts have decided in one case that it does not conflict with a particular clause in the constitution cannot impart any vitality to it, if it is found to be in conflict with some other clause of the constitution. Full effect was given to this view of the doctrine contended for in the decision of the Bond Debt Cases, and it was there held that the construction placed by the court in Morton, Bliss & Co. v. Comptroller General, upon those clauses of the constitution which were then brought in question, was conclusive and binding, although grave doubts were then entertained by a portion of the court, at least, as to the correctness of such construction.

In Boyd v. Alabama, 94 U. S. 645 [24 L. Ed. 302], which is recognized in Douglass v. County of Pike, 101 U. S. at page 687 [25 L. Ed. 968], as well expressing "the rules which properly govern courts in respect to their past adjudications," it is said: "Courts seldom undertake, in any case, to pass upon the validity of legislation where the question is not made by the parties. Their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then, they will construe the acts presented for consideration, define their meaning, and enforce their provisions. The fact that acts may in this way have been often before the court, is never deemed a reason for not subsequently considering their validity when that question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases, nor conclude the court upon the constitutionality of the acts, because that point might have been raised and determined in the first instance."

In that case, Boyd was indicted under a statute of Alabama prohibiting lotteries, and relied for his defence on the privileges conferred by an act passed in October, 1868, which had been repealed by an act passed in 1871. Under a previous indictment against the same person it had been held by the Su-

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preme *Court of the state that, inasmuch as by the terms of the act of 1868 a contract had been created between the state and Boyd, the repealing act was void as to him, and he was consequently acquitted. But in the second case, the court held that the act of 1868 was unconstitutional, and therefore conferred no rights upon Boyd, either by contract or otherwise, and hence it furnished no ground of defence, and that the former decision did not estop the state from raising the question of the constitutionality of the act of 1868. He was accordingly convicted, and the judgment was affirmed by the Supreme Court of the United States.

But appellants also contend that the decision of this court in the Bond Debt Cases was erroneous, and should now be reversed. First, as to the constitutionality of the act to authorize a loan for the relief of the treasury. The constitution of 1868, art. IX., sec. 7, provides that, "for the purpose of defraying extraordinary expenditures, the state may contract public debts, but such debts shall be authorized by law for some single object to be distinctly specified therein." It does seem to us that nothing can be clearer than that the act to authorize a loan for the relief of the treasury violates both of these clauses of the constitution. The body of the act affords no more information as to the object of the loan than the title; and for all practical purposes it might just as well have been entitled, an act to authorize a loan for the uses of the state government; for that was in fact the real object of the act. The debt thereby attempted to be contracted was certainly not "for some single object," and such object was not "distinctly specified in the act."

The purpose of this provision of the constitution undoubtedly was to indicate to the tax-payers, when it was proposed to create a loan, the precise purpose to which the money to be borrowed was to be applied; and when the purpose declared by the act is expressed in the general terms "for the relief of the treasury," it afforded no indication whatever of the particular object to which the borrowed money was to be applied. On the contrary, when the money was paid into the treasury, as the terms of the act necessarily implied it was to be, it would become applicable, and undoubtedly was applied, to any of the various demands that might be made upon the treasury.

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*It is equally clear that the debt sought to be created by this act was not for any "extraordinary expenditure," for provision had already been made for the redemption of the "bills receivable" by an act passed August 26, 1868 (14 Stat., 17), for the payment of the interest then in arrear on the public debt by an act passed on the same day (14 Stat., 18), and for funding the outstanding bills of the bank of the state by an act passed September 15, 1868 (14 Stat., 22), and we are not aware of any other expenditures which the legislature was then called upon to provide for, which could with any propriety be classed amongst "extraordinary expendi-

tures," and none such have been suggested to us. The inevitable inference which accords with the well known facts is, that the object of this act was to raise money for the current demands on the treasury to meet the ordinary expenses of the state government, and therefore plainly in violation of the constitution.

The position taken by one of the counsel for appellants, that the question whether a debt proposed to be contracted is for the purpose of defraying an ordinary or extraordinary expenditure is one exclusively for the determination of the legislature, and the fact that they have authorized the loan must be regarded as sufficient evidence that its object was to meet an extraordinary expenditure, would, it seems to us, render the constitutional provision wholly nugatory. Such a provision was undoubtedly inserted as a check upon the power of the legislature to contract public debts, and it follows, necessarily, that it cannot determine conclusively the limits of its power in this respect; for otherwise there would be no check upon its power except its own will.

Next, as to the second issue of bonds for the payment of the interest on the public debt, we think it equally clear that there was no shadow of authority for such issue, and therefore that the bonds of that issue never did constitute valid obligations of the state. It will be observed that the question is not what the governor might have lawfully done under the authority of "an act to authorize a state loan to pay interest on the public debt" (14 Stat., 18), but the question is whether he had any lawful authority for what he did do. The question is not whether, under the peculiar phraseology of the act, the gov-

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ernor was lim*ited to the issue of bonds to the amount of one million of dollars, or whether he might not have issued as many bonds as would be necessary to raise that amount of money, provided he should deem such an amount necessary to pay the interest on the public debt, but the question is whether, after having made one issue of a million of dollars in bonds, he had any authority six or eight months afterwards to make a second issue of the same amount for the purpose of retiring the first issue, on account of some objectionable words used in the bonds of the first issue, the undisputed testimony showing that to be the sole object of the second issue.

It is quite clear that the act in question does not even purport to contain any authority for the exercise of such a power. The legislature, under the provisions of section 10 of article IX., might have provided by law for the substitution of one set of bonds for another, and possibly might have authorized the governor to make such substitution; but they did not do so, and we do not see by what authority the governor, or any other officer of the state, could, in the absence of any legislation authorizing it, assume to exercise such a power; and hence the bonds so substituted by the governor, without any authority whatever, cannot constitute any part of the valid obligations of the state. But even if we could hold, in disregard of the testimony, that such was not the object of the second issue of the bonds, but that they were designed to create a new and additional debt of the state, then it is equally clear that the act contains no shadow of authority for the creation of such new and additional debt. If the governor could lawfully make a second issue, we see no reason why he might not make a third or fourth, or an indefinite number of issues—there being just as much authority, under the terms of the act, for a fourth issue as there is for a second, and certainly a construction leading to such a result cannot be regarded as a correct one.

Our next inquiry is as to the effect of the act of December 22, 1873 (15 Stat., 518), commonly called the "consolidation act." It is conceded that this act was not passed by the constitutional majority necessary for the creation of a public debt, and that it was not submitted to a vote of the people, as

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required by article *XVI. of the constitution, adopted January 29, 1873 (15 Stat., 466), and therefore nothing would seem to be clearer than that such act cannot have the effect of creating "any further debt or obligation" on the part of the state, and, as we said in the Bond Debt Cases, "must be regarded as simply a scheme for the readjustment of the then existing debt." It cannot have the effect of making anything a debt of the state which was not then a valid obligation of the state.

The argument that the purpose and effect of the act was to reduce, and not to increase, the debt of the state, and therefore it was unnecessary that it should have been passed by a two-thirds vote, or submitted to a vote of the people, is not in our judgment entitled to any weight. The constitution having prescribed the only way in which a debt of the state can be contracted, any attempt by the legislature to create one in any other way must necessarily be futile, even though the legislature may at the same time, and by the same act, make such provisions as that the debt of the state, to a larger amount than the proposed new debt, shall be paid or otherwise extinguished. If there is a lack of power to create the new debt, that cannot be supplied by the payment of an old debt, but can only be supplied by complying with the requirements of the constitution. So that even if it be conceded that the effect of the "consolidation act," fully carried out, would be to reduce the gross amount of the debt of the state, yet it would by no means follow that bonds originally issued without constitutional authority would thereby become valid obligations of the state. They would

still continue to be, as they were before, evidences of debt not contracted by the state in the only mode in which it could contract, and therefore not valid obligations of the state.

But it is contended that by the terms of the "consolidation act" a contract of compromise was entered into by the state with its bondholders, which is binding upon the state. It seems to us that the argument in support of this position wholly ignores the important and vital distinction between a state and the legislature of a state, and assumes that the latter is invested with supreme power so far as making contracts for the state is concerned. This, as we have seen, is an entire mistake, and that, on the

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con*trary, the power of the legislature in contracting a public debt is limited and controlled by the express terms of the constitution. It will not be denied that it is essential to the validity of any contract, whether of compromise or otherwise, that there should be power in the contracting parties to make the contract in question. Now, as the legislature in undertaking to pass the "consolidation act" did not pursue the mode prescribed by the constitution, in which alone any debt of the state could be contracted, any contract based upon that act, whether by compromise or otherwise, purporting to fix anything upon the state as a debt which was not so before, was without authority, and an absolute nullity.

The whole question is one of power. The very object of the constitutional provisions was to place restrictions upon the power of the legislature to contract public debts, and to say that the legislature could, by the act of March 13, 1872 (15 Stat., 278), commonly called the "validating act," or by the "consolidation act," neither of which was passed by the requisite constitutional majority, make that a valid debt of the state which was not so before, would be to say that the very body whose power was intended to be restricted by these constitutional provisions could by these means evade and utterly disregard such restrictions.

Again, it is urged that the "consolidation act" must be regarded as a proposition by the state to its bondholders for a compromise of doubtful rights, and that the state having received all the benefits, must bear all the burdens of the arrangement. Without repeating here what we have just said as to the lack of power on the part of the legislature to make any such arrangement, in so far as it involved the creation or acknowledgment of any new debt on the part of the state, we think such a view is based upon an entire misconception of the terms of the "consolidation act." It was not a proposition to the bondholders as a class, or to the holders of any particular issue of bonds, that if they, or even a majority of them, would surrender all their bonds, new ones would be issued to them for one half of their face value, with the additional advantages proposed by the act, but it was a proposition addressed to each individual bondholder, and did not even involve the necessity that such individual bondholder should surrender all

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*of his bonds before he would be entitled to exchange or fund any of them under the act.

For example, if A. held bonds the validity of which has never been questioned, and also other bonds issued under the act to authorize a loan for the relief of the treasury, he might, under the terms of the "consolidation act," have retained the former and funded the latter, as there is not a word in the act to prevent him from so doing. It is an entire mistake, therefore, to say that the holders of bonds were induced to fund their unquestioned bonds by the opportunity offered them of funding those which might be questioned, and thus a final composition was had between the state and its bondholders. There is nothing in the act to authorize the assumption that any such inducement was held out to the bondholders, and certainly nothing whatever to indicate that the state required, as a consideration for funding bonds that might be questioned, the surrender of other unquestionable bonds.

Indeed, there is nothing in the act to indicate that the legislature regarded any of the bonds, the funding of which was therein provided for, as questionable obligations of the state; and, on the contrary, the only bonds which seem to have been so regarded—a very large amount of the "conversion bonds"—were "declared to be absolutely null and void." So that it is difficult to conceive how either the legislature or the bondholders could then have regarded the "consolidation act" as a proposition for the compromise of doubtful claims, and that the surrender of unquestioned bonds should be regarded as a consideration for the privilege of funding those that were questionable. When, therefore, a bondholder surrendered, for the purpose of funding, invalid bonds, he parted with something which was of no value, and could, therefore, constitute no consideration for a contract, and the bonds which he received in exchange therefor rest upon no better foundation than those which he surrendered.

We do not think the "Lost Bonds Case" (15 S. C., 224), relied upon by the appellants, is in point. In the first place, in that case there was no lack of power to make the contract; and, in the second place, it is very manifest that the arrangement there entered into was entered into as a whole, and

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as a compromise of *disputed claims. In fact, that case turned upon the question whether the arrangement there brought in question was intended as payment or satis-

faction, or whether it was intended as mere substitution of one class of bonds for the other, and it was held that the intention was payment, and not substitution.

We have carefully considered the various cases cited by appellants, decided by the Supreme Court of the United States since our decision in the Bond Debt Cases was rendered, and we are unable to discover any conflict between the points there decided and the principles established by such cases; and after a careful consideration of the whole matter, we can see no reason why the former decision of this court should be overruled.

The judgment of this court is, that the judgment of the Circuit Court, in each of the cases above stated, be affirmed.

[Writ of error dismissed, De Saussure v. Gaillard, 127 U. S. 216, 8 Sup. Ct. 1053, 32 L. Ed. 125.]

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21 S. C. 583

IVY v. CASTON.

DEVRIES & CO. v. SAME.

(April Term, 1884.)

[1. *Attachment* ⟸97.]

Where the affidavit upon which an attachment is issued by a clerk of court or Circuit judge positively alleges a mortgage given by the debtor to another, and contains a statement of belief, resting upon hearsay, inferences, and conjecture, that there was intent to defraud, but makes no positive averment founded on sufficient facts as to the intent and purpose of this mortgage—the attachment should be dissolved, on motion, for irregularity.

[Ed. Note.—Cited in Myers v. Whiteheart, 24 S. C. 202; Kerchner & Calder Bros. v. McCormac, 25 S. C. 465; Monday v. Elmore, 27 S. C. 131, 3 S. E. 65; Baum v. Bell, 28 S. C. 209, 5 S. E. 485; Wando Phosphate Co. v. Rosenberg, 31 S. C. 307, 9 S. E. 969.

For other cases, see Attachment, Cent. Dig. § 249; Dec. Dig. ⟸97.]

[2. *Attachment* ⟸41.]

Quere: Is a mortgage a disposition of property within the meaning of the attachment law?

[Ed. Note.—Cited in Tabb, etc., Co. v. Gelzer, 43 S. C. 347, 21 S. E. 261; Brown v. Bank of Sumter, 55 S. C. 78, 32 S. E. 816.

For other cases, see Attachment, Cent. Dig. § 107; Dec. Dig. ⟸41.]

[3. *Attachment* ⟸250.]

Whether an attachment has been improvidently issued or not involves a question more of fact than of law.

[Ed. Note.—Cited in Monday v. Elmore, 27 S. C. 129, 3 S. E. 65; Sease v. Dobson, 33 S. C. 237, 11 S. E. 728.

For other cases, see Attachment, Cent. Dig. §§ 877–889, 893, 895, 897; Dec. Dig. ⟸250.]

Before Fraser, J., York, November, 1883.

These were motions to dissolve attachments issued, the one by the order of Judge Witherspoon, of the sixth Circuit, in the case of William Devries & Co. against J. P. Caston; and the other by the clerk of court in the case of J. M. Ivy against the same defendant. Both were levied in September, 1883.

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*The affidavit in the Ivy case upon which the attachment issued was made by J. J. Waters, Esq., and was as follows:

I. That a cause of action exists against the defendant and in favor of the plaintiff, to wit (the action being now pending and deponent being one of plaintiff's attorneys): (1.) Plaintiff is the holder of a note of which the following is a copy, the original signature being in the handwriting of the defendant: $1,377^{61}/_{100}$ Rock Hill, S. C., Sept. 8, 1883.

One day after date I promise to pay to the order of J. M. Ivy & Co. thirteen hundred and seventy-seven 61–100 dollars, with interest from date until paid, at ten per cent. per annum, for value received.

(Signed) J. P. Caston.

(2.) W. G. Reid & Co., at defendant's request, sold merchandise to him amounting to one hundred and sixty-three 60–100 dollars, which account is now due, and the same has been duly assigned to the plaintiff, everything stated with reference to this account being based upon information and belief growing out of communications had with W. G. Reid and the plaintiff.

II. That the defendant has recently executed a mortgage upon his stock of goods at Rock Hill to one S. K. Marks, of Chester, S. C., in the sum of ten thousand dollars, to wit, on April 30, 1883, which mortgage this deponent believes to be fraudulent and made to dispose of his said stock of goods with intent to defeat, hinder, delay, and defraud his creditors, and among them the plaintiff. Deponent states his grounds of belief as follows: 1. The said S. K. Marks is the keeper of a small furniture store in the town of Chester, and cannot now be worth, and could not on April 30, 1883, judging from his surroundings, have been worth near the sum of ten thousand dollars. 2. That S. K. Marks is a relative of the said defendant, and during the past year there has been no apparent change in the extent of his business. 3. After allowing for the defendant's indebtedness outside and known to the deponent and heard of, including the claims of the plaintiff, deponent does not believe that the said defendant, judging from the character and extent of his business at Rock Hill, where deponent resides, can be indebted to the said S. K. Marks, or any other person or persons, in any such sum as ten thousand dollars, or even the half of said sum; and that during the past year there has been no apparent change in the extent of his business.

Wherefore deponent prays for a warrant of attachment against the property of defendant in behalf of the plaintiff.

The affidavit in the case of Devries & Co.

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against Caston, upon *which the attachment

was issued, was made by G. W. S. Hart, Esq., and was as follows:

1. That he is one of the attorneys (Hart & Hart) for plaintiffs in above entitled action, and that plaintiffs are not residents of the state of South Carolina, but do business in the city of Baltimore, state of Maryland.

2. That plaintiffs have two causes of action against the defendant, which defendant has admitted to deponent, and which plaintiffs have set forth in their sworn complaint, hereto annexed.

3. That deponent, on the 31st day of August last past, went over from Yorkville to Rock Hill, S. C., where defendant does business, for the purpose of requesting defendant to pay, or to secure the payment of, the two notes described in the said complaint. That deponent did so request defendant, and defendant averred his inability to pay at said time, and stated that his stock of merchandise, etc., was already under mortgage for over ten thousand dollars. That deponent, on his return to Yorkville, proceeded to examine the public records of York county, and there found recorded in book "AAA," pp. 272, 273, a mortgage to S. K. Marks, of Chester county, S. C. That the copy mortgage hereto annexed is a true copy of said mortgage as recorded. That since his said return from Rock Hill, deponent has made inquiry as to the reputed worth of said S. K. Marks, whom deponent knows to be the keeper of a small furniture store in Chester, S. C.; and from said inquiries, and such personal knowledge as deponent had and has, deponent was strengthened in his belief, and does now verily believe, that said S. K. Marks is not, and was not at the time of the execution of said mortgage, worth so much as five thousand dollars, estimating therein any and every species of property of which the said S. K. Marks is now or was then possessed; and, therefore, that James P. Caston could not have been indebted to said S. K. Marks in any such sum as ten thousand dollars.

4. That from the terms of said mortgage, and the matters and things hereinbefore recited, deponent was led to believe, and does verily believe, that said mortgage was executed by the said James P. Caston to the said S. K. Marks (a relative, as deponent is informed and believes) with the intent so to dispose of the property so mortgaged as to defeat, hinder, delay, and defraud the creditors, and among them the plaintiffs above named, of him, the said James P. Caston.

5. That the books of the county auditor for York county show that James P. Caston has returned for taxation real estate valued at twelve hundred and fifty dollars, and personal estate valued at fourteen hundred and

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seventy-five dollars. That the public *records show that his real estate is under mortgage to secure the payment of ten hundred and eighteen dollars.

Motions were made by defendant to set these attachments aside because both irregularly and improvidently issued. The affidavits relating to the second ground of the motions need not be stated. The Circuit judge overruled both grounds of the motion, saying as to the first: "If the matter were before me on an application for a warrant of attachment, I would have some doubt as to the sufficiency of the affidavits on which the warrant in the case of J. M. Ivy was issued; but I am not willing to disturb the conclusion of the clerk that the prima facie evidence of fraud is sufficient in the case of James M. Ivy. The additional facts stated in the affidavit on which the warrant was issued in the case of Wm. Devries & Co. are clearly sufficient for this purpose."

The defendant appealed in both cases upon the grounds following:

1. For error in not holding that in each of the above cases the warrant of attachment should be vacated upon the ground that the affidavits upon which they were based did not set forth a cause of action in favor of the plaintiffs against the defendant, and did not specify the amount of the claim and the grounds thereof.

2. Because the affidavit on which the warrant of attachment in the case of James M. Ivy was based should have been made by the said James M. Ivy instead of by his attorney.

3. Because it does not appear from the facts stated in either of the affidavits in above cases that the defendant assigned, or disposed of, or removed, or was about to remove, the property mentioned in the mortgage to S. K. Marks, or with intent to defraud his creditors.

4. Because said attachments were not issued in conformity with the provisions and requirements of section 250 of the code of procedure in this state.

5. Because his honor, it is respectfully submitted, erred in holding that the mortgage executed to S. K. Marks by the defendant was such an assignment or disposal of the property as is meant by the said attachment law.

6. Because said mortgage was satisfied

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and so marked several *months before said attachments were issued, and was not in existence at the date of said issuing.

7. For error in not holding that said attachments were void.

8. Because the affidavits herein referred to were not in compliance with the provisions and requirements of the said attachment act, and his honor erred in holding that said defects could be cured by subsequent affidavits, and in not holding that said affidavits were fatally irregular and defective.

9. That his honor errer in holding that

the facts of the case justified the issuing the warrants of attachment in above cases.

Messrs. Wilson & Wilson, for appellant.

Messrs. C. E. Spencer and Hart & Hart, contra.

November 14, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Motions were made in the above cases at chambers, before his honor Judge Fraser, in November, 1883, to discharge the attachments therein. The motions were made on two grounds First, for irregularity, the affidavits on which each was based being alleged to be insufficient. Second, that the warrants were improvidently issued, because the facts stated in the affidavits were untrue. Judge Fraser dismissed the motion in each case with $10 costs. The defendant has appealed, assigning error to the Circuit judge in holding the affidavits sufficient, and the warrants, therefore, regular; and also in holding that the facts alleged had been sustained; in other words, in holding that the warrants had neither been irregularly nor improvidently issued.

The remedy by attachment for the collection of a debt, though not strictly a common law proceeding, is yet of ancient origin, and has been incorporated into the legal systems of most countries where the rights of creditors are at all regarded. It has been engrafted by statute in some form upon the laws of perhaps all of our states. While no doubt it is a proceeding necessary to trade and commerce, yet it is a severe and somewhat harsh remedy, and should not be ex-

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tended beyond its prescribed limits. *In our state its foundation is an affidavit, in which must be contained the conditions specified in the act, to wit, that a cause of action exists against the defendant, specifying the amount of the claim, * * * and that the defendant "has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete any of his property with intent to defraud his creditors."

If such affidavit be not made, or if either of these conditions be wanting in the affidavit made, and this appears upon the face of the proceedings, it would not be regular to issue the warrant; and if, notwithstanding these defects, it should be issued, it may be dissolved on motion, on the ground of irregularity. This, of course, refers to cases where the attachment is sought on the ground of disposition of property, &c., &c. So, too, if the statements contained in the affidavit, which, if true, would be sufficient to sustain the warrant, should afterwards be made to appear by counter-affidavits to be untrue, the attachment may be dissolved on the ground that it has been improvidently issued. These attachments, as has been said above, are assailed here upon both of the grounds mentioned, to wit, because both irregularly and improvidently issued. The first was issued by the clerk of the court and the other by the judge of the Circuit, and each upon the affidavit of the attorney of the plaintiff. These affidavits will be found in the statement of the case.

We have three cases in our recent reports, in which the requirements of affidavits in attachment proceedings have been discussed and adjudicated. Smith & Melton v. Walker, 6 S. C., 169; Brown v. Morris, 10 S. C., 469; and Claussen v. Fultz, 13 S. C., 478. When the cases before the court are examined under the light of these cases just cited, we are constrained to the conclusion that the Circuit judge erred in holding the affidavits sufficient, and in refusing defendant's motions.

In Smith & Melton v. Walker, it was said, in substance, that where the attachment is sought upon the ground that the debtor has assigned, disposed of, or secreted his property, or is about to do so, the affidavit must not be founded simply upon information and belief, but it must state the facts upon which this belief is based.

In Brown v. Morris, where the plaintiff had attempted to conform to this rule, at least in form, by stating the facts upon

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which *he relied, it was held that in addition to the statements of the facts, and the sources from which the information is derived, the evidence presented in support thereof should be of such a character as would in an action at law prima facie establish the facts alleged, the court saying, "that in no other way than in such sense and by such means, can the requisite facts be made to appear to the judge or other proper officer before whom the motion is made." And in Claussen v. Fultz, where the attachment was obtained upon an affidavit in which deponent stated upon information and belief, that the defendant was disposing of his property and effects with intent to defraud his creditors, and that he was running his business as agent for that purpose, the court held that such affidavit was insufficient, and that the plaintiff should go further and "show an actual disposition of the property made or intended, with intent to defraud his creditors."

Now the only fact found in the affidavits here, which stands free from mere information and belief, and which is sustained by a positive averment of the deponent, is the fact that the debtor, previous to the issuing of the attachment, had executed a mortgage of his property to one Marks, a relative. The affiant in each case, it is true, after stating this fact, does go on to say that from inquiry and such information as could be obtained,

he does not believe that Caston could be indebted to Marks in the sum mentioned in the mortgage, and that said mortgage was executed with the intent to defraud the creditors of Caston.

Now the execution of the mortgage would not in itself be sufficient to satisfy the statute as a ground for the attachment; because it does not follow in every case that the execution of a mortgage is intended to defraud creditors. Mortgages are legitimate transactions and are of very frequent occurrence. There must be something more than this—something more than a disposition of the property even—there must be a disposition made or intended, with intent to defraud creditors; and the affidavit should contain facts bearing upon both of these conditions. Even assuming that the execution of the mortgage here might satisfy the first condition, i. e., a disposition of the defendant's property (which it is not necessary now to determine), yet the affidavits are wanting in the statement of facts to satisfy the second,

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viz., the *intent to defraud creditors. There is a statement of belief on the part of the affiants, but this belief when analyzed seems to rest more upon hearsay, inferences, and conjecture, than facts within the knowledge of the affiants, capable of being testified to by them.

Of course, we decide nothing as to the character and intent of this mortgage. It may or not have been fraudulent in purpose. That is not the question before us. We are considering the sufficiency of the affidavits to sustain the attachments, and as the weight of these consists in the statement that the debtor had executed a mortgage of his property previous to the issuing of the attachments, with no positive averment founded on sufficient facts as to the intent and purpose of this mortgage, we think, under the principles laid down in the cases cited supra, that said attachments should have been dissolved for irregularity.

Having reached this conclusion upon the first ground of appeal, it is unnecessary to discuss the second, and especially as that involves more a question of fact than of law.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

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BUCK, HEFFLEBOWER & NEER v. MARTIN.

(April Term, 1884.)

[Reported and Annotated in 53 Am. Rep. 702.]

[1. *Partition* ⇐85.]

Where a widowed mother erected a dwelling house and out-buildings upon an unimproved tract of land belonging to herself and her four infant children, in which house they all lived together, she should be allowed in partition the portion of the tract on which the improvements were erected, or, in case of sale, the increased value by reason of such improvements.

[Ed. Note.—Cited in Johnson v. Pelot, 24 S. C. 265, 58 Am. Rep. 253; Sutton v. Sutton, 26 S. C. 39, 1 S. E. 19; Annely v. De Saussure, 26 S. C. 505, 2 S. E. 490, 4 Am. St. Rep. 725; Charleston, C. & C. R. R. Co. v. Leech, 35 S. C. 149, 14 S. E. 730; Shumate v. Harbin, 35 S. C. 528, 15 S. E. 270; Cain v. Cain, 53 S. C. 353, 31 S. E. 278, 69 Am. St. Rep. 863; Hall v. Boatwright, 58 S. C. 548, 36 S. E. 1001, 79 Am. St. Rep. 864; Trimmier v. Darden, 61 S. C. 235, 39 S. E. 373; Vaughan v. Langford, 81 S. C. 288, 62 S. E. 316, 128 Am. St. Rep. 912.

For other cases, see Partition, Cent. Dig. § 237; Dec. Dig. ⇐85.]

[2. *Partition* ⇐85.]

In giving the improving tenant the increased value by reason of the improvements, such increased value must be ascertained after sale, and determined with reference to the purchase money of the entire property.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 236–245; Dec. Dig. ⇐85.]

[3. *Tenancy in Common* ⇐28.]

Infant children living with their mother on the common property have no just claim for rents and profits that were consumed by themselves.

[Ed. Note.—Cited in Rhode v. Tuten, 34 S. C. 502, 13 S. E. 676; Shumate v. Harbin, 35 S. C. 528, 529, 15 S. E. 270.

For other cases, see Tenancy in Common, Cent. Dig. § 76; Dec. Dig. ⇐28.]

Before Hudson, J., Abbeville, February, 1884.

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*The opinion fully states the case.

Mr. Eugene B. Gary, for appellants.

Messrs. Noble & Noble, contra.

November 14, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. In January, 1865, the late William Smith made a deed of gift of a tract of land (525 acres) to the widow and children of his deceased son, Thomas W., viz., the widow, Edna F., and four children, Mary E., Samuel J., Jennie F., and Thomas W. Smith. In June, 1865, the widow Edna intermarried with Benj. M. Martin, and the family went into possession of the land. There were no improvements on the place, and Mrs. Martin and her husband erected a dwelling house and necessary out-buildings, which it is alleged enhanced its value about $300. In 1876, Mary E., one of the children, intermarried with Lawrence K. Dantzler, and on March 28, 1881, they conveyed the interest of the said Mary E., one-fifth, to Richey & Miller, and the same was sold as their property under execution against them, March, 1883, and purchased by the plaintiffs, who took sheriff's title, and instituted these proceedings for partition of the land.

B. M. Martin and his wife Edna both answered, that they had put permanent improvements upon the land, paid taxes therefor, and boarded, clothed, and educated the

children, for which they were entitled to compensation, amounting in the aggregate to more than the entire value of the land. The plaintiffs replied, charging waste, denying the right to compensation for improvements, claiming rents and profits on their fifth, and pleading the statute of limitations, &c.

It was referred to the master, M. L. Bonham, jr., to hear and determine the issues. He took testimony and made report, finding as matter of fact that the improvements enhanced the value of the land $300, and holding that the same should be allowed to Martin and wife; that Martin paid the taxes, and that he should have refunded to him what he had paid within the last six years, viz., $96.00; and that the plaintiffs

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were not entitled *to rents and profits except for the year 1883, but were entitled to partition of the land. On exceptions to the master's report, the cause came on to be heard by Judge Hudson, who held that Martin and wife were not entitled to compensation for the improvements upon the common property, and ordered a writ of partition in the usual form to divide the land into five equal parts, recommitting the report as to the taxes paid.

From this decree Martin and wife appealed to this court upon the following exceptions: "1. Because his honor, the presiding judge, erred in sustaining plaintiffs' first exception. 2. Because the judge erred in failing to allow Mrs. Edna F. Martin compensation for improvements erected on the land described in the complaint. 3. Because the judge erred in signing a writ for the partition of the land in five equal portions."

We agree entirely with what Chancellor Dargan said in a note to Williman v. Holmes, 4 Rich. Eq., 476: "The question whether compensation is to be allowed to a tenant in common, who has made improvements upon the common estate, as against his co-tenant, has been attended with much difficulty. Not to allow it, when the improvements are valuable, in many cases is highly inequitable; yet no safe rule of universal application can be laid down upon the subject. For in some cases, though the improvements may add to the permanent value of the estate, it might be undesirable, inconvenient, or even ruinous, for the co-tenant, who has not concurred in the improvements, to meet his share of the expense," &c. There is no doubt about the general rule. Our cases have settled the question against the right of an improving tenant-in-common to the exclusive benefit of his improvements. Thurston v. Dickinson, 2 Rich. Eq., 317 [46 Am. Dec. 56]; Dellet v. Whitner, Cheves Eq., 223; Hancock v. Day, McMull. Eq., 69 [36 Am. Dec. 293]; Thompson v. Bostick, McMul. Eq., 79.

To this rule however, there are well established exceptions, one of which is that where improvements are made by a tenant in common, who has reason to believe, and does honestly believe, that he has fee simple title in severalty to the land so improved. In such case the tenant is allowed compensation, and if practicable, in partition the part of the land so improved will be assigned to the tenant who made the improvements, without

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charg*ing him with the value of said improvements; that is to say, the partition will be made without any reference to the improvements. Williman v. Holmes, supra; Scaife v. Thomson, 15 S. C., 337; Annely v. DeSaussure, 17 Id., 391; Johnson v. Harrelson, 18 Id., 604.

In this last case the principle is announced by the Chief Justice as follows: "As a general rule, and in ordinary cases, where the co-tenants are all known and easy of access, and one moves forward without consultation with the others, and erects improvements of his own accord whether desired or not by the others, he does so at his own risk, and such improvements will not be allowed. * * * Where, however, improvements have been erected by a co-tenant, which add value to the common estate, and erected under circumstances which would make it a great and obvious hardship upon the improving tenant to deprive him entirely of the benefit of such improvements, throwing their whole value into the common estate for partition, the disposition of the court of equity has always been to give the improving tenant the benefit thereof as far as consistent with the equity of his co-tenants. 1 Story Eq. Jur., § 655." It seems to us that the improvements in this case were erected by the mother and her husband, "under circumstances which would make it a great and obvious hardship upon them to be deprived of the benefit of such improvements, throwing their whole value into the common estate."

We do not regard the rule that the improving co-tenant is not entitled to compensation, as applying to the case where all the co-tenants concur in the improvements. From the peculiar circumstances of this case, we must regard it as belonging to that class of cases. It is true that the children were minors at the time the improvements were made and could not consent for themselves, but they were with their mother, and the family needed a home—indeed, it was absolutely necessary. If, at the time, an application had been made to the court for leave to build a little cottage on the common property as a shelter for the family, can there be a doubt that such application would have been granted by the court, acting for the children? Ex parte Palmer, 2 Hill Eq., 218; Corbett v.

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Laurens, 5 Rich. Eq., 316. *Then we regard that done which should have been done. It was not the legal duty of the mother or her husband to support the children without the use of their shares. The possession of the

mother was also the possession of the children living with her, and of course they have no just claim for rents and profits which they consumed themselves. The plaintiffs have no higher rights than Mrs. Dantzler transferred to Miller & Richey. We think the facts require us to consider the improvements as made with the concurrence of all the co-tenants, through the court acting for them.

In this view, what equity could Mrs. Dantzler or her vendee have as to more than one-fifth of the land without regard to the improvements, to which she had in no way contributed? Possibly the land may be somewhat worn by cultivation, but that was the result of supporting and rearing the family of which she was a member, and of this she certainly had no right to complain. We think this is an exceptional case, and that under the circumstances Mrs. Martin ought to have the enhanced value the improvements have given to the land, and that the same may be allowed to her without the slightest injustice to Mrs. Dantzler or any one who stands in her place by purchase of her share; that the writ of partition be so framed that the commissioners should assign, if practicable, to Mrs. Martin the portion improved, without charging her with the value of the improvements; or if the land must be sold, that the amount added to its value by the improvements shall be allowed her out of the proceeds of sale, before an equal division of the same among her and the children or those now owning their shares, the amount added to the value by the improvements to be ascertained after the sale by the master fixing the ratable proportions of their value to that of the entire tract of land, considered only in reference to the purchase money of the whole. Hand v. S. & C. R. R. Co., 17 S. C., 220.

The judgment of this court is, that the judgment of the Circuit Court, subject to the modifications herein indicated, be affirmed.

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NOTES OF CAUSES

Decided during the period comprised in this Volume, and not reported in full.

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*No. 1574. STATE v. JENKINS. April Term, 1884.

[*Criminal Law* ⊂⊃763, 764, 1144.]

Defendant was indicted for cow-stealing. The prosecutor missed his cow one morning. Following its tracks, he found it seven miles distant at the ferry opposite the town of Beaufort, in the possession of defendant, who was then butchering it. Prosecutor claimed it as his property. The defendant said he had bought it from a man, whose name was unknown; but if the cow belonged to the prosecutor, the defendant would pay for it. There was other evidence in the case that defendant's mother had agreed the day before to buy a cow from one F.; that on this morning, F. had come to town and reported the cow at the ferry, and that she had then sent her son, the defendant, across the river to butcher the cow. In argument, the defendant's counsel stated that such transactions as this might be careless, but there seemed to be no remedy.

In charging the jury, Judge Pressley said: "Is that the way an honest man would act? * * * Do honest people act so?" And again: "If that is the way business is done in Beaufort, then the sooner its morals be corrected, the better. The counsel suggests there is no remedy for this kind of business. I know a remedy, and a very good one; it is the verdict of the jury rendered in such cases—that is a legal and proper remedy." Defendant was convicted. *Held*, on appeal, that the natural and almost inevitable effect of this language was to influence the jury in reaching a conclusion by conveying to them the impressions which the testimony left upon the mind of the judge; and, therefore, that the Circuit judge transcended the limits prescribed for him by article IV., § 26, of the constitution.

The judge's charge was not given in the case, and the parts complained of were stated only in the exceptions. To the service

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*of exceptions, accepted by the solicitor, he added: "And I agree to this as a correct statement as corrected by the judge." The court say: "We take this occasion to say that the practice adopted in this case of incorporating in the exceptions only such portions of the judge's charge as it is desired to review is not a safe one for the appellant, and should be avoided. For unless it appears in the 'Case,' or otherwise than in the exceptions merely, that the judge charged, or refused to charge, the points excepted to, we cannot assume that any such points were in fact charged or refused. * * * In this case, the language of the acceptance of service of the exceptions affords the evidence that the judge did charge as is therein imputed to him. We have, therefore, felt at liberty to consider the exceptions in this case, which otherwise we could not properly have done."

[Ed. Note.—Cited in State v. Anderson, 26 S. C. 602, 2 S. E. 699; State v. Addy, 28 S. C. 13, 4 S. E. 814; State v. Howell, 28 S. C. 254, 5 S. E. 617; State v. Wyse, 32 S. C. 54, 10 S. E. 612; Norris v. Clinkscales, 47 S. C. 513, 25 S. E. 797; Sloan & Son v. Courtenay, 54 S. C. 345, 32 S. E. 431.

For other cases, see Criminal Law, Cent. Dig. §§ 1731, 2736–2764, 2766–2771, 2774–2781, 2901, 3016–3037, 2940; Dec. Dig. ⊂⊃763, 764, 1144.]

Judgment reversed. Opinion by Mr. Justice McIVER, June 16, 1884. W. J. Verdier, for appellant. F. H. Gantt, solicitor, contra.

No. 1575. STATE v. JONES. April Term, 1884. Several parties were indicted for murder, but only Jones, Allen, and Hutson were arrested; and they were put upon trial at Hampton C. H., before Judge Cothran, at June term, 1883, and were convicted of manslaughter. From the judgment pronounced in the case, Allen and Hutson appealed. *Held*—

[1. *Criminal Law* ⊂⊃756.]

That in reading to the jury his notes of testimony, the Circuit judge did not violate the provisions of article IV., section 26, of the constitution. State v. White, 15 S. C., 392.

[Ed. Note.—Cited in Norris v. Clinkscales, 47 S. C. 516, 25 S. E. 797.

For other cases, see Criminal Law, Cent. Dig. § 1766; Dec. Dig. ⊂⊃756.]

[2. *Criminal Law* ⊂⊃841.]

If the Circuit judge misstates the testimony in charging the jury, the proper time and place to correct such misstatements are at the trial, or at most by a motion for new trial, when they would be corrected. Exceptions alleging misstatements in a charge present no errors of law.

[Ed. Note.—Cited in State v. Davis, 27 S. C. 613, 4 S. E. 567; Bowen v. Carolina, C. G. & C. R. Co., 34 S. C. 235, 13 S. E. 421; State v.

Milling, 35 S. C. 27, 14 S. E. 284; Rumph v. Hiott, 35 S. C. 459, 15 S. E. 235; Davis v. Elmore, 40 S. C. 537, 19 S. E. 204; Simmons Hardware Co. v. Bank of Greenwood, 41 S. C. 190, 19 S. E. 502, 44 Am. St. Rep. 700; Whaley v. Bartlett, 42 S. C. 474, 20 S. E. 745.

For other cases, see Criminal Law, Cent. Dig. § 2022; Dec. Dig. ⟸841.]

[3. *Homicide* ⟸340.]

The judge charged the jury "that the jury could not find those charged as aiding and abetting guilty of manslaughter only if the principal be found guilty of murder." Inasmuch as defendants were found guilty of manslaughter only, an exception alleging error in this portion of the charge raises a purely speculative inquiry, in which courts of justice ought not to indulge.

[Ed. Note.—Cited in State v. Richardson, 47 S. C. 23, 24 S. E. 1028.

For other cases, see Homicide, Cent. Dig. §§ 715–717, 720; Dec. Dig. ⟸340.]

Judgment affirmed.

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Opinion by Mr. Justice McIVER, June *16, 1884. J. P. Youmans, for appellant. F. H. Gantt, solicitor, contra.

No. 1580. STATE v. WHITE. April Term, 1884. Defendant was indicted for assault and battery with intent to kill and murder, and for aggravated assault and battery, and was tried in Beaufort county, before Judge Cothran, at June term, 1883. The jury found a verdict of "guilty." Defendant appealed:

[1. *Homicide* ⟸89.]

The Circuit judge charged the jury "that perhaps the best test by which to determine the first grade of the offence, assault and battery with intent to kill and murder, would be to apply the testimony which they had heard to the case as if an actual homicide had occurred. And if from the testimony they would be satisfied beyond a reasonable doubt that if death had ensued in this case the defendant would be guilty of murder, then it would be their duty to find him guilty of assault and battery with intent to to kill and murder." *Held*, that this charge was in exact conformity to the law, and certainly favorable for the defendant.

[Ed. Note.—Cited in State v. Williamson, 65 S. C. 250, 43 S. E. 671; State v. Du Rant, 87 S. C. 535, 70 S. E. 306.

For other cases, see Homicide, Cent. Dig. § 118; Dec. Dig. ⟸89.]

[2. *Criminal Law* ⟸1038.]

In failing to go further and instruct the jury as to the different grades of homicide, no error was committed which can be here corrected, his attention not having been called at the time to such omission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. ⟸1038.]

Judgment affirmed. Opinion by Mr. Justice McGOWAN, June 26, 1884. W. J. Verdier, for appellant. F. H. Gantt, solicitor, contra.

No. 1588. ROOKHART v. DEAN. April Term, 1884. This was an action by plaintiff against one Alexander to recover the share of crop made by plaintiff on Alexander's farm, and after the death of Alexander revived against Dean et al., his executors. Before action brought, a settlement had been made by a trial justice (but not the nearest) between plaintiff and Alexander. Plaintiff at first objected to a settlement being made, until told by the trial justice that if it was not fairly made, the plaintiff could have his remedy at law. The settlement was then made by this officer, the plaintiff assenting to all the items, and saying that he did not recollect any others, all disputes being resolved in his favor by Alexander's direction,

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and both parties seemed *satisfied with the result. A balance in favor of Alexander was paid out of plaintiff's share of the corn, plaintiff carrying off the remainder and receiving pay for his part of the cotton seed. The referee, to whom the cause was referred, disallowed the settlement, and found in favor of plaintiff. On exceptions to this report, including exceptions to the admissibility of evidence by plaintiff, Judge Witherspoon overruled the report and gave judgment for defendants. *Held*, on appeal—

[1. *Witnesses* ⟸159.]

That plaintiff's testimony was not incompetent under section 400 of the code, as he only testified to acts of his own with which he in no way, by his own testimony, attempted to connect the deceased—such connection being made by another witness.

[Ed. Note.—Cited in Foggette v. Gaffney, 33 S. C. 311, 12 S. E. 260; Sullivan v. Latimer, 38 S. C. 166, 17 S. E. 701; Dyson v. Jones, 65 S. C. 314, 43 S. E. 667.

For other cases, see Witnesses, Cent. Dig. §§ 629, 664, 666–669, 671–682; Dec. Dig. ⟸159.]

[2. *Appeal and Error* ⟸1003.]

That the Circuit judge having found the settlement to have been full, fair, and complete, such finding not being without evidence to support it, or opposed to the weight of the testimony, must be affirmed; and it therefore makes little difference whether the settlement was made by the proper officer, or by a private individual.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938–3943; Dec. Dig. ⟸1003.]

Judgment affirmed. Opinion by Mr. Chief Justice SIMPSON, July 1, 1884. Wofford & Jennings, for appellant. Bobo & Carlisle, contra.

No. 1590. STATE ex rel. MAXWELL v. LEWIS. April Term, 1884.

[*Infants* ⊂⊃94.]

The relator, alleging infancy and non-service of process, applied to the Circuit Court for a writ of certiorari directed to Whaley, a trial justice, requiring him to certify the proceedings in the case of Lewis v. Maxwell, heard and decided by him October 27, 1883. The return by the trial justice set forth all the proceedings, which showed a service by the trial justice upon the defendant in that case of the summons and complaint, an appearance by the defendant, and that there was no plea of infancy, the trial justice stating "that no plea of minority was ever made before me in the oral answer or in evidence." Upon hearing this return, the court, Witherspoon, J., dismissed the proceedings, with costs. An appeal from this judgment was dismissed, the court saying that the question must be determined by an inspection of the return and the face of the proceedings, and they failed to show the relator's infancy, and did show his voluntary appearance, even

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though there had been an irregular and *perhaps unwarranted service.

[Ed. Note.—Cited in State ex rel. Nesbitt v. Marshall, 24 S. C. 508, 510; Shumate v. Harbin, 35 S. C. 527, 15 S. E. 270; Williams v. Garvin, 51 S. C. 400, 29 S. E. 1.

For other cases, see Infants, Cent. Dig. §§ 289, 290; Dec. Dig. ⊂⊃94.]

Opinion by Mr. Chief Justice SIMPSON, July 3, 1884. Bowen & Lee, for appellant. G. M. Trenholm, contra.

No. 1593. EPSTEIN & BRO. v. BROWN. April Term, 1884. This was an action to recover $457.88 damages for an alleged unlawful taking and carrying away by defendant of certain personal property of the plaintiffs, of the value of $228.94. Verdict for plaintiffs, $400; and defendant appealed. *Held*—

[1. *Trover and Conversion* ⊂⊃60.]

That in charging the jury that "they were allowed to punish a wrong-doer and deter others from like conduct, and that the jury might find vindictive damages in this case if they found there was wilful invasion of the plaintiff's right of property," the Circuit judge (Wallace) correctly charged a principle of law applicable to such cases.

[Ed. Note.—Cited in Hall v. South Carolina Ry. Co., 28 S. C. 267, 5 S. E. 623; Duckett v. Pool, 34 S. C. 325, 13 S. E. 542.

For other cases, see Trover and Conversion, Cent. Dig. §§ 281, 282; Dec. Dig. ⊂⊃60.]

[2. *Appeal and Error* ⊂⊃110.]

A refusal to grant a new trial, which was moved upon the ground that the evidence did not sustain a verdict including vindictive damages, is not appealable to this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 741; Dec. Dig. ⊂⊃110.]

Judgment affirmed. Opinion by Mr. Chief Justice SIMPSON, July 7, 1884. J. J. Brown, for appellant. F. H. Gantt, contra.

No. 1594. FITZSIMONS v. GUANAHANI COMPANY. April Term, 1884. This was an action by plaintiff to recover from defendant $750 for analyzing 1,500 tons of guano at Port Royal, at defendant's request, the complaint alleging that plaintiff was then inspector of guanos for Richmond county, Georgia, under the laws of Georgia; that the compensation provided by the laws of Georgia for such services was fifty cents a ton; that plaintiff's services were reasonably worth $750; and that no part thereof had been paid. Defendant interposed an oral demurrer at the trial, that the complaint did not state facts sufficient to constitute a cause of action. Judge Wallace overruled the demurrer and defendant appealed. *Held*—

[1. *Appeal and Error* ⊂⊃1099.]

That this case was not concluded by the former decision. 16 S. C., 192. That the former case only decided that under the pleadings there plaintiff should have been confined to the cause of action stated in his complaint, and the Circuit judge there having held otherwise, his ruling was reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370–4379; Dec. Dig. ⊂⊃1099.]

[2. *Contracts* ⊂⊃332.]

That the complaint here does state facts

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sufficient to consti*tute a cause of action.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1615–1639; Dec. Dig. ⊂⊃332.]

Judgment affirmed. Opinion by Mr. Chief Justice SIMPSON, July 7, 1884. William Elliott, for appellant. W. J. Verdier, contra.

[For prior opinion, see 16 S. C. 192. For subsequent opinion, see 23 S. C. 603.]

No. 1599. ESTES v. WOODS. April Term, 1884. This was an action commenced May 12, 1883, on a sealed note, bearing date April 8, 1875, and upon an alleged new promise, to wit, a letter written by defendant to plaintiff on January 29, 1882, in words following: "My family has been sick and the weather so bad that I could not come over and see you concerning that note you wrote me about. I am going to Columbia this week, and when I come back I will come over and see you and see what must be done concerning the same."

The Circuit judge (Fraser) charged the jury that if they were satisfied that this

letter was in reply to a letter received by defendant from plaintiff, and that in such letter of plaintiff the note sued on was sufficiently described to leave no doubt as to the particular debt intended, that then the letter of defendant was a sufficient acknowledgment of the debt to take it out of the operation of the statute of limitations. Verdict for plaintiff. *Held*—

[1. *Limitation of Actions* ⇐141.]

That the provision of section 131 of the code as to written acknowledgments has reference only to the evidence necessary to establish an acknowledgment or new promise, but does not change the pre-existing law as to what acknowledgments will continue a debt not barred, or what new promises will create a new contract.

[Ed. Note.—Cited in Hill v. Hill, 51 S. C. 141, 28 S. E. 309.

For other cases, see Limitation of Actions, Cent. Dig. § 574; Dec. Dig. ⇐141.]

[2. *Limitation of Actions* ⇐148.]

The note in this case was barred before the letter of January 29, 1882, was written, and such letter did not contain either an express promise to pay the old debt, or a clear and distinct admission of liability from which could be implied such a promise as would support an action. Therefore the Circuit judge erred in his charge to the jury.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 597–603; Dec. Dig. ⇐ 148.]

Judgment reversed. Opinion by Mr. Justice McGOWAN, August 13, 1884. W. A. Sanders, for appellant. S. P. Hamilton, contra.

No. 1605. McGOUGAN v. HALL. April Term, 1884. This was a case of chancery by certain legatees of William Hall, deceased, against the executor of the will and others. The following points were ruled:

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[1. *Judgment* ⇐714.]

*A decree of Chan. Carroll in this cause in 1866, construing the will, declaring the interest of the several parties, directing the executor to render an account of the "cotton and other visible personal estate," and that the life-tenants give bond for the forthcoming of the property at the termination of the life estate, was not an adjudication upon the accounts of the executor, and did not prevent further proceedings to that end.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1240, 1242, 1243; Dec. Dig. ⇐ 714.]

[2. *Executors and Administrators* ⇐503.]

Credit allowed without any voucher to sustain it, and not claimed in the account filed by the executor, overruled.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2154; Dec. Dig. ⇐503.]

[3. *Executors and Administrators* ⇐109.]

An executor should not be allowed fees paid a surveyor for designating the lines between several devises described in the will by metes and bounds.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 438; Dec. Dig. ⇐109.]

[4. *Appeal and Error* ⇐1022.]

A finding of fact by the master, concurred in by the Circuit judge, approved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⇐ 1022.]

[5. *Appeal and Error* ⇐203.]

No testimony is incompetent under section 400 of the code, if not objected to at the time when offered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1064; Dec. Dig. ⇐203.]

[6. *Executors and Administrators* ⇐266.]

Where an executor permitted all the assets of an estate to go into the hands of the life-tenants, without providing for debts outstanding, and then paid those debts with his own money, he is not entitled to interest on the amounts so paid.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1029; Dec. Dig. ⇐266.]

[7. *Appeal and Error* ⇐984.]

The Circuit judge having allowed commissions to an executor who had failed to make returns, this court will not interfere with the judge's discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3815, 3881–3888; Dec. Dig. ⇐984.]

[8. *Executors and Administrators* ⇐99.]

A legatee, at the time (1866) a married woman, is not liable for any part of a note given by the executor, and the widow to the attorney then representing them, this legatee's interest not being involved in the litigation on the side represented by such attorney. A surrender of property by the widow to the other parties, this legatee included, in consideration of the widow's release from her liability on this note, does not show an acknowledgment of liability by such legatee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 415, 417, 754; Dec. Dig. ⇐99.]

Judgment of Fraser, J., affirmed, and judgment of Pressley, J., with slight modification, also affirmed. Opinion by Mr. Justice McIVER, September 9, 1884. W. H. R. Workman and W. H. Lyles, for plaintiffs. J. T. Hay, contra.

No. 1606. BENBOW v. RICHARDSON. April Term, 1884. Order of non-suit being entered in action for the recovery of land, the costs were taxed by the clerk, and on

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appeal from this *taxation Judge Mackey

ruled that defendant was entitled only to $10, costs of motion. On appeal this ruling was reversed, the court holding—

[1. *Costs* ⇐4.]

That costs should be taxed under fee-bill of force when non-suit was ordered, and not under fee bill of force when the judgment was entered thereon; citing Kapp & Rothschild v. Loyns, 13 S. C., 288; Lewis v. Brown, 16 S. C., 58.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 2, 3, 109; Dec. Dig. ⇐4.]

[2. *Costs* ⇐48.]

That in case of a non-suit, the defendant is entitled to the same costs as where trial is had.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 209; Dec. Dig. ⇐48.]

[3. *Costs* ⇐277.]

Whether a plaintiff may bring a second action before the costs of the first are actually paid, reserved.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1048–1060; Dec. Dig. ⇐277.]

Opinion by Mr. Chief Justice SIMPSON, September 13, 1884. Moise & Huggins, for appellant. No counsel contra.

No. 1607. HILL v. RILEY. April Term, 1884.

[*Infants* ⇐30.]

The personal property of an intestate being in the hands of the administrator, and the real property having been partitioned under decree of the Probate Court (in 1873) and bonds given for the value of the lands assigned to parties in the cause, a minor daughter of intestate receipted in full for her share of the personalty, and also for her share of the real property, receiving therefor, after her majority, the note of her mother for the amount so receipted for. The bonds to the Probate Judge were then marked satisfied. This daughter seven years afterwards sued her mother on this note, but took a nonsuit, the statute of limitations being pleaded. She then brought this action for partition of these lands and for an account of the rents; or if the court held the partition valid, then for a foreclosure of the statutory lien. Judge Wallace dismissed the complaint. This court affirmed this judgment, approving the finding of master and Circuit judge that the note was received in payment; and holding that the subsequent acquiescence by plaintiff estopped her from questioning irregularities or want of jurisdiction in the Probate Court; and that if there were any lien in this case under the statute of 1791 ("which is by no means certain"), it had been discharged.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 41–49, 54, 55; Dec. Dig. ⇐30.]

Opinion by Mr. Chief Justice SIMPSON, September 13, 1884. S. C. Cason, for appellant. T. P. Cothran, contra.

REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT

OF

SOUTH CAROLINA

VOLUME XXII

CONTAINING CASES OF APRIL AND NOVEMBER TERMS, 1884

BY ROBERT W. SHAND

STATE REPORTER

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(22 S.Car.)

JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.

HON. WILLIAM D. SIMPSON.

ASSOCIATE JUSTICES.

HON. HENRY McIVER. HON. SAMUEL McGOWAN.

CIRCUIT JUDGES.

FIRST	CIRCUIT,	HON.	BENJAMIN C. PRESSLEY.
SECOND	"	"	ALFRED P. ALDRICH.
THIRD	"	"	THOMAS B. FRASER.
FOURTH	"	"	JOSHUA H. HUDSON.
FIFTH	"	"	JOSEPH B. KERSHAW.
SIXTH	"	"	ISAAC D. WITHERSPOON.
SEVENTH	"	"	WILLIAM H. WALLACE.
EIGHTH	"	"	JAMES S. COTHRAN.

ATTORNEY-GENERAL.

HON. CHAS. RICHARDSON MILES.

SOLICITORS.

1*st Circuit*—W. ST. J. JERVEY.	5*th Circuit*—R. G. BONHAM.
2*d Circuit*—F. H. GANTT.	6*th Circuit*—T. C. GASTON.[2]
3*d Circuit*—J. J. DARGAN.[1]	7*th Circuit*—D. R. DUNCAN.
4*th Circuit*—H. H. NEWTON.	8*th Circuit*—J. L. ORR.

CLERK OF THE SUPREME COURT.

A. M. BOOZER.

[1] Until November, 1884, when T. M. Gilland succeeded.
[2] Until November, 1884, when J. E. McDonald succeeded.

LIST OF ATTORNEYS

ENROLLED IN THE SUPREME COURT OF SOUTH CAROLINA DURING THE YEAR 1885

ALSTON, JOSEPH K.....Winnsboro.
ANDERSON, Z. B.....Sumter.
AUSTIN, WM.....Charleston.
BASS, W. L.....Kingstree.
BEACH, G. ALBERT.....Walterboro.
BRYANT, FERD. D.....Marion.
BUIST, JR., HENRY.....Charleston.
BUTLER, WM. ENSTON.....Charleston.
DANTZLER, C. G.....Orangeburg.
DANTZLER, M. O.....Orangeburg.
DARGAN, R. K.....Darlington.
DICKERSON, E. J.....Aiken.
EDWARDS, L. W.....Colleton.
EVANS, JUNIUS H.....Marion.
FEATHERSTON, C. C.....Anderson.
FITCH, W. M.....Charleston.
GREEN, JOHN T.....Darlington.
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HOLMAN, W. A.....Barnwell.
HUGHES, EDWARD W.....Charleston.
HUNT, C. J.....Laurens.
IRVINE, W. H.....Greenville.
JEFFERIES, J. C.....Gaffney City.
KEELS, JOHN R.....Sumter.
LANIER, JOHN B.....Edgefield.
LOFTON, RICHARD M.....Charleston.
MACFARLAN, ROBERT.....Cheraw.
MASSEY, SAM. F.....Fort Mill.
MCDOW, THOS. F.....Lancaster.
METTE, J. A.....Edgefield.
MOONEY, J. ALLENDER.....Greenville.
MORGAN, B. A.....Greenville.
NELSON, P. H.....Camden.
PARKER, JR., WM. HENRY.....Charleston.
REYNOLDS, T. J.....Beaufort.
RICE, JR., S. M.....Union.
RICHEY, W. R.....Abbeville.
SAWYER, E. J.....Bennettsville.
SEARSON, Z. A.....Yemassee.
STEVENSON, HAVILAND.....Aiken.
STUCKEY, A. B.....Darlington.
THOMSON, THOS. P.....Abbeville.
THRUSTON, GEO. B.....Greenville.
WASHINGTON, E. C.....Columbia.
WATSON, B. E.....Columbia.
WELBORN, JAMES C.....Rock Hill.
WHITTAKER, J. C.....Charleston.
WILLIAMS, JOHN C. P.....Ridgeway.
WINDLER, CORNELIUS L.....Camden.
WOODS, E. O.....Marion.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. WILLIAM D. SIMPSON, CHIEF JUSTICE.
HON. HENRY McIVER, ASSOCIATE JUSTICE.
HON. SAMUEL McGOWAN, " "

22 S. C. *1

*CALDWELL v. BENNETT.

(April Term, 1884.)

[1. *Trial* ⟸139.]

If there is any evidence tending to support the plaintiff's case, it is the province of the jury to determine its force and effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. ⟸ 139.]

[2. *Malicious Prosecution* ⟸71.]

In an action for malicious prosecution, there being evidence that the prosecution was ended, and circumstances proved which tended to show a want of probable cause (from which malice may be inferred), the Circuit judge properly refused a nonsuit.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 160–167; Dec. Dig. ⟸71.]

[3. *Malicious Prosecution* ⟸71.]

In actions for malicious prosecution, the jury should be instructed, as matter of law, as to what constitutes probable cause, and then it is for them to say, from a review of all the facts and circumstances proved to have been present to the mind of the prosecutor, at the time he commenced his prosecution, or the plaintiff, when he instituted his civil action, whether there was or was not probable cause for such proceeding.

[Ed. Note.—Cited in Taylor v. Dominick, 36 S. C. 376, 15 S. E. 591; Ashley v. Holman, 44 S. C. 165, 21 S. E. 624; McCall v. Alexander, 84 S. C. 189, 65 S. E. 1021.

For other cases, see Malicious Prosecution, Cent. Dig. § 161; Dec. Dig. ⟸71.]

[4. *Malicious Prosecution* ⟸32.]

In such cases malice may be inferred from the want of probable cause.

[Ed. Note.—Cited in Baker v. Hornick, 57 S. C. 227, 35 S. E. 524.

For other cases, see Malicious Prosecution, Cent. Dig. § 67; Dec. Dig. ⟸32.]

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*Before Wallace, J., Colleton, October, 1883.

This was an action by Thomas H. Caldwell against Abraham Bennett, for malicious prosecution, commenced in November, 1881. The opinion fully states the case.

Messrs. Fisburne & Rice, for appellant.
Messrs. Howell & Murphy, contra.

November 14, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. The action in this case was for malicious prosecution, in which the plaintiff was charged, upon the oath of defendant, with stealing cotton from the field. The plaintiff was arrested on the warrant and carried before a trial justice, who, on a preliminary examination, dismissed the prosecution for insufficiency of evidence. The only testimony as to the facts and circumstances, which were supposed to give rise to the prosecution, came from the plaintiff himself, who testified that he was charged by the defendant with stealing cotton from the field on the place where one Becky Pool lived; that he had bought the place and agreed to let Becky live there and plant some cotton; that she thinned and hoed the cotton and plaintiff worked it; that when she left in September or October she was owing him some six dollars; that defendant came to plaintiff and said he wanted to see him about Mrs. Pool's cotton, adding: "I understand you have picked the cotton." Plaintiff replied: "You have understood rightly." Defendant said: "You have got yourself into the law." Plaintiff asked: "What have you

got to do with it?" Defendant replied: "I have a great deal to do with it," that he had bought it and paid his money for it. A few days afterwards plaintiff was arrested for stealing the cotton. On his cross-examination plaintiff explained more particularly his arrangement with Becky Pool, and said that he did not know that she had sold any of this cotton before she went away.

On the close of the testimony for the plaintiff the defendant moved for a non-suit, "on

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the ground of insufficient proof of *malice and probable cause." The motion was overruled and the case went to the jury under the following instructions from the Circuit judge: "That probable cause was a question of law, and when I had explained to them what probable cause was, as a matter of law, then they were to decide from the testimony whether or not such probable cause existed. That probable cause was the existence of such facts as would induce a reasonable man to believe that a crime had been committed by the defendant. In considering this question as to whether such probable cause existed, the defendant here has a right to demand that the jury should consider the facts as he saw them at the time of the institution of the prosecution. The jury were further told that express malice was ill-will, a desire to injure the defendant, and whether such malice existed in the breast of the prosecutor, was a question of fact for them upon the evidence. The jury were further told that if they found that the prosecutor had probable cause, then the plaintiff was not entitled to recover, even if the prosecution was malicious."

The jury having found a verdict for the plaintiff, the defendant appeals upon the following grounds: "1. For that the presiding judge charged the jury: 'Probable cause is a question of fact for your consideration, after I have explained to you what probable cause is. That which would excite in the mind of a reasonable man a belief that a crime had been committed would be probable cause, and that it is for you to decide whether probable cause existed upon the preponderance of evidence'; all of which, they respectfully submit, was error. 2. Because his honor neglected to charge the jury that they were only judges of the truth of the facts stated, and that he was the judge whether they showed a want of probable cause, which, it is respectfully submitted, was error. 3. Because his honor, in charging the jury, neglected to define what express malice was, and charged them that if they found that there was want of probable cause and express malice in bringing the prosecution, that they must bring in a verdict for plaintiff, which, it is respectfully submitted, was error."

The defendant also gave notice that he would renew his motion for non-suit on the ground that plaintiff had wholly failed to

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*prove his case. Upon this, the Circuit judge, in his report, says that the motion for non-suit was refused "because the plaintiff having put in evidence of facts and circumstances relating to the matter, I regarded it proper to leave it to the jury to say whether want of probable cause had been proven, and whether express malice was indicated."

We will first consider whether there was any error in refusing the motion for a non-suit. The question in such a motion is, not whether the evidence is sufficient to support the plaintiff's case, but whether there is any evidence tending that way. If there is, then it is the province of the jury to determine its force and effect. It is quite manifest, therefore, that the ground upon which the motion was based in the court below, "insufficient proof of malice and probable cause" (meaning, doubtless, want of probable cause), could not be sustained. But, aside from this, we do not think it can be said that there was no testimony tending to establish plaintiff's case. For it is quite clear that there was testimony that the prosecution was ended; that there were circumstances tending to show a want of probable cause; and the rule is well settled that malice may be inferred from a want of probable cause. Bell ads. Graham, 1 N. & McC., 278 [9 Am. Dec. 687]; Campbell v. O'Bryan, 9 Rich., 206. So that all the three elements necessary to sustain the action were shown, at least prima facie, and hence there was no error in refusing the motion for non-suit.

The next inquiry is that presented by the first and second grounds of appeal, for, as we understand these grounds, they practically raise the same question. We lay no stress upon the fact that the phraseology imputed to the Circuit judge in the first ground differs from that actually used by him, as appears by that portion of his charge as reported by him, which we have copied above; for we think they may be construed as amounting substantially to the same thing. Construing these two grounds in the light of the argument submitted by the appellant, we understand that his complaint is that the Circuit judge should have confined the jury to a single inquiry whether the testimony adduced by the plaintiff was true, and should himself have determined whether the facts which they found to be established were

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*sufficient in law to constitute probable cause, or the want of it. In other words, that he should have instructed the jury that if they believed the testimony adduced by the plaintiff, then such testimony did or did not constitute sufficient proof of a want of probable cause as matter of law, and that it was error on his part, after instructing them as matter of law, what was probable cause, to leave it to the jury to say from the testimony

whether such probable cause existed. Strictly speaking, the proper way to have raised the question would have been by a request to charge, which the appellant omitted to make; but waiving this, we will proceed to consider the question.

It must be admitted that the exact boundary line between the province of the judge and that of the jury, in determining the existence or want of probable cause in actions for malicious prosecution, does not seem to be well defined by the authorities in this state. There is no doubt that, upon well-settled principles, it is the exclusive province of the jury to pass upon the truth of the facts and circumstances relied upon as establishing the presence or absence of probable cause; and it seems to be well settled that a fact occurring after the matter or transaction which gives rise to a prosecution, or a civil action, such as the finding of "no bill" by the grand jury, the entry of a nolle prosequi by a prosecuting officer, the failure to prosecute, or the discontinuance of a civil action, will, as matter of law, be held insufficient to constitute even prima facie evidence of a want of probable cause. Lipford v. McCollum, 1 Hill, 82; Fulmer v. Harmon, 3 Strob., 576; Ford v. Kelsey & Deas, 4 Rich., 365; Frederick v. Halberstadt, 14 Rich., 41. But when testimony is adduced as to alleged facts and circumstances attending the supposed commission of the offence charged, or relied upon as evidence to show that there was, or was not, any ground for the charge, there does not seem to be any clear and well-defined rule.

It is true that there are several cases in this state which contain expressions going to support the position contended for by the appellant, but we do not think that the point is distinctly decided in any one of them. See Thomas v. Rouse, 2 Brev., 75; Nash v. Orr, 3 Brev., 94 [5 Am. Dec. 547]; Paris v. Waddell, 1 McMull., 358; Horn v. Boon, 3

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Strob., 307. On the other hand, we find *other cases in which the course pursued by the Circuit judge in this case received the sanction of the tribunal of last resort. Paris v. Waddell, 1 McMull., 358; Sims v. McLendon, 3 Strob., 557; Frederick v. Halberstadt, 14 Rich., 41.

The case of Hogg v. Pinckney, 16 S. C., 387, is relied upon by appellant; but we think that case, when properly understood, tends rather to support a contrary view. In that case the action was for a malicious arrest in a civil suit, charging fraud in the contracting of the debt for which the action was brought. The fraud alleged was that the goods were sold by the defendants to the plaintiff upon his promise to give a lien on his crop, which the plaintiff had failed and refused to give. The Circuit judge instructed the jury that the plaintiff must show a want of probable cause for the charge of fraud: "That the material points for them to consider was [sic] whether the plaintiff, at the time he agreed to give the lien to defendants, had no intention of giving the same, and that if they found he had no such intention, it would go far to show probable cause for the arrest; but, on the other hand, if they found that at the time he did intend to give it, it would go far to show a want of probable cause." Then, after instructing them as to damages, he said, in speaking of the evidence adduced to assail or substantiate the statements contained in the complaint and affidavit upon which the order of arrest was obtained: "If the evidence disproves these statements, then of course the probable cause is overthrown. If, on the contrary, the evidence supports these statements, or pointedly increases their strength, the probable cause is sustained. That if the jury, as reasonable men, under the circumstances proved, would have acted as the defendants did, then the jury might conclude the defendants had probable cause for their action; but, in view of the testimony, if the jury would not have acted as the defendants, then the jury might conclude the defendants did not have probable cause." The plaintiff having obtained judgment, the defendants appealed upon the ground, inter alia, that the Circuit judge had left the question of probable cause to the jury as a question of fact. This court, however, did not so understand the charge, but, on the contrary, construed it as amounting in effect to an instruction to the jury that if they be-

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lieved the facts stated *in the complaint and affidavit, then there was probable cause; but if, on the other hand, they did not believe the statements therein contained, then there was a want of probable cause.

This part of the opinion, standing alone, might possibly give rise to the inference, that it would have been error on the part of the Circuit judge, after explaining what would, in law, constitute probable cause, to leave it to the jury to say whether, upon a consideration of all the facts and circumstances present to the mind of the defendants at the time they acted, the want of probable cause was, or was not, shown. But when considered in connection with what was said as to the fifth exception, it is manifest that such an inference would be altogether unwarranted. In reference to that exception the following language was used: "The judge seems to have charged the jury that, if they, as reasonable men, under the circumstances proved, would have acted as the defendants did, then they might conclude the defendants had probable cause for their action; but in view of the testimony, if the jury would not have acted as the defendants, then the jury might conclude the defendants did not have probable cause. If the judge had confined the jury to the facts and cir-

cumstances which surrounded the defendants at the time they acted, then his charge would not have been objectionable. But he went further than this, and permitted them to consider all the facts developed on the trial, whether they were present before the defendants at the time of the arrest or not. This we think was error." From this language it is quite clear that, if the jury had been instructed, as they were in this case now under consideration, that in considering whether the testimony showed the presence or absence of probable cause, as defined to them, they must confine their attention to such facts and circumstances as were present to the minds of the defendants at the time they obtained the order for arrest, the court would have held that the charge was unobjectionable.

Under this state of the authorities here, we think that the question which we have been considering is still an open one in this state. If the rule contended for by the appellant should be adopted, it seems to us that it would lead to great complexity and confusion, and that it would, in many cases, be very difficult to apply it practically. Many prosecu-

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tions rest mainly, if not *entirely, upon circumstantial evidence, and in such cases it would be very difficult, if not impossible, so to present alternative views of the testimony to the mind of the average juror as to enable him to reach an intelligent conclusion, as to whether there was or was not a want of probable cause for the prosecution. The failure to establish to the satisfaction of the jury a single circumstance in the chain, although apparently quite insignificant in itself, or the proof of some other, apparently unimportant, fact, might very materially affect the conclusion which should be reached. So that if this is the rule, then the only safe course would be to require a special verdict in every case, and let the judge say whether the facts as found by the jury did or did not constitute probable cause.

Indeed, the difficulty in applying such a rule seems to have been fully recognized, for in some of the strongest cases cited by the appellant it is conceded that the rule does not apply where the testimony is complicated or contradictory, and that it applies only where the testimony is undisputed. This concession demonstrates the impolicy of the rule, as it would be necessary to determine in each case what degree of complexity or contradiction would take the case out of the rule, or when the facts were so undisputed as to require its application.

But there is another and more formidable objection to this rule, in that it invests the judge with power to determine a question of fact. For assuming the definition of probable cause, as given by the Circuit judge in this case, to be the correct one, inasmuch as no exception is taken to it, after the jury have found what were the facts and circumstances present to the mind of the prosecutor at the time he instituted the prosecution, another question of fact would still remain, i. e., whether such facts and circumstances would be sufficient to induce a reasonable man to believe that the offence charged had been committed, and this question of fact should be decided by the jury and not by the judge; for the question is not whether such facts and circumstances would induce a well educated lawyer, such as every judge is supposed to be, to believe that an offence had been committed (as is well illustrated by the remark of Judge O'Neall in the case of Lipford v. McCollum, supra), but whether such

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facts and cir*cumstances would be sufficient to induce an ordinarily reasonable and impartial man, a class which the jury is supposed to represent, to believe that the offence had been committed.

Unless, therefore, we are compelled by authority, as we do not think we are, to adopt the rule contended for by the appellant, we are not inclined, for the reasons indicated, to do so. On the contrary, we think the true rule is, that after the jury have been instructed as to what constitutes probable cause, as matter of law, it is for them to say, from a review of all the facts and circumstances proved to have been present to the mind of the prosecutor at the time he commenced the prosecution, or to the plaintiff at the time he commenced his civil action, whether there was or was not probable cause for such proceeding. This rule is, as we have seen, not without the support of authority is easy of application, and is in analogy with the rule in cases of negligence, which like probable cause presents a mixed question of law and fact.

The third ground of appeal seems to have been taken under a misapprehension of the judge's charge; for, from his report, it appears that he did distinctly instruct the jury what express malice was, and if there was any error at all, it was in favor of the defendant; for, as we have seen, malice may be inferred from the want of probable cause. Indeed, in the absence of any showing to the contrary, such would seem to be the legitimate inference; for it is difficult to conceive any motive but a malicious one for instituting a prosecution without any probable cause.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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MOFFATT v. HARDIN.

(April Term, 1884.)

[1. *Witnesses* ⇦140.]

In action by assignees to foreclose a junior mortgage given to the deceased mortgagee by his

grantee, a clerk of court, who held officially the senior mortgage given by such mortgagee, and as such made a party defendant, is not incompetent to testify to communications between himself and the deceased relating to the ownership

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of *the mortgaged property; especially where he has ceased to be clerk of court and owner of the mortgage.

[Ed. Note.—Cited in Griffin v. Earle, 34 S. C. 252, 13 S. E. 473.

For other cases, see Witnesses, Cent. Dig. § 614; Dec. Dig. ⟸140.]

[2. *Witnesses* ⟸206.]

An attorney for a trust estate in a cause just ended was called upon by the trustee to draw a deed from the trustee to the cestui que trust, and a bond and mortgage in return, which he did without further charge, and signed his name to them as a witness. *Held*, that he might be called as a witness in a subsequent action to prove statements made at that time by the trustee to the cestui que trust in his hearing.

[Ed. Note.—Cited in Brazel v. Fair, 26 S. C. 386, 2 S. E. 293; Catoe v. Catoe, 32 S. C. 596, 597, 10 S. E. 1078; Monaghan Bay Co. v. Dickson, 39 S. C. 149, 17 S. E. 696, 39 Am. St. Rep. 704; Wilson v. Gordon, 73 S. C. 158, 53 S. E. 79; Strickland v. Capital City Mills, 74 S. C. 22, 54 S. E. 220, 7 L. R. A. (N. S.) 426.

For other cases, see Witnesses, Cent. Dig. § 761; Dec. Dig. ⟸206.]

[3. *Evidence* ⟸441.]

Parol testimony is admissible to prove contemporaneous declarations of mortgagee explaining the uses to be made of the mortgage and the conditions of its existence.

[Ed. Note.—Cited in Moses v. Hatfield, 27 S. C. 329, 3 S. E. 538; Lindsay v. Garvin, 31 S. C. 261, 9 S. E. 862, 5 L. R. A. 219; Lipscomb v. Lipscomb, 32 S. C. 246, 10 S. E. 929.

For other cases, see Evidence, Cent. Dig. § 2039; Dec. Dig. ⟸441.]

[4. *Evidence* ⟸408.]

Parol testimony is admissible to explain a receipt.

[Ed. Note.—Cited in Bulwinkle & Co. v. Cramer & Blohme, 27 S. C. 381, 3 S. E. 776, 13 Am. St. Rep. 645; Catoe v. Catoe, 32 S. C. 597, 10 S. E. 1078; Rapley v. Klugh, 40 S. C. 144, 18 S. E. 680; Lenhardt v. Ponder, 64 S. C. 365, 42 S. E. 169.

For other cases, see Evidence, Cent. Dig. § 1829; Dec. Dig. ⟸408.]

[5. *Trusts* ⟸231.]

From the facts of this case, a mortgage by a cestui que trust to her trustee *held* to be entitled to a credit for an amount then in the hands of the trustee, for which he held a receipt, and for a further amount in the hands of the clerk of court belonging to the cestui que trust, for which the trustee held her order.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 330–335; Dec. Dig. ⟸231.]

[6. *Witnesses* ⟸37.]

The testimony of a respectable witness as to transaction of years ago should not be disregarded because of his forgetfulness of the execution of a receipt between the parties at that time.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80–87; Dec. Dig. ⟸37.]

[7. *Mortgages* ⟸257.]

The innocent assignees for value of such bond and mortgage, without notice of the credits to which the mortgagor was entitled, took these securities subject to the defences of the mortgagor against his mortgagee.

[Ed. Note.—Cited in Harris v. McCaslan, 31 S. C. 425, 10 S. E. 104.

For other cases, see Mortgages, Cent. Dig. § 687; Dec. Dig. ⟸257.]

8. This case distinguished from Montgomery v. Scott, 10 S. C., 449.

[This case is also cited in Patterson v. Rabb, 38 S. C. 148, 17 S. E. 463, 19 L. R. A. 831, and Rapley v. Klugh, 40 S. C. 143, 18 S. E. 680, without specific application, and in Patterson v. Rabb, 38 S. C. 150, 17 S. E. 463, 19 L. R. A. 831, as to facts.]

Before Kershaw, J., Chester, March, 1883.

The opinion fully states the case. The Circuit decree was as follows:

This action was tried before a referee, and was heard by me upon exceptions to his report, taken by the defendants, Julia L. Hardin and the clerk. The plaintiffs, as assignees of a bond and mortgage given by the defendant, Julia L. Hardin, née Stroud, before her marriage, to George W. Melton, now deceased, upon the land described in the complaint, seek to foreclose the same. Macoy, the former clerk, was made a party, because as clerk he held a prior mortgage of the same land.

Mrs. Hardin resists the foreclosure upon the ground that she had paid the debt in part, and had provided Melton, the mortgagee, with means sufficient to pay the balance,

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before the trans*fer of the bond and mortgage to the plaintiffs, and that they are liable to account for said payments and funds in settlement of the mortgage, in the same manner and to the same extent as Melton would be if he were the present holder of the bond and mortgage seeking to foreclose the same. She also claims that at the time of the purchase of the land for which the mortgage was given by her to Melton, he was her trustee, and that she is entitled to set aside the transaction, and does elect to set it aside, on account of the fiduciary relation existing between them. As to this latter contention, it is sufficient to say that the mortgage having been executed on the 22d day of May, 1874, nearly nine years ago, and she having enjoyed the benefit of the purchase during all that time, it is too late to avail herself of that defence, however it may aid the court in solving the question of fact involved in the other branch of the case.

Before entering upon the consideration of the merits of the defence, there are questions relating to the competency of witnesses to be disposed of. First, as to Mrs. Hardin. I have no doubt that her testimony as to her transactions with the deceased Melton, as whose assignees the plaintiffs claim, was properly excluded by the referee. The exception of the defendant on this ground is therefore overruled.

Next, as to the testimony of Macoy, as to

communications made to him while clerk by Mr. Melton. I consider that he was competent. He had no interest whatever that could be affected by the result of the present suit. He was made a party as the officer of the court, holding securities for litigants—a merely formal party. He has ceased now to to be a party at all, having been succeeded in office, and in the technical ownership of the mortgage, by reason of which he was originally made a party. His examination, or any judgment or determination in this action, can in nowise affect his interest or the interest heretofore owned or represented by him; hence the code (Section 400) will not exclude him. Moreover, plaintiffs themselves examined Macoy on their own behalf, touching declarations of Melton, and transactions with him, the effect whereof was to waive the objection previously made by them to his competency.

Plaintiffs also objected to the competency

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of Mr. Hamilton to *testify to the declarations of Melton, and transactions between him and Mrs. Hardin, upon the ground that they were confidential communications between client and attorney. It is not very clear who was Mr. Hamilton's client at the time. Plaintiffs, in the argument upon other parts of the case, insist that he was the attorney of Miss Stroud, while the referee seems to regard him sometimes as her attorney, and at other times as the attorney of both her and Melton. For the purpose now under consideration, however, it is immaterial who was his client. Communications made by Melton in the presence of Miss Stroud are not privileged, and cannot be excluded. Whart. Evid., § 587. If it had been otherwise, the objection could only have been made by Melton, or for the protection of his interests by his personal representatives. Ibid, § 584.

The objection that Hamilton's testimony tended to vary the written contract to which he testified is not tenable. He was the subscribing witness to the deed, and was competent to testify to the conversation between the parties at the time it was executed. Spencer v. Bedford, 4 Strobh., 96. The testimony was explanatory of the transaction. It does tend to show that no money passed between the parties, but the receipt which it appears to contradict had not been produced at the time the objection was made. But if it had been, the testimony would have been admissible. Trimmier v. Thomson, 10 S. C., 190. I therefore conclude that Mr. Hamilton's testimony was properly admitted by the referee.

These preliminaries being disposed of, the case will be considered upon its merits. The result depends upon the degree of credit to be attached to the testimony of Major Hamilton. He is the only witness to the negotiations between Mrs. Hardin and Mr. Melton whose lips are not sealed. Mr. Melton is dead, and Mrs. Hardin has been excluded from testifying under plaintiffs' objection. Mr. Hamilton's testimony has been put aside by the referee as unworthy of credit, on two grounds: first, because of his failure of memory in relation to the receipt given by Mrs. Hardin to Melton on the day of the settlement; and next, because the settlement itself was considered by the referee "strange," and presumably improbable.

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*I do not find in either of the reasons assigned just cause for discrediting the testimony of a gentleman holding high position at the bar, unimpeached in any respect, intelligent, disinterested, having every opportunity of knowing the facts, and testifying positively. If the testimony of such a witness must be set aside as unworthy of belief, because he is shown to have forgotten one of many circumstances connected with the transactions to which he testifies, we should have little human testimony worthy of credit.

The discrepancy is shown thus: Mr. Hamilton, being cross-examined, said: "On the day the note and mortgage were executed, Miss Julia L. Stroud never, within my knowledge, receipted Melton for $1,214.11, due by him as trustee, as ascertained by the court." In the reply, plaintiffs produced and proved a receipt in Maj. Hamilton's handwriting, signed by Julia L. Stroud, acknowledging the receipt from Mr. Melton of the sum of $1,245.24, in full settlement of the said sum reported against him, &c. It might have been more satisfactory if Mr. Hamilton had been shown this receipt, and examined in reference to it, when he was on the stand, rather than to have led him on to deny any knowledge of the paper, and then confront him with it in reply. The judicial mind seeking for truth would have been more favorably impressed had the other course been pursued.

As it is, however, it is not charged upon Mr. Hamilton that he is thereby placed under any worse imputation than that of having forgotten an important fact involved in the transaction. It is possible that this apparent contradiction or lapse of memory might have been explained by Mr. Hamilton, had he been allowed the opportunity after the production of the receipt. He offered to go upon the stand and testify, but it was objected to, and the matter must remain as presented, to wit, that a paper is shown to exist, of which he had once had knowledge, but which he had forgotten at the trial. Yet I cannot agree with the referee, that the testimony of a credible and disinterested witness is to be disbelieved as to those matters which he swears he does remember, because of the existence of some other fact connected with the transaction which he does not remember.

Nor do I consider the improbabilities of
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Mr. Hamilton's statement so great as to throw doubt upon it. It appears to me less improbable than the hypothesis advanced by the plaintiffs. Mr. Melton had purchased the land in question for Mrs. Hardin, and at her request, paying therefor part cash, and securing the balance by his own bond and mortgage, while Mrs. Hardin was in possession of the land and enjoyed its benefits. Mr. Melton owed her $1,214.00, and there would be also due to her from the proceeds of the land sales a sufficient sum to pay, or nearly to pay, the price of the land, when the amount due to her by Mr. Melton had been applied. According to Mr. Hamilton's testimony, on May 22, 1874 (the land having been sold in December previous), Mr. Melton sent for him. He found him in company with Miss Julia L. Stroud (Mrs. Hardin). Mr. Melton requested him to draw the note and mortgage which is the subject of this suit. He did so, and returned with the papers to Mr. Melton's office, where he found Miss Stroud, Melton, and W. D. Simpson. At the time of, or immediately preceding, the execution of the papers, Melton stated to Miss Stroud that the court had ascertained that he (Melton) was indebted to her some $1,200, and that there would be a sum of money coming to her from the clerk of the court, and he was confident these two sums would be sufficient to pay for her purchase of these two tracts of land; that as he had paid the cash portion of the purchase, and it was not certain what sum would be coming from the clerk of the court, he would get her to execute the note and mortgage for his protection, and if it should turn out, after a settlement with the clerk, that the amount due by him and coming to her from the clerk, would be sufficient to pay the bonds given by him for the purchase money, he would cancel the note and mortgage; if not, he would give her credit for as much as the two sums amounted to.

At that time the note and mortgage were executed, and Melton gave his deed, with the usual warranty, to Miss Stroud, conveying the mortgaged premises, Mr. Hamilton being a subscribing witness thereto. At the same time she gave to Mr. Melton her receipt for the balance due her by him as trustee, and her release of him as trustee. These were dealings between a trustee and his cestui que trust, a young lady said at the trial to have recently come of age. He had
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written her a letter a short time *before, seeking to impress her with the idea that some one or more persons were trying to cheat her out of her interest, claiming credit for defeating them, enjoining secrecy as to their correspondence, and warning her against "outside influences," &c.; whereas nothing has been made to appear showing that any one was trying to injure or get any advantage over her. He was evidently seeking to establish an influence over her, to the exclusion of all others, and there is no reason to doubt that he had her entire confidence.

It was his duty, under the circumstances, to protect her interests against all the world, and to have acted out honorably the rôle he had assumed towards her. If he had looked to her interest, he would have transferred his bid to her for the purchase of the land and paid the cash portion of it out of the funds in his hands as trustee, to which she was entitled. Or he would at least have shown some reason why that was not done. Giving to Mr. Hamilton's testimony due credit, he paid her nothing, but undertook to account to her for the amount for which she receipted to him, upon her note and mortgage. He ought to have given her credit then for that amount, but he used it to obtain his discharge as trustee, and held the note and mortgage open against her. When the next instalment became due on the land purchased in December, 1874, he took from her an assignment of the amount which might be coming to her out of the estate in the hands of the clerk. He paid that instalment out of his own funds and assigned her note and mortgage, and the assignment of the funds in the clerk's hands, to the plaintiffs, without giving her credit for anything, and without notice to her.

These dealings on the part of Mr. Melton, his further assignment of the collaterals to Irwin, hereafter mentioned, and his subsequent insolvency indicate that he was then in failing circumstances and anxious to secure the control of all the credits possible. The plaintiffs seek to overcome the testimony of Mr. Hamilton by producing the receipt of Miss Stroud and an assignment by Mr. Melton to her of a note of Joseph Stroud, secured by a mortgage on mules, which assignment bears date May 22, 1874. This paper is produced by plaintiffs, and there is absolutely no testimony to connect Mrs.
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Hardin with it. It is fair *to conclude that Melton intended to give her that paper in order to secure her in some way in regard to these transactions, but there is no evidence which will authorize the conclusion that it was ever delivered to her, or that she accepted it on account of what Melton owed to her. Why should she do so, and leave her mortgage standing open? The referee finds that Melton paid her the amount due her by the transfer of this paper and the cash paid by him on the land purchase, which was $733.19; yet he does not find that Mrs. Hardin is entitled to credit for the amount so paid to Melton. Her note to Melton was for the entire price for which he bid off the land, including the cash portion paid by him; and when she paid him, as the referee finds, the

cash advanced by him and paid on the land, she was certainly entitled to credit for that amount.

But the assignment of the note and mortgage of J. L. Stroud cannot be inferred to have been received by Mrs. Hardin, there being no evidence of her acceptance of it. The presumption would rather be, that she had declined to take it, and that Melton had delivered it to plaintiffs (who produce it without explanation) among the other securities transferred to them. If Mrs. Hardin did not accept the assignment of that note and mortgage as cash from Mr. Melton, then it is clear that she is entitled to have credit for the whole amount due her by Melton as her trustee, and for which her receipt was given him, to wit, $1,214.00, of the date of the note and mortgage, May 22, 1874. The receipt was given for $1,245.24, but that included Melton's commissions.

The referee has been led away by the doctrine applicable to purchasers for valuable consideration without notice. That doctrine has no application whatever to the purchase of unnegotiable notes and securities. These plaintiffs, as assignees, stand in all respects in regard to this mortgage as Melton stood at the time of the transfer, and are bound by all the equities which then existed between Melton and Mrs. Hardin, affecting the mortgage debt. It is wholly immaterial whether they had notice or not. If it had not been, I would have held that there was sufficient to put them upon the inquiry. But it is not worth while to go into that question, for plaintiffs took these securities absolutely without prejudice to any set off or other de-

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fence existing *at the time of or before notice of the assignment. Authorities might be multiplied upon this point, but it is sufficient to say, ita lex scripta. Code of Procedure, Sec. 133.

This provision of the law also excludes the application of the doctrine of estoppel, which was invoked for the protection of the plaintiffs. The exceptions taken on behalf of the clerk must also be sustained. It was manifest error in the referee to recommend that the plaintiffs be allowed the relief demanded in the complaint, without providing for the balance due on the first mortgage in the hands of the clerk of the court.

Since the hearing by the referee, a petition has been entered by T. J. Irwin, asking to be made a party, and that he be decreed to be paid any balance that may remain after satisfying the demands of the plaintiffs out of the mortgaged property. He claims as assignee of the receipt of the plaintiffs which Mr. Hemphill gave to Mr. Melton for the collaterals. Irwin has been made a party by an order of the court, and is entitled to the relief he demands, if there should be anything remaining due after satisfying plaintiffs' demand.

It is therefore adjudged and decreed, that the defendant, Julia L. Hardin, be credited upon her note and mortgage in the hands of the plaintiffs with the sum of one thousand two hundred and fourteen dollars and eleven cents ($1,214.11), as of the date of the same, May 22, 1874; that the said Julia L. Hardin pay the balance due to the clerk of the court upon the bond and mortgage of the same premises, given by George W. Melton, and set up in the answer of Mr. Macoy, as clerk; that upon such payment being made, she have further credit upon her note and mortgage held by plaintiffs, for the amount so paid to the clerk; that in the said payment to the clerk of the court, she be allowed the proportion to which she is entitled, out of the funds and securities in the hands of the clerk, arising from the sales of the land of the estate of Dr. William Wylie; that if anything remain due by her after the application of the credits aforesaid to her note and mortgage, she pay the same to the plaintiffs, or so much thereof as will satisfy the debt of G. W. Melton to plaintiffs, for which they hold the said note and mortgage as collateral security, they crediting the note and

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mortgage to the extent of such pay*ment; that if any balance be then due on her said note and mortgage, the said Julia L. Hardin pay the same to T. J. Irwin, and that her note and mortgage be thereupon satisfied and discharged, and satisfaction thereof be entered upon the records by the clerk of the court, and the said note and mortgage be delivered up to the said Julia L. Hardin.

That upon the failure of the said Julia L. Hardin to pay the said sums of money, or any of them, as required by this decree, on or before the first day of September next, the said Julia L. Hardin be thereafter forever foreclosed and barred from all title, claim, and equity of redemption in the premises described in the complaint, and that the same be sold by the sheriff of Chester County, after due advertising, on the first Monday in October next, or on some convenient sales-day thereafter, for cash, and that he do pay from the proceeds of said sale, first, the costs of these proceedings, and then the amounts herein ordered and decreed to be paid by the said Julia L. Hardin; the clerk allowing, in the payment to be made to him, credit as hereinbefore directed to be allowed to the said Julia L. Hardin, in case the settlement be made by her, for the amounts to which she is entitled, in the estate of Dr. William Wylie, deceased, in his hands.

That if this decree be complied with by the said Julia L. Hardin, by the payment of the said sums, and the mortgaged lands be not sold, the said Julia L. Hardin pay the costs of this action.

That the report of the referee herein be reversed, so far as it conflicts with this decree.

That the said referee ascertain and report, as soon as may be, the sums of money required to be paid by Julia L. Hardin, under the terms of this decree, and that the payments herein ordered to be made, conform to the amounts to be ascertained by the said report.

Messrs. John J. Hemphill and A. G. Brice, for appellants.

Mr. S. P. Hamilton, contra.

November 14, 1884. The opinion of the court was delivered by

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*Mr. Justice McGOWAN. This was an action to foreclose a mortgage on two tracts of land, called for convenience C and D, executed by Julia L. Stroud, now Julia L. Hardin, to one George W. Melton, on May 22, 1874, to secure a note under seal of same date, given to the said Melton, for $2,204.08¾, due January 1, 1875, with interest. On June 22, 1875, the said Melton borrowed money from Mr. James Hemphill, acting for himself and Mrs. Moffatt, and gave him two notes, one payable to Mrs. Moffatt, for $1,500, and the other payable to James Hemphill, for $1,000, and to secure these notes assigned and transferred the note and mortgage of Miss Stroud, to foreclose which this action was brought, making also a party defendant G. W. Curtis, clerk of the court, who, as clerk, held a senior mortgage on the said lands, to be more fully explained hereafter. The defense was that the note and mortgage were not due, but had been substantially paid, and should have been marked satisfied, at least to a large extent, before Melton, the payee, assigned them to the plaintiffs.

The cause was referred to W. A. Sanders, Esq., as special referee, when the facts appeared, of which the following is a general outline: Miss Julia L. Stroud had an interest under the will of Dr. William Wylie, of which George W. Melton was appointed trustee. A proceeding was instituted to settle the estate, entitled Alexander P. Wylie, executor, v. George W. Melton, trustee. In this cause there was an order of sale, by authority of which, besides other property, the tracts of land C and D were sold December 1, 1873, and bid off by George W. Melton at the aggregate price of $2,199.58. The terms of sale were complied with by Melton, who made the payment required in cash and took title from the clerk, who made the sale, and mortgaged the lands back to him to secure the remainder of the purchase money. The allegation is, that this purchase was made by Melton, trustee, for Miss Stroud, who immediately went into possession of the lands.

On May 20, 1874, the report upon the accounts of Melton, trustee, was filed, by which it appeared that, for rents of land, personalty, &c., he was indebted to Miss Stroud in the sum of $1,214.11; and a few days

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thereafter, May 22, 1874, Melton *executed a conveyance of C and D to Miss Stroud, and took from her the note and mortgage for the whole purchase money, which he afterwards assigned, and are in contention here. Although the account against Melton had not then been confirmed, yet he took from Miss Stroud at that time a receipt in full for the amount ($1,214.11) which the report showed he owed her.

Afterwards, on June 1, 1874, the account was confirmed by order of court, which provided, "that upon the payment of the sums of money reported due by the trustee to his cestui que trusts, Mrs. M. J. Wylie and Miss Julia Stroud, and the production or the filing of the receipts from one or more of them, or the payment of the said sum of money into court, that said George W. Melton be released and discharged from his said trusts." Three days after this order was passed, June 4, 1874, Melton produced the receipt previously taken, and filed it in the office of the clerk, taking from him (the clerk) a receipt for the same, which stated that it was "in full release of her said trustee, as provided by the order of court, June 1, 1874."

On December 23, 1874, Miss Stroud gave to the clerk of the court an order directing him to pay to Melton "all moneys in his hands as clerk of the court at any time due in the above stated case (Wylie v. Melton), and take a receipt from the said George W. Melton for the same." Accepted by the clerk, "to be paid when in funds applicable thereto." There was at that time no money in the clerk's hands due to Miss Stroud, but on the assumption that Melton would pay the remainder of his land bonds, there would be in his hands for her the sum of $961.15, and this must have been the anticipated funds upon which that order was given. This order (known in the proceedings as "assignment G") was taken out of the clerk's office and assigned by Melton to the plaintiffs as further collateral security for the money borrowed as aforesaid.

It appeared also that one of the attorneys for the plaintiffs found in the record of the case (Wylie v. Melton) in the clerk's office a mortgage of one Joseph H. Stroud to George W. Melton, February 3, 1873, covering sixteen mules and horses, to secure a note for $874. There were endorsements on the paper, showing that Melton himself had sold most of the mules and horses.

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*This mortgage had on it an assignment, "without recourse," by Melton to Miss Julia L. Stroud, but there was no proof that the mortgage was worth anything, or had ever been delivered to Miss Stroud, or any other evidence whatever concerning it.

In July, 1876, George W. Melton died intestate and insolvent, and the plaintiffs, after crediting what they could realize from his estate, which left still a balance unpaid of about $2,300, as assignees instituted this proceeding to foreclose the mortgage against

Julia L. Hardin, impleading also G. W. Curtis, successor of Macoy, as clerk of the court, who held officially unpaid balances of the senior mortgages on the lands C and D, executed for the purchase money by George W. Melton, while the legal title to the same was in him under the clerk's deed.

Mrs. Hardin was excluded under section 400 of the code from testifying to any agreement or transaction with Melton, when the note and mortgage and receipt and assignment G were placed at his disposal. But C. C. Macoy, the then clerk, testified (subject to objection), "that C and D were sold to Mr. Melton, and when I called upon him to comply, he objected until he could see Miss Stroud, his reason being, to the best of my recollection, that he had bid off the lands at the sale for her, and there being some money transactions between them, the matter would have to be delayed until he could see her. * * * * At the time the assignment G was lodged with witness, there was no fund in court for Miss Stroud. It was lodged with me, to the best of my recollection, on the day it bears date. My recollection is that assignment G was taken out of the office and never returned. I do not recollect who took it out. * * * * I applied to Mr. Melton to pay the instalment on these bonds several times. He claimed that he had money coming to him from Miss Stroud, then in the office under this assignment G, and that it should be applied to the bonds, and that it was unnecessary for him to pay the money into court. Witness said if these bonds had been paid in full, there would have been due Miss Stroud $961.15."

S. P. Hamilton, Esq., testified (subject to objection) as follows: "I drew the note made by Julia Stroud, payable to George W. Melton, also the mortgage taken to secure it. I am a witness to the mortgage. The suit of Wylie, executor, v. Melton, trustee,

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*had been concluded, so far as the litigation was concerned. In that litigation I represented George W. Melton, trustee, and Miss Stroud. On April 4, 1873, the court, by its order, required the trustee to pay me a fee of $200 for my compensation in and about the litigation of the trust estate. * * * * On May 22, 1874, I was sent for by Mr. Melton to come to his office in the town of Chester. I found Miss Julia L. Stroud there. Mr. Melton requested me to draw the deed and the note and mortgage, which are the subject of this suit. I received no fee for this, other than I received under the order of court. I returned after the papers were drawn and found Miss Stroud and Mr. W. D. Simpson there in Melton's office. At the time, or immediately preceding the execution of the papers, Melton stated to Miss Stroud that the court had ascertained that he was due her as her trustee some $1,200, and that there would be a sum of money coming to her from the clerk of the court, and that he was confident that these two sums of money together would be sufficient to pay for the purchase of the two tracts of land. He said that as he had paid the cash portion of the purchase, and that it was not certain what sum would be coming from the clerk of the court, he would get her to execute the note and mortgage for his own protection, and that if it should turn out after a settlement with Macoy, the clerk, that the amount due by him and the amount coming from the clerk, would be sufficient to pay the bonds given by him for the purchase of the lands, that he would cancel the note and mortgage; if not, he would give her credit on the note and mortgage for as much as the two sums of money came to," &c.

The plaintiffs objected to this testimony on the ground that Major Hamilton was acting as the attorney of Mr. Melton, and he was not at liberty to disclose such communications; and also because the testimony tended to vary written contracts made at the time. The testimony was taken subject to objection.

On the cross examination the witness stated: "I do not know of Melton's turning over money or valuable assets on the day the note and mortgage were executed. Miss Julia L. Stroud never, within my knowledge, receipted Melton for the $1,214.11, due by him as trustee, as ascertained by the court," &c. In

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reply *the plaintiffs offered the receipt of Miss Stroud to George W. Melton for the sum of $1,245.24 (commissions added), "in full settlement of said sum reported against him as trustee in the case of A. P. Wylie, executor, v. George W. Melton, trustee," &c. This receipt was in the hand-writing of Major Hamilton. The defendants claimed the right to reply, which would have given an opportunity for explanation, but the referee ruled that the plaintiffs had the reply, and no testimony was admissible after they had concluded.

The referee held that the agreement between Melton and Miss Stroud at the time the papers were executed indicated in the testimony of Macoy and Major Hamilton was not established by satisfactory proof, and recommended that the relief demanded should be granted, and the mortgage foreclosed for the whole amount remaining due upon the notes. Exceptions were filed to this report by Mrs. Hardin and the clerk, G. W. Curtis, and upon the hearing, Judge Kershaw reversed the findings of the referee, and recommitted the report, with instructions that "Mrs. Hardin should pay the balance due to the clerk of the court upon the bond and mortgage of the same premises given by Geo. W. Melton, and set up in the answer of Mr. Macoy as clerk; that upon such payment being made, she have credit upon her note and mortgage held by plaintiffs for the amount

so paid to the clerk, and that in this payment she be allowed the proportion to which she is entitled out of the funds and securities in the hands of the clerk arising from the sales of the lands of the estate of Dr. William Wylie; that Mrs. Hardin be also credited upon her note and mortgage in the hands of the plaintiffs with the sum of $1,214.11, as of the date of the same, May 22, 1874; and that if anything remained due by her after the application of these credits on her note and mortgage, she pay the same to the plaintiffs, or so much thereof as will satisfy the debt of G. W. Melton to the plaintiffs," &c.

From this decree the plaintiffs appeal to this court upon the following exceptions:

1. "Because his honor held that the testimony of C. C. Macoy as to communications between himself and G. W. Melton was competent and admissible.

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*2. "Because he held that the examination of Macoy by the plaintiffs was a waiver of the objection to his testimony made by them.

3. "Because he held that the testimony of S. P. Hamilton, Esq., was properly admitted by the referee, and that it did not tend to vary the written contract between Mrs. Julia L. Hardin and Melton.

4. "Because he holds that Melton bought the land described in the complaint for Mrs. J. L. Hardin, and at her request.

5. "Because he holds there is no testimony to connect Mrs. Hardin with the mortgage of Joseph H. Stroud on certain mules, and the plaintiffs produced it without explanation.

6. "Because he holds that plaintiffs are bound by all the equities existing between Melton and Mrs. Hardin, even without notice of them; that the plaintiffs had sufficient notice to put them upon inquiry, and that Mrs. Hardin cannot be estopped by her conduct.

7. "Because he adjudges and orders that Mrs. Julia L. Hardin be credited upon her note and mortgage in the hands of the plaintiffs with $1,214.11, as of date May 22, 1874.

8. "Because he orders and adjudges that Mrs. Hardin pay to the clerk the balance due on the bond and mortgage of Melton to the clerk of the court, and that such payment be entered as a credit on her bond and mortgage held by plaintiffs.

9. "Because he orders and adjudges that in the payment to the clerk of the court, Mrs. Hardin be allowed the proportion to which she is entitled out of the funds and securities in the hands of the clerk arising from the sales of the lands of Dr. William Wylie.

10. "Because he orders that Mrs. Hardin pay plaintiffs the balance only, if any, due on her bond and mortgage, after allowing the above credits, or so much of said balance as will satisfy the debt of Melton to them; and that the overplus, if any, due on her note and mortgage be paid to T. J. Irwin, and that thereupon her note and mortgage be marked satisfied and discharged, and delivered up to her, and satisfaction entered on the record.

11. "Because he reverses the referee's report so far as it conflicts with his decree herein.

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*12. "Because he did not adjudge that the plaintiffs were entitled to an order of foreclosure and sale and judgment against Mrs. Julia L. Hardin for the balance, if any, due after application of the proceeds of the sale to their debt," &c.

First. In regard to the preliminary question as to the admissibility of the evidence. The testimony of Mr. Macoy as to conversations with Melton, who is now dead, was objected to as inadmissible under section 400 of the code. It is true that he was once a party, made so by the plaintiffs for the reason that as clerk he held officially a senior mortgage on these same lands. We suppose that in any event that mortgage would have to be first paid, and that he really had no interest in the event of the suit. He could not be made incompetent to testify by simply being made a party defendant. This court has lately held that section 400 of the code did not exclude those who were competent to testify before its passage; that the word "affect" should be construed in the sense of "promote the interest of said witness"; and that if the evidence of the witness does not tend to promote his interest, he is competent, whether he is a party or not. Robinson v. Robinson, 20 S. C., 570.

Besides, as the Circuit judge says: "He was made a party as the officer of the court holding securities for litigants, a merely formal party; and he has now ceased to be a party at all, having been succeeded in office and in the technical ownership of the mortgage by reason of which he was originally made a party. His examination or any judgment or determination in this action can in nowise affect his interest or the interest heretofore owned or represented by him. Moreover, plaintiffs themselves examined Macoy on their own behalf, touching declarations of Melton and transactions with him," &c.

Second. The plaintiffs also object to the competency of Major Hamilton to testify as to the declarations of Melton and transactions between him and Mrs. Hardin, upon the ground that they were confidential communications between client and attorney. It is a wise rule to hold professional communications privileged, but it does not follow that everything which passes between parties in the presence of a lawyer must be regarded as communications made to him under the

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seal of confidence. It has been *held that privilege does not protect statements made to the counsel in the presence of third par-

ties, such persons not being concerned in a confidential communication. 1 Whart. Evid., §§ 587, 588. We do not understand that the arrangement between Melton and Miss Stroud as to the use to be made of the papers executed was in the nature of a communication to the counsel. He was in no way consulted about it, but in preparing the papers as requested, he was present and happened to hear the agreement between them. There could be nothing confidential or secret in its nature about an honest agreement between parties. Major Hamilton signed the mortgage as a witness, and that entitled him to state the conversation which occurred at the time. Spencer v. Bedford, 4 Strobh., 96.

Besides, it seems to us that if he was present as counsel for any other purpose than the preparation of the papers, he was counsel for both parties. In the litigation then just ended, out of which the business arose, he had represented the trust estate, and in doing so represented both the trustee and cestui que trust. For that service he had been paid from the trust estate, and he prepared those papers between trustee and cestui que trust as a supplemental matter, without further charge. Mr. Brice, in his admirable argument for the plaintiffs, properly admitted that if Major Hamilton were counsel for both, his testimony could not be excluded on that ground. If one of two parties to a verbal agreement abuses the confidence of the other, who is excluded from testifying, it would certainly be unfortunate if a person who happened to hear the agreement should also be excluded for the reason that he was a lawyer present, preparing the papers at the instance of both. "In regard to the person to whom the communications must have been made in order to be thus protected, they must have been made to the counsel, attorney, or solicitor acting for the time being in the character of legal adviser." 1 Greenl. Evid., § 239.

Nor do we regard this testimony as inadmissible on the ground that it tended to vary the terms of written instruments. The purpose manifestly was not to vary the terms of the papers, but to explain the uses to be made of them and the conditions of their existence; as stated in the case of Kaphan v.

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Ryan, 16 S. C., *357, "to show the whole agreement in which they originated and of which they constituted only a part." It is said in 1 Greenleaf's Evidence, § 284, that the rule does not apply to the admission of parol evidence in cases where the original contract was verbal and entire, and a part only was reduced to writing. Lewis v. Gray, 1 Mass., 297; Knight v. Knotts, 8 Rich., 35; McGrath & Byrum v. Barnes, 13 S. C., 332 [36 Am. Rep. 687].

Besides, a receipt is not one of those solemn papers in writing as to which parol evidence is not admissible, but is always capable of explanation. "In itself a receipt does not express the terms of any contract or uniting of the minds of the parties between whom it has passed, but merely indicates, by way of admission, the fact stated in it; consequently it is not governed by the rule which prescribes the effect of instruments adopted by parties as the special means of evidencing some compact or understanding had between them, but, like evidence not enjoying any special privilege, it is capable of being contradicted or modified by other classes of evidence." Heath v. Steele, 9 S. C., 92.

Third. Then as to the merits of the case, the evidence being admissible. If this question were between these defendants and George W. Melton, or his personal representative, it seems to us that there could be little doubt about it. It is clear, not only from Melton's letter, but from the testimony of Macoy and the acts of the parties, that the lands were bid off for Mrs. Hardin. They were most likely bought for her for the reason that she had money due to her from the estate, and she went into immediate possession. Neither Melton, who is dead, nor Mrs. Hardin can testify upon the subject; but from anything that appears, we are unable to reach the conclusion that Melton, on the day the note and mortgage were signed, had a settlement with Mrs. Hardin and paid her what he owed her as trustee, and advanced her the money for the order upon the clerk, not given until long after, leaving the whole of the note and mortgage due to himself personally. The undisputed record facts of the case would seem to indicate that lands purchased for Mrs. Hardin from the estate of Dr. William Wylie should be paid for out of money due to her from that estate.

It does not seem to us probable that Mel-

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ton, a man in busi*ness, and evidently needing all the money he could raise, should pay for lands bid off for his cestui que trust out of his private means, and give her credit for the advance as an investment, when at the same time he owed her in the very matter of the estate, money about enough to pay for them; and it would seem to be still less probable that Mrs. Hardin should encumber her newly acquired lands to secure the purchase money, when there was lying to her credit in the case in which they were sold money to pay for them. It would require strong proof to make it appear that any such settlement was made, and that Mrs. Hardin received the money.

But instead of such full proof, there is really none, except what may be fairly inferred from Melton's possession of the receipt for $1,214.11 and the order on the clerk given long afterwards; for we cannot give to the little balance of the chattel mortgage, found in the record assigned to Mrs. Hardin, the importance claimed for it. There is no evidence that it had any value, or that Mrs. Hardin ever had knowledge of its existence, and it is therefore impossible for us, simply

from the fact that it was found in the record, to infer that Melton that day had a full and final settlement with Mrs. Hardin, in which he paid her as cestui que trust what, as trustee, he owed her, without using in any way what the record showed he owed her as trustee. If such settlement were made, it is very unfortunate that there was no record of it.

But when we take into consideration the testimony of Mr. Macoy and Major Hamilton, the matter is made intelligible, in accordance with what would seem to be the probabilities of the case. As it seemed reasonable that Mrs. Hardin left with the clerk her order in favor of Melton (assignment G) in order to enable him to set off that fund against the land bonds, so Mr. Macoy says Melton informed him. As we would suppose in advance that Mrs. Hardin would use the money due to her from Melton in paying for her lands, and had given him the control of the receipt for that purpose as soon as the account against him was confirmed by the court, accordingly, Major Hamilton states that such was his distinct undertaking "at the time, or immediately preceding the execution

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of the papers." Surely the tes*timony of a gentleman so respectable as Major Hamilton should not be disregarded only for the reason that, in respect to a transaction which took place some seven or eight years before, he had forgotten that on the occasion referred to a receipt was actually given, especially as his testimony is in exact conformity to the view suggested as probable by all the circumstances of the case. We think that as against Melton himself, or his personal representative, the defence made should prevail.

It is said, however, that this is not an action to enforce these securities by Melton, or his personal representative, but new parties have been introduced; that Melton, without making the proper credits on the note and mortgage, assigned them for full value and without notice to the plaintiffs, who are now entitled as innocent purchasers to enforce them in the condition in which, as assignees, they received them, without regard to the omission of Melton to credit them in accordance with his agreement. This would certainly be true if the securities were negotiable in their nature, and had been transferred before due for full value, and without notice. See the recent case of First National Bank of Parkersburg v. Johns, 46 Amer. Rep., 516, where a great number of the authorities are collected.

But the bond and mortgage assigned here were not negotiable securities transferred before due, but mere choses in action, and very different principles apply. They are not subject to the doctrines of implied warranty and of purchaser for valuable consideration without notice. Maybin v. Kirby, 4 Rich. Eq., 116. The books are full of cases upon the subject, but we are not aware that the general doctrine is anywhere stated with more clearness than by Judge Butler in the case of Hodges v. Connor, 1 Speers, 123: "This case, according to the legal character and purport of the paper sued on, must be regarded as a contest between the original parties to it. That is, the intermediate holders have acquired no higher rights, nor should they occupy any better position than the original payee."

This principle has been expressly embodied in section 133, Revised Code, which declares that, "In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or

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other defence existing at the time *of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due." Nothing could be plainer or more positive than this provision. As we understand it, the debtor, in executing such securities, gives no authority expressly or impliedly in fact or in law, that they may be sold at all; and if they are sold, the purchaser is notified by the law that he takes them at his peril under the principle of caveat emptor.

So far as the debtor is concerned the doctrine of estoppel cannot displace this positive provision of express law. We suppose that under certain circumstances he might be estopped from denying that he uttered the security or matters of that kind, which would avail the payee as well as any subsequent holder, but he cannot be estopped from setting up any defence against the holder, which would be good against the payee himself. This results from the nature of the security. The law so declares in terms. Mr. Pomeroy does say that, in reference to certain kinds of securities, such as certificates of stock, which are of a quasi negotiable character, the doctrine of estoppel has been held to apply in certain cases between assignor and assignee; but he denies its application between the debtor and assignee. After discussing the whole subject he sums up as follows: "All defences, either legal or equitable, in favor of the debtor himself against the original creditor at the time of the assignment, or of notice to him of the assignment of a non-negotiable thing in action, will avail against the assignee, who seeks to enforce the demand against such debtor," &c. Pomeroy's Rights and Remedies, § 162.

But it is still further strongly pressed upon the court that there is a general principle in the law applying to all cases, "that when one of two innocent parties must suffer, he by whom the loss was occasioned must suffer;" and that the inexcusable negligence of Mrs. Hardin in parting with the control of the receipt and order on the clerk put it in the power of Melton to do an injustice to innocent parties, and she ought to suffer the consequences; and the case of Montgomery

v. Scott, 10 S. C., 449, is relied on to sustain
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the proposition. We think this case *differs from that in several very important particulars. In that case the alleged mortgagor brought the action to set aside the mortgage itself on the ground of fraud and imposition in obtaining her own signature. Here the mortgagor does not deny the existence of the mortgage, but insists, by way of defence, that the mortgagee undertook to make certain credits upon it, which he did not make. In that case the question was whether the mortgagor was guilty herself of negligence in failing to take proper precaution against signing a paper not intended; here the alleged negligence of the mortgagor is not in her signing the mortgage, but in trusting the matter of credits to her friend, the mortgagee, who abused that confidence.

It would certainly have been better if the credits had been endorsed at the proper time, when Melton was furnished with the means of doing so; but in considering the matter of negligence we cannot overlook the relations that the parties held to each other as trustee and cestui que trust. They were not on equal terms in the matter. The confidence of Mrs. Hardin was natural, but, as it turned out, misplaced. The fault was that of Melton in not endorsing the proper credits at the proper time, and we have already held that as against him or his estate, the credits should now be allowed. It seems to us that in any view the over-confidence or want of caution of Mrs. Hardin cannot be considered as reaching beyond the law involved in the nature of the securities.

It is not claimed that she authorized the assignment. The utmost that can be said is, that the absence of the credits enabled Melton to assign them. Even if that unauthorized act of his could be regarded in any proper sense as caused by her omission to have the credits endorsed, yet that assignment could not be so made as to escape the public well known law, which declares that it was subject to all defences against the original payee. The securities were fair upon their face, without credit or endorsement, and the plaintiffs were misled. That they should lose their money is matter of the sincerest regret, but from our view of the facts and the law, we are constrained to hold that the defendants are entitled to have the credits entered, as directed by the Circuit judge.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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*SHEORN v. ROBINSON.

(April Term, 1884.)

[1. *Vendor and Purchaser* ⇨232.]

Actual possession of land by a vendee under a contract to purchase operates as notice to a subsequent purchaser from the vendor, although such possession, as matter of fact, is unknown at the time to such subsequent purchaser. Mr. Justice McIver, dissenting.

[Ed. Note.—Cited in Biemann v. White, 23 S. C. 492, 493; Graham v. Nesmith, 24 S. C. 295; Sweatman v. Edmunds, 28 S. C. 63, 5 S. E. 165; Daniel v. Hester, 29 S. C. 149, 7 S. E. 65; Ellis v. Young, 31 S. C. 325, 326, 9 S. E. 955; Tant v. Guess, 37 S. C. 500, 16 S. E. 472; Manigault v. Lofton, 78 S. C. 499, 501, 502, 59 S. E. 534; Foster v. Bailey, 82 S. C. 381, 64 S. E. 423; Folk v. Brooks, 91 S. C. 9, 74 S. E. 46.

For other cases, see Vendor and Purchaser, Cent. Dig. § 544; Dec. Dig. ⇨232.]

2. Per McIver, A. J. A purchaser of land under a decree of foreclosure is chargeable with notice of the rights of a purchaser in possession under a contract to purchase (prior in date to the mortgage) where the title deeds held by the mortgagor gave notice, which, if prosecuted, would have led to knowledge of such contract.

[Ed. Note.—Cited in Daniel v. Hester, 29 S. C. 150, 7 S. E. 65.]

Before Fraser, J., Kershaw, May, 1884.

To the statement of the case as made by the Circuit decree, it will be proper to add the following facts, which appear in the brief:

In compliance with defendant's notice, plaintiff produced the following deeds, which defendants offered in evidence, to wit:

I. Deed of J. D. Dunlap, receiver of John Chesnut, to Thos. Moore and A. L. Monroe, March 1, 1869, 618 acres, more or less, bounded west by Wateree river, No. 19 of the general plat, plat whereof is attached to the deed.

II. Thos. Moore to A. L. Monroe, February 16, 1873, "all my right, title, and interest in 286 acres of said land," "bounded north by land of Jos. Brevard, Scipio Williams, and Paris Watts, east by land of Wm. J. Gerald, south by Wm. D. McDowall, and west by Thos. Moore, as shown by plat hereto annexed and by plat annexed to deed to Robert Robinson from myself, bearing even date herewith, being the eastern portion of the tract of 618 acres conveyed by Dunlap to Thos. Moore and A. L. Monroe" as above stated. Defendant offered in evidence the record book, "C. C.," p. 106, showing the plat of the last mentioned deed, which calls for 220 acres. The plat was made by S. M. Boykin, D. S., at the request of A. L. Monroe, on November 15, 1869.

III. Deed of A. L. Monroe to Robert Robinson, dated February 17, 1873, for 66 acres, at two hundred and ninety-seven dollars, plat attached with renunciation of dower. This
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deed *was never delivered or recorded, and was found in possession of A. L. Monroe after his death.

The description, boundaries, marks, &c., of the land in mortgage of A. L. Monroe to Witte Bros., is the same as in deed of Moore to Monroe, except that no reference is made to plats or deed to Robinson.

The Circuit decree was as follows:

This case came before me at the June term of the court for Kershaw County, on the report of the master and exceptions thereto. The action was brought originally against Robert Robinson and Wesley Truesdel, and the former having departed this life, it was duly continued against his heirs at law. The action was brought to recover possession of a tract of land containing (66⅔) sixty-six and two-thirds acres of land, and an equitable defence was set up, and by consent all the issues of law and fact were referred to the master.

In March, 1869, A. L. Monroe and Thomas Moore purchased at the sale of the lands of the late John Chesnut a tract of 618 acres of land. Both parties in this action claim under A. L. Monroe, and it is therefore unnecessary to inquire into the validity of the title of John Chesnut, or in what way partition was made between Thomas Moore and A. L. Monroe, so as to give title in severalty to A. L. Monroe for 286 acres of said tract of 618 acres, and of which 286 acres the land in dispute is a part. For the purposes of this case neither party can dispute his title, and the pleadings show this derivation of title from a common source without any evidence on the subject.

The tract of 618 acres was mortgaged by Thomas Moore and A. L. Monroe to secure the purchase money to the estate of John Chesnut. A. L. Monroe gave to Witte Bros. a mortgage of the 286 acres in 1875, and one in 1876 for advances, and one again in 1877, by which the two former were cancelled; with money borrowed from Witte Bros. the Chesnut mortgage was paid up. The mortgage to Witte Bros. of 1877 was foreclosed by a decree of the court, and at the sale on June 8, 1880, plaintiff became the purchaser and took title, and the sale was confirmed by order of the court. Before this sale defendants gave notice of their claim, the plaintiff being present, and there receiving actual notice.

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*The master thus states the defense set up by Robert Robinson, who is now represented in this case by his heirs at law: "A. L. Monroe, in March, 1870, agreed to sell, and did sell, to Robert Robinson, sixty-six and two-thirds acres of said land, and on that day received from Robert Robinson $130 in part payment, and put Robinson into possession of the same, and had a dividing line between his land and Robinson's run out by a surveyor; that Robinson also paid Monroe $189.50 in part payment of the same land in the years 1872, 1873, and 1875, and then ceased paying, leaving a balance still due for the 66⅔ acres. The proof is that Robinson built a frame house on the land, worth two hundred dollars, with two rooms and passage, brick chimney and windows; and that he cut timber on the land and sold it as firewood; that he boxed the pine trees for turpentine and sold the rosin; that he cleared up a part of the land in 1870, and has cultivated it from then until this time."

A deed with renunciation of dower was made out and signed, but not delivered, by Monroe. The testimony by Wesley Truesdel, which I think not excluded by section 400 of the code, and if it had been, could only have been objected to by Robinson and his heirs (9 S. C., 392), shows that he entered and is still in possession of 30 acres of this 66⅔ acres, under some agreement with Robert Robinson. I am unable to ascertain, from anything before me, the exact amount still due on the contract between A. L. Monroe and Robert Robinson, or how much has been paid by Wesley Truesdel on his contract with Robinson (if anything), though it does appear that he has erected a log house on the land.

If Wesley Truesdel is in possession as a tenant, his possession inures to the benefit of Robert Robinson, who put him in possession. If he is in possession as a purchaser from Robert Robinson, he is entitled to the full protection of any equitable rights which Robert Robinson may have acquired in the land. In Jones on Mortgages, § 600, we find the following: "Possession by a vendee under a contract of purchase, whether it be personal or by a tenant, is constructive notice of his equitable rights as purchaser, and any one taking a mortgage under such circumstances from his vendor, takes subject to his

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rights. The mortgage lien, *under such circumstances, covers the property only to the extent of the unpaid purchase money."

In the discussion of the subject in Pomeroy Eq. Jur., § 615, we find that "the constructive notice thus described, like that arising from a record or registration, does not seem to depend upon any actual knowledge or information of the possession communicated to or had by the subsequent purchaser, since he is held to be charged with notice even though he is a resident of another state. * * * The purchaser cannot say, and cannot be allowed to say, that he made a proper inquiry and failed to ascertain the truth." See Knox v. Thompson, 13 Amer. Dec., 246, and note.

The case of a purchaser at a sale by the sheriff under an execution is not exactly analogous to that of a purchaser at private sale and who holds under a mortgage as an individual deed; but in Kairson v. Puckhaber, 14 S. C., 626, No. 990, it is said "that possession was notice," which I take to mean without any actual notice of the possession; possession, like recording, operating as notice. At any rate, I think that a man who buys or takes a mortgage of land is presumed to know whether the possession corresponds with the paper title, and if inconsistent with it, this would be sufficient to affect

him with notice of all the rights which accompany such possession. I therefore hold that Robert Robinson was entitled to have a specific performance of the contract with A. L. Monroe, and that Wesley Truesdel is protected thereby in his contract with Robert Robinson; that Witte Brothers took subject to these equities, and that the plaintiff takes no higher title than Witte Bros.

For want of accurate information, I cannot make a complete decree, but can only announce my judgment on the principles which govern the case.

It is therefore ordered and adjudged, that the report of the master be overruled; that the plaintiff has the right to have payment of the full amount of the purchase money, and interest, which remains unpaid, according to the contract between A. L. Monroe and Robert Robinson; that it be referred to the master to inquire and report what this balance so unpaid amounts to; that upon the coming in and the confirmation of

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such report, if *such balance be not paid within a time to be fixed by the court, that the master do sell the said 66⅔ acres on such terms and at such time as the court may order, and out of the proceeds of sale he do pay the costs of the plaintiff and expenses of the sale, and then to the plaintiff such unpaid balance; then the costs of the other parties to this action, and any balance to the defendants in the proportions they may be entitled to under the agreement with Wesley Truesdel made by Robert Robinson.

It is also ordered and adjudged, that the master do inquire and report the terms of the contract between Robert Robinson and Wesley Truesdel, and what amount is due thereon, and if the amount of the balance due to plaintiff on the coming in of the master's report, and the confirmation of the same, shall be paid as directed by the court, or if a sale shall be made as above provided for, then the title to the 66⅔ acres to be made, or the distribution of any balance coming to the defendants to be paid out to them in such proportion as their interests shall appear under said report, the heirs of Robert Robinson being entitled to the whole, land or fund, as the case may be, except so much as may be coming to Wesley Truesdel under his contract.

If the whole balance due to the plaintiff shall be paid in as may be directed by the court, on the coming in of the master's report, then all the costs to be paid by the several parties who have incurred them.

The plaintiff appealed upon the following exceptions:

1. That his honor errs in holding that one "who buys, or takes a mortgage of land, is presumed to know whether the possession corresponds with the paper title, and, if inconsistent with it, this would be sufficient to affect him with notice of all the rights which accompany such possession."

2. That his honor erred in holding that possession of land by one who claims to hold under contract of purchase, is constructive notice to a subsequent mortgagee for value of the claims of such party in possession.

3. That his honor erred in holding that the defendants are entitled to demand of plaintiff a specific performance of contract with A. L. Monroe, mortgagor; the mortgagees having no notice of their occupancy or claims.

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*Mr. J. T. Hay for appellant cited 108 U. S., 517; Jones Mort., §§ 570, 576, 591–2; Dart Vend. & Pur., 402–5; 2 Wh. & Tud. Lead. Cas., 407; Pom. Eq. Jur., §§ 660, 664; 6 Serg. & R., 179; Bail. Eq., 266, 386; Speer's Eq., 159; McMull. Eq., 196; 17 S. C., 593; 1 McCord, 428; 2 Bail., 101.

Mr. W. H. R. Workman, contra.

November 19, 1884. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Witte Bros., of Charleston, held a mortgage on one A. L. Monroe, of Kershaw County, executed in 1877, and covering the land in dispute. This mortgage was foreclosed by proper proceedings in 1880 and the land ordered to be sold. At this sale, made in February, 1881, the appellant, Sheorn, became the purchaser, and finding the defendants in possession of sixty-six acres of the land mortgaged, brought the action below for possession and damages for the detention. The defendants interposed an equitable defence growing out of the following facts: That in 1870, some years before the execution of the mortgage by Monroe to Witte Bros., the defendant Robinson bought from the said Monroe the sixty-six acres in controversy, a portion of which he sold to his co-defendant Truesdel, and although no conveyance was delivered by Monroe, yet that he immediately went into possession under this purchase, and with his co-defendant has continued in possession ever since, having in the meantime paid nearly all, if not the entire, purchase money.

The fact of possession by the defendants, as stated, from 1870 is conceded, and it is also admitted that Sheorn, appellant, had full knowledge of this possession at the time he bought at the foreclosure sale. Witte Bros., however, had no actual knowledge of the sale by Monroe to Robinson, or of the possession of Robinson, at the time they took their mortgage under the foreclosure of which Sheorn purchased. Under this state of facts, the Circuit judge held that although Witte Bros. had no actual knowledge of the possession of Robinson, yet the fact of this possession, like the record of a deed,

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operated as notice, and that there*fore the

appellant, standing in the shoes of Witte Bros., was not a subsequent purchaser without notice. The appeal questions this ruling, and this is the only question in the case.

The ruling of the Circuit judge in its full meaning is that possession of land by a vendee under a contract of purchase operates as notice to a subsequent purchaser or encumbrancer, although such possession as matter of fact is unknown to such subsequent purchaser at the time of said purchase. The possession in such case stands in the place of a record of the deed where the vendee has purchased with a conveyance regularly executed and delivered, and as the record of a prior deed is notice, whether it is actually known or not, so possession, whether known or not, is also sufficient notice.

In Jones on Mortgages, section 600, the doctrine on this subject is laid down in general terms as follows: "Possession by a vendee under a contract of purchase, whether it be personal or by a tenant, is constructive notice of his equitable rights as purchaser, and any one taking a mortgage under such circumstances from his vendor takes subject to his rights." It is not distinctly stated here whether the knowledge of the fact of possession must be brought home to the subsequent encumbrancer or purchaser, yet it is held that the possession is the foundation of the notice, and therefore, like recording, must operate as constructive notice, whether actually known or not.

The ground upon which the recording of a deed operates as notice, whether the fact of record be known or not, is that it is always in the power of the subsequent purchaser, by searching the records, to ascertain whether or not there has been a previous conveyance; and if he fails to make the necessary examination, it is his own fault, and his rights must be determined by the facts of the record within his reach on the subject. So, too, it is an easy matter for a purchaser of land to ascertain at the time of his purchase whether his vendor or some one else is in possession, and if he fails to do so, he should take the consequences. Mr. Pomeroy, in treating of constructive notice, says: "The constructive notice thus described, like that arising from a record or registration, does not seem to depend upon any actual knowledge or information of the possession com-

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municated to or had by *the subsequent purchaser, since he is held to be charged with notice even though he be a resident of another state." Pom. Eq. Jur., § 615.

And in our case of Massey v. McIlwain, McCardell and King, 2 Hill Eq., 427, where the land of King had been sold under executions against him in favor of creditors who had no knowledge of the possession of Massey, who was holding under a contract of purchase, the court, in discussing the effect of the possession, said: "He (Massey) was also in possession, and that, according to some of the English cases, was not only a notice to creditors, but sufficient to repel the claim of a subsequent purchaser. In Daniels v. Davidson (16 Ves., 254), the Lord Chancellor (Eldon) observes that there was considerable authority for the opinion which he held, that where there was a tenant in possession under a lease or agreement, a person purchasing the estate was bound to inquire on what terms he was in possession, and was bound by the terms of the lease or agreement, and refers to the case of Douglas v. Whitrong, in which Lord Kenyon held that possession was sufficient notice, and to the case of Taylor v. Stibbert, 2 Ves., Jr., 440, in which it was expressly ruled; and if possession alone be notice to a purchaser, it is necessarily so to creditors."

In the case of Massey v. McIlwain and others, supra, while it was conceded that McIlwain and McCardell, the purchasers, had full notice of the transactions between Massey and King before they purchased at the sheriff's sale, yet it was not pretended that the creditors of King had any information whatever as to the sale by King to Massey, or of Massey's possession; and it was also conceded that McCardell and McIlwaine had the right to stand in the shoes of the creditors who had no notice. With these facts, however, the court held that the claim of Massey was superior to that of the purchaser, basing its judgment partly at least on the ground that the possession of Massey operated as notice.

We have examined the English cases of Daniels v. Davidson and Taylor v. Stibbert, above referred to. In the latter, it seems that the possession of the adverse claimant was known to the purchaser, and the court said that there was no difficulty in hold-

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*ing that whoever purchases an estate from the owner, knowing it to be in possession of tenants, is bound to inquire into the estates of these tenants. In the former case, it was said: "That to maintain the plea of purchase for valuable consideration without notice, the defendant must aver that the vendor was, or pretended to be, seized, and that he was in possession, which would be satisfied by the possession of his tenant." This seems to imply that if he bought with some one else in possession, other than his vendor, his failure to know this fact would be inexcusable, and he could not aver that said vendor was in possession, a necessary averment in the plea of bona fide purchase without notice.

There are two kinds of notice, actual and constructive. Either is sufficient to prevent the plea of bona fide purchase without notice. It is not necessary to discuss actual notice. That is well understood, and such notice is not claimed here. The case turns on constructive notice. An illustration of constructive notice is found in the recording

of deeds. As we have said, recording amounts to notice, whether known or unknown, because the means of information are at hand. We think this principle should apply where at the time of the sale the vendor is out of the possession and a third party is in. It is the business of one who buys land, or attempts to secure a lien on land, to know the surroundings. In justice to his own interests, and certainly in justice to the interests of a party who has contracted to buy in advance of his purchase, and who is notoriously in possession, claiming it and using it as his own, he should examine into and ascertain the facts. One in possession under an equitable title has nothing that he can record; and possession, open and unconcealed, is the only mode by which he can give notice to the world of his rights; and when this notice is given in the only way in which it could be given, he should be protected. We think, upon authority and principle, the ruling of the Circuit judge was correct.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

Mr. Justice McGOWAN concurred.

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*Mr. Justice McIVER. It seems to me that the terms of the deed from Moore to Monroe, one of the links in the chain of plaintiff's title, were sufficient to put the purchaser upon inquiry, which, if followed up, would have disclosed the facts that the sixty-six acres had been sold to Robinson; that he was put into possession, and that a deed for the same, with plat attached, had been signed, though not delivered. This, according to well-settled principles, would have been sufficient notice of Robinson's equity. I therefore concur in the result reached by the majority of the court.

I am not prepared, however, to assent to the doctrine that mere possession, unknown by the purchaser, or rather by the creditor under whom he claims, is sufficient notice. This would, in effect, annul the recording law, for the logical result would be that one in possession under an unrecorded deed would prevail over another holding a deed duly recorded; and this is conceded to be the necessary consequence by the distinguished author upon whose authority the conclusion reached by the majority of the court mainly rests. See Pom. Eq. Jur., § 615. Besides, it would be mounting a presumption upon another presumption: first, a presumption that the purchaser knew of the possession; second, that he knew such facts as a knowledge of the possession would lead him to, by a proper prosecution of the inquiry.

Again, the very idea of the efficacy of constructive notice, in defeating a better legal title, is based upon fraud; that one should not be permitted to buy property which he has good reason to know some one else has a just claim to. Now, unless he knows the facts which would lead to such a conclusion, he cannot be said to be guilty of any fraud. When a purchaser examines the records of the proper office, which the statute law informs him is the proper source to go for information, and finds that his vendor has a clear legal title, he has a right to presume that everything is right, as the law presumes that he who has the legal title is constructively in possession; and unless some fact, as, for example, the fact that some one, other than his vendor, is in actual possession, is brought to his knowledge, which would naturally lead him to suppose that there was some outstanding equitable claim, he has a right to stand upon such legal title.

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*It is true that the doctrine announced in the opinion of the majority of the court has the support of authority, cited in the opinion, of great weight. But, while recognizing the weight of such authority, I do not think it should be allowed to control, when the effect, as it seems to me, would be to annul, or at least defeat, the operation of a portion of the statute law of this state. I do not think that the case of Massey v. McIlwain, 2 Hill Eq., 421, decides the point now before us; for although it did appear, in that case, that the creditors had no notice of the equity set up by Massey, yet it did not appear whether they did or did not have knowledge of the fact of Massey's possession, and therefore it does not seem to me that the question which we are now called upon to determine was considered in that case.

In the absence of any authoritative decision in this state, I am unwilling to adopt a conclusion, however well supported by authority elsewhere, the effect of which would be to defeat the operation of a part of the statute law of this state.

Judgment affirmed.

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22 S. C. 42

STARK v. HOPSON.

(April Term, 1884.)

[1. *Dower* ⇐79.]

In action by a widow for dower in the lands of her husband, especially in those sold during his life, she is not required, under the issue of non-seizin, to make strict proof of her husband's title; she may make out a prima facie case by the slightest and lowest order of evidence.

[Ed. Note. Cited in Morgan v. Smith, 25 S. C. 338; Ex parte Steen, 59 S. C. 223, 37 S. E. 829.

For other cases, see Dower, Cent. Dig. § 306; Dec. Dig. ⇐79.]

[2. *Trial* ⇐91.]

It is error to strike out on motion testimony as incompetent under section 400 of the Code,

where such testimony had been previously given without objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 242 244, 252; Dec. Dig. ⇦91.]

[3. *Appeal and Error* ⇦1177.]

A probate judge struck out certain testimony as incompetent and decided the case without regarding it; the Circuit judge held the excluded testimony to be competent, but sustained the decree of the court below, after taking such testimony into his consideration. *Held*, that, the Circuit judge erred; that he should have ordered a new trial, so that this testimony might be considered in the first instance by the probate judge.

[Ed. Note.—Cited in Ex parte White, 33 S. C. 447, 450, 12 S. E. 5; Mordecai v. Canty, 86 S. C. 479, 68 S. E. 1052.

For other cases, see Appeal and Error, Cent. Dig. § 4607; Dec. Dig. ⇦1177.]

Before Fraser, J., Richland, July, 1883.

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*For a full understanding of the points decided on this appeal, the case is sufficiently stated in the opinion of this court.

[For subsequent opinion, see 30 S. C. 370, 9 S. E. 345.]

Messrs. Bacon & Moore, for appellant.

Messrs. Clark & Muller, contra.

November 20, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was a petition in the probate court of Richland County by Eliza C. Stark, the widow of Theodore Stark, deceased, for dower in a square of land in the city of Columbia, described as containing four acres, more or less, and bounded by Taylor, Harden, Laurens, and Blanding streets. It was admitted that the petitioner was married to Theodore Stark, deceased, in April, 1835, and that he had recently died (the precise date not given), leaving the petitioner him surviving. It was also admitted that the defendant, Hopson, was in possession of part of the aforesaid square; so that the only question in the case was that of the seizin of Stark during the coverture.

It seems that the square, having no house on it, was not actually occupied by any one until about the year 1840. Mrs. Stark testified, without objection at the time, that "Major Stark was in possession of the square during her marriage with him, owned and controlled it, and paid taxes on it, but never lived on it, or cultivated it, as it was an open lot." On her cross-examination she said that "Major Stark came in possession of it long before her marriage as a present from Mrs. Taylor, the mother or grandmother of Governor John Taylor. I think he sold it to Joe Black. I never had any other evidence that Major Stark owned it, only from his own statements. I heard his sisters, Martha, Mary, and Emma, say that it was a present from Mrs. Taylor. I heard the family say so. The lot of land was given to Major Stark and three maiden sisters; the sisters sold their interest to Major Stark long before I was married. I heard him say that he had sold the property. I never relinquished dower," &c.

The defendant proved that he had a deed

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of the premises occu*pied by him from the heirs of Latta (March, 1860), which was destroyed when Columbia was burned during the war. He was allowed, against objection, to state verbally that, "to the best of his knowledge," Latta bought from J. A. Black, and then to introduce what purported to be a conveyance (1840) by N. A. Peay, as trustee for A. F. Peay, to Jos. A. Black, of "all that lot or parcel of land lying and being in the town of Columbia, containing four acres, being one square in said town, bounded north by Walnut street," &c., and reciting that it was the lot which had been conveyed to him (Peay) by B. F. Taylor, executor of Robert Stark, deceased. It thus, for the first time, was intimated that the street known as "Blanding" had formerly been called "Walnut street"; but it still did not appear how the lot had ever become the property of Robert, the father of Theodore Stark.

In reply the petitioner offered as a witness A. R. Taylor, who testified that he had resided all his life—seventy-one years—in Columbia; that he was the grandson of the first Thomas Taylor and his wife Ann, and the son of Governor John Taylor. "Major Stark and his maiden sisters, Martha, Mary, and Emma, were grand-nephew and nieces of Thomas Taylor. Mrs. Ann was very fond of the Misses Stark, particularly Martha. Colonel Thomas Taylor died in November, 1833, Mrs. Ann in July, 1834. * * * * Knows the lot now in litigation; have known it ever since I was a boy. It was not built upon until L. F. Hopson built upon it. That part of the town was generally known as 'Taylor's town,' because it was owned by the Taylors. I never heard of Robert Stark owning the land in this case." [Ruled that no testimony be admitted to prove that Theodore Stark owned the land in question. Plaintiff excepted.] The witness proceeded: "According to the best of my recollection the land in this case passed out of the Taylor family in 1833. I am not positive as to the time. The period fixed in my mind was caused by my brother having died in 'nullification times.' [Again ruled that no testimony that Theodore Stark owned the land can be adduced in attacking the deed marked A. Plaintiff excepted.] Thomas Taylor was the second son of his father, Thomas Taylor, whose will was admitted in evidence," &c.

On the next day after it was taken with-

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out objection, the *judge of probate, on mo-

tion, struck out so much of the testimony of Mrs. Stark as was based on what she heard from her husband, under section 400 of the Revised Code [plaintiff excepted], and after striking out that evidence against objection, proceeded to consider the case without reference to it, and decreed for the defendant on the following grounds: "I. As a matter of fact, Theodore Stark never had possession of the land as set forth in the petition of Mrs. Eliza C. Stark. II. As a matter of law, that Theodore Stark never had a title to the land in question. III. As a matter of law, that Mrs. E. C. Stark, the petitioner, is not entitled to dower in the said land."

From this judgment Mrs. Stark appealed to the Circuit Court, and at the same time gave notice of an application for a new trial, on the ground of surprise and newly discovered evidence in the will of Thomas Taylor, the twelfth clause of which contained a devise "to the children of my niece, Sarah Stark," of a square in Columbia, which, although bounded on Walnut street, was probably the identical lot in which dower was claimed. The appeal and motion were both heard by the Circuit judge, who, among other things, ruled that it was error in the probate judge to strike out any part of Mrs. Stark's testimony; "that the motion to strike out came too late, and the whole of the testimony should have been considered;" but after this ruling he went on himself to consider the testimony stricken out (which was in the record), and affirmed the judgment of the probate court. From this judgment Mrs. Stark appeals to this court upon nineteen exceptions; but from the view which this court takes, it will not be necessary to consider them in detail.

In an action by a widow for dower in the lands of her husband, and especially those sold during his life, some indulgence as to proof is regarded proper. She is not required to make strict proof of her husband's title under the issue of non-seizin. She is not the custodian of her husband's title papers, and therefore, in making out a prima facie case, the slightest and lowest order of evidence is all that can be exacted at her hands. 2 Scrib. Dower, 197; Forrest v. Trammell, 1 Bail., 78; Reid v. Stevenson, 3 Rich., 66; Pickett v. Lyles, 5 S. C., 275. It is very manifest that in this case all the facts were

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not considered *by the probate judge; but we will not go into the matter of the alleged surprise as to the devise in the will of Thomas Taylor, nor of the exclusion of certain evidence alleged to be cumulative.

We agree with the Circuit judge that it was error on the part of the probate judge to strike out, upon subsequent motion, any part of the testimony of Mrs. Stark not objected to at the time it was given. "The time to object to the incompetency of a witness to speak as to any particular matter is when the testimony is offered. It would be unfair to allow a party to postpone his objection as to competency until after the testimony has been given, for in that case he would be enabled to retain the evidence if it enured to his advantage, and to exclude it if it made against him. Such speculative advantages are discountenanced by the courts." Burris v. Whitner, 3 S. C., 512.

We think, however, that having made such ruling correctly, the Circuit judge himself should not then have proceeded to consider the evidence which had been stricken out and not taken into consideration by the probate judge; but he should have reversed the judgment and ordered a new trial in the Probate Court. Mrs. Stark was entitled to have the evidence considered in the first instance by the judge of probate. Section 55 of the Revised Code provides that "the Circuit Court shall have appellate jurisdiction of all matters originally within the jurisdiction of the Probate Court." So far as the rejected testimony was concerned, the Circuit judge took original jurisdiction of the case, which we think was error. It was like taking in the appellate court new testimony which had never been before the probate judge, whose judgment was under review upon appeal. See Griffin v. Griffin, 20 S. C., 486.

The judgment of this court is that the judgment of the Circuit Court be reversed, and the cause be remanded to the Probate Court of Richland County in order that there may be a new trial.

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22 S. C. *47

*WHITESIDES v. BARBER.

(April Term, 1884.)

[*Appeal and Error* ⇐123.]

In action for recovery of an interest in land, the jury found a verdict for the interest claimed and also for plaintiff's proportion of the net amount of rents and profits received by the defendant, which were stated in the verdict; the Circuit judge then passed an order directing the cause to be transferred to Calendar 2, that the plaintiff have leave to apply for judgment thereon, and that defendant have leave to set up any proper equities, and for this purpose may perfect his pleadings by amendment or otherwise. From this order defendant appealed. *Held*, that there being nothing but a verdict and an administrative order in the case, this court could not entertain the appeal.

[Ed. Note.—Cited in Moore v. Smith, 24 S. C. 316, 319; Whitesides v. Barber, 24 S. C. 374; Murdock v. Courtenay Mfg. Co., 52 S. C. 434, 29 S. E. 856, 30 S. E. 142.

For other cases, see Appeal and Error, Cent. Dig. § 877; Dec. Dig. ⇐123.]

Before Fraser, J., York, November, 1883.

The case is sufficiently stated in the opinion of this court for a proper understanding of the ruling made.

[For subsequent opinion, see 24 S. C. 373.]

Messrs. John P. Gage and Hart & Hart, for appellant.

Mr. W. B. Wilson, Jr., contra.

November 20, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. Thomas Whitesides had a life estate in a small tract of land, 210 1–5 acres, with limitation over to his three sons, James, John, and Austin Whitesides. During his life all of the three sons died intestate and without issue, leaving as their heirs at law the said Thomas Whitesides, their father, and two sisters, Mrs. Margaret Dunlap and Mary Whitesides. Mrs. Dunlap died in 1862, intestate, leaving as her heirs at law her husband, Thomas N. Dunlap, and two children, Missouri and B. T. Dunlap, the plaintiff. Mary Whitesides died in 1863, unmarried and intestate, leaving as her heirs at law her father, the said Thomas Whitesides, and niece, the said Missouri Dunlap, and her nephew, the said B. T. Dunlap. Missouri intermarried with one James M. Smith, and died childless and intestate, leaving as her heirs at law her said husband (Smith) and her father, Thomas N. Dunlap, and her brother, B. T. Dunlap.

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*In 1876 the father, Thomas Whitesides, the life tenant, died seized and possessed of the different interests which he had inherited as before stated, amounting in the aggregate to two-thirds of the said tract of land, which he held as tenant in common with his grandson, B. T. Dunlap, and with T. N. Dunlap and James M. Smith, in unequal shares. The said Thomas Whitesides left a widow, Jane M. Whitesides, and she, with the said B. T. Dunlap, his grandson, were his heirs at law as to his undivided interest in the land.

When the plaintiff, B. T. Dunlap, arrived of full age, he found the land in possession of one Ferguson H. Barber, claiming it as his own; and he instituted this action against the said Barber for the recovery of his interest therein, including that as heir at law of his grandfather, Thomas Whitesides, as well as his own interest as tenant in common. Pending the action, the plaintiff, B. T. Dunlap, died, and his sole executor and devisee, Thomas W. Whitesides, was by order substituted in his place. The said Barber answered, claiming that he purchased the land at a sale ordered by the Probate Court of York County, which was conveyed to him by the sheriff who made the sale on January 17, 1877.

It appeared that Thomas Whitesides left debts, but that no will had been proved or administration granted on his estate, or an account taken of his personalty; that a creditor filed a petition in the Probate Court of York County, J. H. Clawson, assignee, v. Jane M. Whitesides et al., alleging that the personal property of the deceased debtor was not sufficient for the payment of his debts and praying that the interest of the deceased (two-thirds) in the said tract of land should be sold in aid of the personalty, and the assets marshalled. The heirs at law of the deceased, as well as his co-tenants, were made parties, but as there was neither executor nor administrator, his personal representative of course was not a party.

While this proceeding was pending, Jane M. Whitesides, the widow, filed her petition in the nature of a cross-bill for partition and dower in her late husband's portion. In this action, which was entitled Jane M. Whitesides v. B. T. Dunlap et al., Missouri and B. T. Dunlap, the plaintiff, were minors, and,

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as it was sup*posed, were made parties by accepting service of summons. Being over fourteen years of age, they indicated the defendant, F. H. Barber, as their guardian ad litem, who was appointed and consented to the proceeding. From this time forward the orders of the probate judge were made in both cases, united and stated together in the caption.

On September 22, 1876, the probate judge ordered the whole tract of land sold; but in December thereafter he issued another order, staying the sale "until the further order of the court," and issued a writ of partition to divide the land. The commissioners recommended that the land (with small exception, unnecessary to state here) should be sold and the proceeds divided, and this return was simply marked "approved and confirmed," without repeating the express order of sale, which had been "stayed." The land was sold by Glenn, sheriff of the county, and the defendant Barber became the purchaser for $715, which he paid, and received sheriff's titles, January 17, 1877. The judge of probate paid the proceeds of sale to the costs, the widow's dower, and the few debts of the deceased, Thomas Whitesides, and set down for the plaintiff what was termed his share; but he refused to receive it, and, as before stated, when he came of age brought this action for his part of the land.

The cause came on to be heard before Judge Fraser, and the jury found a special verdict as follows: "We find that the plaintiff is entitled to the possession of 65–144 of the land in dispute, of which 41–144 in his own right, and 24–144 as heir of Thomas Whitesides. We find that the net value of the rents and profits, after deducting taxes and other expenses and value of timber used, to be $1,750.04; and that the plaintiff is entitled to the same, in the same proportion and in the same right as to the land." Upon receiving this verdict, the Circuit judge made the following order: "The jury having rendered a special verdict against the defendant, Ferguson H. Barber: It is ordered, that the case be transferred to calendar No. 2; that the plaintiff have leave to apply for judgment thereon; that the defendant, Ferguson H.

Barber, have leave to set up in the cause such equities as he may properly do in this action, and that for this purpose he may apply for leave to perfect his pleadings, either

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by amend*ment or otherwise, as he may be advised, and as may be proper in the case."

From this order the defendant Barber appealed and filed numerous exceptions, which it is unnecessary to set out, as from the view taken we have no jurisdiction to entertain the appeal. This court has the right to review upon appeal only final judgments and such intermediate judgments, orders, and decrees as involve the merits. There is nothing in this case but a special verdict and an administrative order. From the verdict of a jury no appeal lies to this court. State v. Rankin, 3 S. C., 438 [16 Am. Rep. 737]; Sloan v. Westfield, 11 S. C., 445; First National Bank of Charleston v. Gary, 14 S. C., 571.

There was no final judgment. Indeed, no judgment could be entered on the verdict, for the reason that the Circuit judge ordered that "the case be transferred to calendar No. 2, and that the plaintiff have leave to apply for judgment thereon." Section 286 of the code provides that "upon receiving a verdict the clerk shall make an entry in the minutes, &c., &c. If a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict." Here "a different direction" was given by the court, and it may turn out that when the equities are heard on calendar 2, the plaintiff may not recover judgment at all.

The judgment of this court is that the appeal be dismissed, without prejudice, for the want of jurisdiction to entertain it at this stage of the proceedings.

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22 S. C. 50

THE STATE v. PACIFIC GUANO COMPANY.

(April Term, 1884.)

[1. *States* ⇐190.]

When the state comes into her own courts to assert a right of property, she is bound by all the rules established for the administration of justice between individuals.

[Ed. Note.—Cited in State v. Evans, 33 S. C. 186, 11 S. E. 697.

For other cases, see States, Cent. Dig. § 178; Dec. Dig. ⇐190.]

[2. *Public Lands* ⇐169.]

When the state sues for the recovery of land she can recover only on the strength of her own title; but as sovereign and the source of title, she may rest upon this prima facie showing, until the defendant makes proof that her original title has been divested.

[Ed. Note.—Cited in State v. Pinckney, 22 S. C. 503; State v. Evans, 33 S. C. 186, 11 S. E. 697.

For other cases, see Public Lands, Cent. Dig. § 502; Dec. Dig. ⇐169.]

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[3. *Navigable Waters* ⇐1, 37.]

*The title to the soil in all navigable streams in which the tide ebbs and flows, remains in the state, and does not pass under her grant of the superjacent land; but tidal channels are navigable in law only when they are navigable in fact for trade and commerce by craft of some kind. Cases cited and reviewed.

[Ed. Note.—Cited in State ex rel. Port Royal Min. Co. v. Hagood, 30 S. C. 526, 9 S. E. 686, 3 L. R. A. 841; Heyward v. Farmers' Min. Co., 42 S. C. 150, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702; State v. Columbia Water Power Co., 82 S. C. 186, 63 S. E. 884, 22 L. R. A. (N. S.) 435, 129 Am. St. Rep. 876.

For other cases, see Navigable Waters, Cent. Dig. §§ 5, 212; Dec. Dig. ⇐1, 37.]

[4. *Action* ⇐22.]

Whether a cause is a "case of chancery" can only be determined by considering whether it belongs to that class which, previous to the Constitution of 1868, would have been appropriately presented in the court of chancery.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 124–139, 143, 145; Dec. Dig. ⇐22.]

[5. *Appeal and Error* ⇐987.]

Information by the attorney general on behalf of the state to recover damages for an intrusion upon her soil and to enjoin further trespass, is substantially an action for the recovery of real property and is not "a case of chancery." This court therefore cannot review findings of fact by the Circuit judge in such a case; but if the right existed, the findings in this case would not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3895; Dec. Dig. ⇐987.]

[6. *Navigable Waters* ⇐46.]

A grant by the state of the lands on the shore of a navigable tidal channel, gives title only to high water mark.

[Ed. Note.—Cited in State v. Pinckney, 22 S. C. 507; Nathans v. Steinmeyer, 57 S. C. 389, 35 S. E. 733.

For other cases, see Navigable Waters, Cent. Dig. §§ 287, 288; Dec. Dig. ⇐46.]

[7. *Appeal and Error* ⇐251.]

Whether a grant can issue from the executive department of the state government for lands as "vacant" down to low water mark, not determined, the question not being raised by proper exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1476–1484; Dec. Dig. ⇐251.]

[8. *Estoppel* ⇐29.]

The acceptance of a grant in aid of title previously claimed does not estop the grantees from setting up any other prior or more extended title, if they can do so.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 69; Dec. Dig. ⇐29.]

[9. *Navigable Waters* ⇐37.]

Under a deed calling for a boundary in the middle of the channel of tidal navigable streams, the defendant could not claim the presumption of a grant to the soil below common high water mark under color of title.

[Ed. Note.—Cited in State v. Pinckney, 22 S. C. 504; Heyward v. Farmers' Min. Co., 42 S. C. 148, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702.

For other cases, see Navigable Waters, Cent. Dig. § 204; Dec. Dig. ⇐37.]

10. Can the state be disseised in such manner as to be divested of title either under the statute

of limitations or by the presumption of a grant against her remonstrances? And if so, could such disseisin be effected by a mere constructive possession for any length of time under color of title only?

[11. *Navigable Waters* ⟸37.]

The state holds the beds of the channels of her tidal navigable streams for the public use of her citizens; such property may be disposed of by an act of the legislature, but may not be granted by her officers as "vacant land."

[Ed. Note.—Cited in Heyward v. Farmers' Min. Co., 42 S. C. 157, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702.

For other cases, see Navigable Waters, Cent. Dig. §§ 201–226, 285; Dec. Dig. ⟸37.]

[12. *Navigable Waters* ⟸37.]

It not having been the policy of the state to part with her right to such beds of channels, an act of the legislature making a grant of any part of them cannot be presumed.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 204; Dec. Dig. ⟸37.]

[13. *Public Lands* ⟸169.]

For these reasons, a grant from the state cannot be presumed in favor of one who after purchase of several grants bordering on both sides of tidal navigable streams, caused all these lands to be included in one survey and plat, and thereafter held under such plat claiming the whole.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 502; Dec. Dig. ⟸169.]

[14. *Mines and Minerals* ⟸6.]

The fact that the state had granted the

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right to another corporation *to dig and mine for phosphates in these streams does not prevent the state from bringing this action to assert her title to the soil.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 6; Dec. Dig. ⟸6.]

[15. *Mines and Minerals* ⟸51.]

The value of the phosphates taken by the defendant corporation from the soil of the state should be estimated at the value of the phosphates, less the amount defendant has added to their value by their removal and preparation for market, defendant having acted under an honest but mistaken belief in its right to these phosphates.

[Ed. Note.—Cited in Lewis v. Virginia-Carolina Chemical Co., 69 S. C. 367, 368, 48 S. E. 280, 104 Am. St. Rep. 806.

For other cases, see Trespass, Cent. Dig. § 139; Mines and Minerals, Dec. Dig. ⟸51.]

[This case is also cited in Frampton v. Wheat, 27 S. C. 293, 3 S. E. 462, without specific application.]

Before Wallace, J., Beaufort, November, 1883.

The opinion fully states the case. The Circuit decree was as follows:

This information, on behalf of the state, alleges as the cause of action that the defendants on the first day of August, 1882, and at divers times before and after that date, at Palmer's creek, otherwise known as Fisherman's or Sheephead creek, at Big creek, at Haulover creek, at Horse creek, at South Wimbee creek, and at Chisolm's otherwise known as Frenchman's or House creek, navigable waters in the County of Beaufort and State of South Carolina, useful for the purposes of trade and commerce, and in which the tide from the sea ebbs and flows, did intrude upon the rights and property of the State of South Carolina, by removing from the beds of the streams named before, below high water mark, large quantities of phosphate rock and phosphatic deposits, and converting the same to their own use, and demands damage therefor and an injunction to perpetually restrain defendants from continuing the acts complained of. The answers of the defendants are in substance a denial that the beds of the creeks named are the property of the state. Whether they are or not is the leading question in the case.

The state rests her claim to the property upon her rights as successor to the British crown to the fee of all vacant ungranted lands in the limits of her territory. 3 Kent's Com., 377, 521. The defendants, admitting this right of sovereignty, claim that their grantors having been in possession of the beds of these creeks and holding them adversely for a century, they are entitled to the legal presumption that they entered under a grant, and that the title of the state is now in these defendants.

The legal rule under which defendants

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claim is certainly well *established, and nowhere more clearly stated than by Mr. Justice Evans in the case of McLeod v. Rogers and Gardner, 2 Rich., 19. Says the learned judge: "Ever since the case of McClure v. Hill, 2 Mill Con. R., 420, it has been regarded as the settled law in this state that twenty years' continuous adverse possession is as good a title as a grant or a deed, where there is an absence of any of those facts which go to rebut the presumption. After a possession continued for so long a time undisputed by any, and acquiesced in by all, the law will presume that the possession in its incipiency was rightful, and that the tenant when he took possession did so under a grant or deed, or whatever may be necessary to invest him with the legal title. He who claims under a presumption of a grant is entitled to stand on the same ground as if he produced the grant. The law substitutes the presumption in place of the grant." These principles have been frequently affirmed by the courts of the state since the case of McLeod v. Rogers. See Riddlehoover v. Kinard, 1 Hill Eq. 378; Godfrey v. Schmidt, Cheves Eq., 57; Boyce v. Lake, 17 S. C., 481 [43 Am. Rep. 618].

The defendants, with the view of bringing themselves within the scope of the rule first stated, produce and put in evidence the will of Mary Bull, dated May 1, 1781. This will devises "all the lands included within the ditch of Bull's Island, in Prince William's parish," to Daniel Blake, Miles Brewton, and Arthur Middleton, in trust for her granddaughter Mary Butler. Defendants also put

in evidence a conveyance which recites the will of Mary Bull above referred to, and conveys "all that plantation, island, or tract of land situate, lying, and being in Prince William's parish, in the state aforesaid, containing by estimation four thousand (4,000) acres, more or less; butting and bounding to the south, southeast, and southwest on Coosaw river, to the east and northeast on Bull river, north, northeast, and west by certain tide waters flowing from Coosaw and Bull's rivers into a creek or channel commonly called by the name of Bull's ditch."

These instruments, both the will and the deed, describe the land penetrated by the creeks in question, and defendants establish an unbroken chain of paper title to themselves down from these papers to the present time, and claim that their grantors and

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*themselves have held the land adversely under this color of title for a much longer period than is sufficient to raise the presumption of a grant. The case of McLeod v. Rogers, supra, is authority for the rule that for the purpose of making out a state of facts upon which to predicate the presumption of a grant, the possession of grantors and grantees may be connected.

In reply to this ground it is insisted that as time does not run against the sovereign, a grant cannot be presumed against the state when she comes into court to establish her proprietary rights, and that such defence can only prevail in actions between individuals. And, secondly, it is insisted that no such adverse possession of the beds of these creeks has been established as is necessary to raise the presumption of a grant, even if such presumption could be set up against the state. In regard to the doctrine of nullum tempus interposed in answer to the defence, it may be observed that until a recent period, when the state by her own act provided otherwise, the statute of limitations did not run against the state, and no proprietary right of hers could be barred by it. The reason of the rule is twofold. First, because the plea admits the right, but claims that it is barred by laches, and laches cannot be imputed to the sovereign. Second, because an intrusion or trespass upon the land owned by the state does not operate to dispossess the state, and there is no time of ouster from which the statute could ever begin to run. 1 Bl. Com., 247; 3 Wash. Real Prop., 191, 159, and cases there referred to; Harlock v. Jackson, 1 Tread., 135; State v. Arledge, 1 Bail., 551.

The presumption of a grant, however, proceeds upon different assumptions. "One who claims under the statute was a trespasser throughout, and his possession began in a trespass and so continued until the statutory time had run out." McLeod v. Rogers, supra. The presumption of a grant is the negation of a trespass. It does not impute laches or claim the benefit of a successful disseisin. It does not claim title against, but from, the state. Instead of producing the highest evidence of a grant, to wit: the grant itself, a rule of evidence which is now also a rule of property, allows the proof of certain facts to establish the equivalent of a grant to put the tenant in the same strong position that he would occupy if he held an actual grant

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that he was able *to produce. No right of the state is thus denied. Time does not run against her and create a bar, but proof of years of acquiescence are allowed to raise the presumption of the performance of a sovereign act. To attribute a voluntary act to a free and intelligent agent, and to hold others bound by it, while the agent himself was not, would be unreasonable. It appears, therefore, that the reasons why the statute of limitations does not run against the state do not apply to the presumption of a grant, and such presumption may be set up against the state.

The next question to be considered is, have the defendants made out such a case of adverse possession as is sufficient to raise the presumption of a grant of the beds of the creeks? The lands held by this state as successor to the British crown, were with very limited exceptions held for the purpose of being granted to settlers. Any freeman who chose to institute and pursue the prescribed method of proceeding to that end, could obtain a grant to vacant land. Hence the reasonableness of the grounds of the presumption of a grant. These grants, too, when bounded on fresh water rivers or on their margins carry the exclusive rights and title of the grantee to the middle of the stream; for according to the common law the beds of fresh water rivers are the property of the adjacent proprietors. Cates v. Wadlington, 1 McCord, 580 [10 Am. Dec. 699]; McCullough v. Wall, 4 Rich., 84 [53 Am. Dec. 715]. So the beds of fresh water streams, whether navigable or not, stand upon the footing of land not covered by water, and were held only to be granted. Upon the other hand, when grants of land were bounded upon navigable streams in which the tide from the sea ebbs and flows, the right and title of the grantee only extended to the river, and did not include any part of its bed. 3 Kent's Com., 427 and 428; Shands v. Triplet, 5 Rich. Eq., 77.

It would seem, therefore, that the common law in its wisdom made a difference in the effect of grants of land, whether bounded upon fresh water streams and navigable streams in which the tide ebbs and flows; and that beds of streams of the latter class were not held by the state solely for the purpose of being granted to individuals, as the adjacent land was. The inference cannot be resisted, therefore, that the beds of this class

of streams were held by the state in trust
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for the use and benefit of all her citi*zens who might desire to avail themselves of their privilege. While the state, as sovereign, had perhaps the power to grant these beds, they were not held by her entirely for that purpose, and to do so might in some degree be held a breach of duty. It will be obvious, therefore, that if a grant of these beds can be presumed at all, it would require stronger proof than would be sufficient to raise such a presumption in relation to the adjacent land. Palmer v. Hicks, 6 Johns, 133, and notes; Commonwealth v. Roxbury, 75 Mass., 451.

These observations are intended to apply to only navigable streams in which the tide ebbs and flows; for although every stream in which the tide ebbs and flows is, according to the common law, prima facie a navigable stream, yet this presumption may be rebutted by showing that the conditions and objects of navigation do not exist. In the case of the Mayor of Lynn v. Turner, Cowp., 86, Lord Mansfield is reported to have said: "How does it appear that this is a navigable stream? The flowing and reflowing of the tide does not make it so, for there are many places into which the tide flows which are not navigable rivers, and the places in question may be a creek in their own private estate." In Miles v. Rose, 5 Taunt, 706, Gibbs, C. J., said: "The flowing of the tide, though not absolutely inconsistent with the rights of private property in a creek, is strong prima facie evidence of its being a public navigable river;" and Heath, J., expressed the same opinion.

In our own case of the State v. Duncan, 1 McCord, 404, the question considered by the court was whether a creek in which the tide ebbed and flowed was such a highway, for the obstruction of which an indictment would lie. In the report of the case the words highway and navigability seem to be used as meaning the same thing, and the case, therefore, lends some support to the view just stated. If a channel, therefore, in which the tide ebbs and flows, and in the language of the civil law is floatable, can be used for the purpose of trade and commerce, it is a navigable stream. Neither the character of the craft with which it is accomplished, nor the relative ease or difficulty of the navigation, are tests of navigability.

In the case of The Montello, 20 Wall., 441
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[22 L. Ed. 391], the following *language occurs: "It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river rather than the extent and manner of that use. If it is capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are or may become the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river." In the case of The Daniel Ball, 10 Wall. 563 [19 L. Ed. 999], the court hold that those rivers are navigable in law, which are navigable in fact; and they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

By applying the tests, derived from the above cited cases, to the creeks in controversy here, it will be at once perceived that Big creek and Chisolm's creek are not navigable streams. Although the tide ebbs and flows through them, yet the conditions necessary to sustain trade or commerce of any kind do not exist. Flowing out of Coosaw river with the tide into Chisolm's Island, they lose themselves in the marshes with which they are surrounded. They are entirely in the private estate of the owners of the island and make no connections with thoroughfares of travel or trade, and are none themselves. With regard to South Wimbee, Horse Island, Haulover, Palmer's and Fish creeks, the case is different. Each of these constitute part of water communications between the two great navigable thoroughfares—Coosaw and Bull rivers. It appears in the testimony that each can be, and has been, navigated with small craft by any and all who chose to so use them. The navigation of parts of some of them may be difficult, but it has been proven to be practicable. South Wimbee connects waters of
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Coosaw and Bull *rivers through Bull's ditch; Horse Island creek, out of Bull river, connects with Palmer's creek out of Coosaw, by means of Haulover creek and Grand Doll gutters. That this latter connection has existed from time immemorial is proved by a conveyance of Horse Island by William Bull to John Bull in 1748, in which Horse Island is described as "bounded to the northeastward on a creek running out of Coosaw river into Bull river," &c. This is the creek referred to as Horse Island creek, and it reaches Coosaw river now by means of Grand Doll gutters, Haulover, and Palmer's creek. Fish creek, too, runs out of Bull river and forms a junction with Palmer's creek. I am satisfied from the testimony that this latter creek has afforded means of communication from Bull

river to Palmer's creek from time immemorial, yet, at the point called the Hammock, I am equally satisfied that it has been artificially widened. These creeks, therefore, to wit: Horse Island, Haulover, Palmer's, Fish, and South Wimbee creeks, are navigable waters in which the tide ebbs and flows.

It now becomes necessary to inquire into the alleged adverse possession of the beds of these last named creeks by the defendants and their grantors. The defendants have taken actual possession of the beds of these creeks, and by damming up some of them and mining in them, have clearly evinced their intention to hold them as their private property against any one. Their acts in pursuance of a claim of right are of a nature to raise the presumption of a grant if the duration of their possession had been sufficient. This latter essential, however, is wanting, as their deed bears date on June 3, 1877, unless they can connect themselves with such a possession on the part of their grantors as will sufficiently supplement their own.

As has been seen, the defendants claim by adverse possession under the deed from Mary Bull above referred to, as color of title. It is important, therefore, to inquire what the will of Mary Bull conveyed. Several grants by the lords proprietors were put in evidence by the plaintiffs. While there may be some difficulty in locating some of them with certainty, yet there is no doubt that the part of Chisolm's Island penetrated by these creeks is covered by some of these grants. Those that relate to this part of the island call for metes and bounds that exist

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by the *same names now. They are bounded by creeks and marshes and rivers, but do not convey any channels. The claims of title which have their source in these grants all finally converge to Mary Bull. She owned the fee in all the land penetrated by these creeks under muniments of title, none of which covered the beds of these creeks. She, by her will, conveys all the land included within the ditch of Bull's Island. This includes the land penetrated by these creeks, except South Wimbee creek, which is the north, northeast, north, northwest boundary of the land.

The color of title of defendants, therefore, does not cover this creek, because the land is bounded on it, and it is a navigable stream in which the tide ebbs and flows, and right of grantee does not cover its bed. It would seem, too, that their color of title, while calling for the outlines of the island as boundaries, and ignoring the existence of the creeks, should be construed with reference to the light thrown upon the title of their grantor by the colonial grants. It is certain Mary Bull had no title to the creeks, but owned on all sides of them. She could convey only what she had, although the terms of her conveyance were general. I would be unwilling to hold, however, that defendants are restricted in their claim by the descriptions in the grants after they had renounced all claim under them. Yet it is clear that a chain of paper title, beginning at the paper title of these defendants, can be traced up to existing grants from the lords proprietors to all this land, except the beds of these creeks. The papers are in evidence in this case. The defendants, however, renounce all claim under the paper title, which they did not put in evidence, and rest upon their claim of the presumption of a grant. These facts are important with reference to the extent of the possession and the nature of the holding of defendants' grantors. They would seem to establish a strong probability that these grantors held under this claim of paper title until the value of the beds of the streams was discovered, and then renounced that part of it which did not include them.

While, therefore, the boundaries mentioned in Mary Bull's will, and in the conveyance of the trustees appointed by her, included the creeks, yet that would not of itself be

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sufficient *to raise the presumption of grant to the beds of these streams, nor is the fact of the boundaries sufficiently aided by the proof of the building of a bridge and the warning off a sloop which came to pick oysters, while the public used the streams for navigation at their pleasure. I do not think, therefore, that defendants have established a state of facts that makes out such an adverse holding of the beds of these streams for a sufficient length of time to entitle them to the presumption of a grant. It follows that the title is in the state.

It is argued on behalf of defendants that the state, having granted an exclusive right to other corporations to dig and mine and remove phosphate rock from the beds of these creeks, cannot, therefore, maintain this action. It is true there are acts of the General Assembly which grant to other corporators the right to remove phosphate rock from these creeks, but there is no proof that these corporators have ever availed themselves of the privilege, or performed the conditions on which it was to exist. But if they had, they would have only the right to enter upon the property of the state and remove the phosphates, and what they removed would be their property. The fee still remains in the state, and the right of property in all the phosphate rock not removed. For an unauthorized entry upon the land and injury to the property of the state, she has the right of redress.

It appears that defendants have been mining and removing valuable phosphate deposits from the beds of these creeks, and the state thereby having suffered wrong and injury is, according to familiar principles, en-

titled to damages. The measure of damages for a willful trespass upon property, like that involved here, is the full value of the property, without deduction for labor and expense. But if the trespass is committed under an honest but mistaken belief of right, then the measure of damages is the value of the property, less the amount which the trespasser has added to its value by its removal and preparation for market. Sedgwick on Damages, 670–673; 36 Am. Rep., 769, and notes. The trespass in this case, I am sure, belongs to the latter class.

It is therefore ordered, adjudged, and decreed: First. That the beds of the creeks on Chisolm's Island, known as Horse Island creek, Haulover creek, Fish creek, Palmer's

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creek, and South *Wimbee creek, are the property of the State of South Carolina. Second. That the defendants, their servants, agents, and employees, be perpetually enjoined from mining in and removing from the beds of said creeks phosphate rock and phosphatic deposits. Third. That it be referred to Simeon Hyde, jr., Esq., to take testimony and report to this court what quantity of phosphate rock and phosphatic deposit have been taken from the beds of said creeks and converted to the use of defendants, and the value of the same in its natural state and position; and that the State of South Carolina is entitled to a judgment for the sum so ascertained. Fourth. That plaintiff have leave to apply at the foot of this decree for further necessary and proper orders.

[For subsequent opinions, see 24 S. C. 598; 26 S. C. 610, 2 S. E. 265; 28 S. C. 63, 5 S. E. 167.]

Messrs. A. T. Smythe, W. J. Verdier, and A. M. Lee, jr., for the plaintiff.

Messrs. Simonton & Barker, for defendants.

Possession under color of title for the period from 1799, when A. R. Chisolm went in, to 1882, creates the presumption of a grant for everything within the color of title, including the beds of these creeks, be they navigable or not. What is color of title? When one sets up a claim based upon possession under color of title, whether it be deed, will, plat, or anything, such deed, &c., is used only to show the extent of the claim, and not as a muniment of title. The title depends on the possession, and the office of the deed, &c., is to show the extent of the claim. The question is, does the possession by its duration warrant the presumption of title, and then the deed, plat, &c., is used to show the area of such possession? 3 McCord, 260; 2 Id., 273; 2 Hill, 495; 11 Am. Dec., 739; 14 Id., 578, 580, and notes; 18 Id., 463. Possession under color of a part is possession of the whole. 1 Nott & McC., 357, 374; 1 Mill Con. R., 85; 2 Id., 426; 2 Speer, 451; 1 Strob., 145. Our possession for eighty-three years presumes a grant—is a grant. 1 Bay, 26; 2 Bail., 101; 17 S. C., 141. And this as against the state, as well as against a citizen. 2 Mill Con. R., 423; 2 Rich., 22. We do not claim against the state by ad-

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verse possession, and *could not. We claim under the state by the presumption of a grant from her. Nor is this presumption affected by the fact that the land is the bed of a navigable stream. 3 Kent, 427; 7 Cush., 82; 9 Am. Dec., 507; 16 Id., 54; 33 Id., 329; 39 Id., 685. The state may grant these beds, provided the jus publicum, the right of passage, is not obstructed. Whatever can be granted can be presumed to have been granted. 60 E. C. L. R., 894. Claims were distinctly made by building and maintaining a causeway and a bridge.

His honor objects to our presumption of a grant by saying that Mary Bull could not dispose of the beds of streams; but we do not rely on title under Mary Bull's will and the Butler deed, but on presumption from possession, using this will and deed to show the extent of our possession. 2 Mill Con. R., 426; 2 McCord, 273; 3 Id., 261. He further holds that as our paper title covers all our claim, except these beds, the probability is that we held only under our paper title, until the discovery of these phosphates. But the evidence shows that we always claimed them, and our paper title, traced back to the lords proprietors, does not cover all of our claim. These colonial grants did not cover even all the marshes. The presumption is that a subsequent grant was obtained covering this magnificent estate. 2 Mill Con. R., 426. The new grant of 1869, taken to perfect title, does not affect the claim under older deeds. 1 Strob., 1; 7 Wheat, 535; Herm. Estop., 249, 362, 366, 378, 386–7; 15 S. C., 133; 1 N. Y., 254; 39 Am. Dec., 669; 43 Id., 553.

These creeks are not navigable streams. 3 T. R., 253; 10 E. C. L. R., 414. Fresh water rivers are called navigable. Cheves, 259; Rice, 450; 1 McCord, 582; 2 Strob., 12. And both salt and fresh water streams, indiscriminately, declared to be navigable. 10 Stat., 300; 12 Stat., 268, 474, 923; 13 Stat., 288, 439; 16 Stat., 840; Gen. Stat., §§ 1062, 1097. These creeks are not public highways, as defined in 1 McCord, 404–5. The Code of Procedure prescribes a statute of limitations, which, as to actions for the recovery of land, fixes twenty years; but section 109 establishes a rule of property applicable to all actions thereafter prosecuted. We have been charg-

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ed with the *value of the rock in position, but one dollar a ton is the royalty fixed by the state.

Messrs. William Elliott and H. B. Sargent, jr., same side.

November 21, 1884. The opinion of the court was delivered by

Mr. Justice McGOWAN. This action was commenced in September, 1882, by information filed on behalf of the state by the attorney general, under section 79, General Statutes, which provides that "the attorney general may, when in his judgment the interest of the state requires it, file and prosecute informations or other process against persons who intrude upon the lands, rights, or property of the state, or commit or erect any nuisance thereon."

The information alleged that the defendant company "The Pacific Guano Company," a corporation under the laws of Massachusetts, and William Weymouth, their superintendent, had intruded upon certain territory, the property of the state; that this property consisted of the beds of certain creeks known as South Wimbee creek, Fish or east branch of Palmer's creek (and sometimes called Sheephead or Fisherman's creek), Horse Island or Palmer's creek, Big creek (otherwise called Haulover cut), and Chisolm's creek—five in number—all tide waters between Bull and Coosaw rivers, in Beaufort County, and running through or forming the boundaries of what is now commonly called "Chisolm's Island"; that the beds of these creeks contained large deposits of phosphatic rock; that the defendants had engaged in the business of digging and removing these deposits from said territory, and had removed large quantities therefrom and appropriated the same to their own use, and that they intended to continue so to remove such rock; that the state had by sundry acts of the General Assembly asserted her interest and property in such deposits, and provided the manner in which those so desiring could lawfully dig for the same, with a penalty for those who dug unlawfully. The state therefore asked three hundred thousand dollars damages for the rock so unlaw-

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fully *removed, and for an injunction restraining the defendants from further intruding and removing such rock.

The defendants answered, denying the ownership of the state in the creeks named or in the phosphatic deposits therein. After issue joined and before trial the defendants filed a petition in the Court of Common Pleas for Beaufort County, praying that the case should be transferred to the United States Court. The petition was refused by the Circuit judge, and no further action was taken thereon. In October, 1882, an order was taken referring the case to Simeon Hyde, jr., to take the testimony and state an account of all the phosphate rocks dug by the defendants from the creeks mentioned in the information, or any of them; and requiring the defendants to enter into bond in the penal sum of fifty thousand dollars, conditioned to file monthly true and faithful returns with the clerk of the court of all rock dug from said creeks, from the date of the commencement of the action, and to pay such royalty or other damage as the court might ultimately determine, and on failure to execute such bond, enjoining them from further digging therein. The bond was executed and filed, and the defendants continue to dig under its provisions.

A number of references were held and much testimony taken, particularly as to the size, condition, and navigable capacity of the different creeks indicated. This testimony is all printed in the brief, and cannot of course be reproduced in this preliminary statement; but it may contribute to clearness to give a short outline of the general scope of the evidence.

The sea coast of the state, notably in the neighborhood of Beaufort, is characterized by a net-work of marine channels, in which, being very little above the level of the sea, the tide ebbs and flows. These channels, known as rivers or creeks, afford water communication, more or less perfect, according to their size and the state of the tide, to and from the mainland and among the numerous islands of this tide-water region. Coosaw or Chisolm's Island is one of the larger of them. It forms a long strip between Bull and Coosaw rivers. Bull river lies on the north, Coosaw river on the south, and the eastern end of the island is the point of intersection of these rivers. The western boundary is formed by South Wimbee creek, which runs in a

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*southwesterly direction from Bull river and meets Adam's creek, which runs in a northwesterly direction from Coosaw river. The junction of these two creeks is called "Haulover cut." The three together, South Wimbee, Haul-over cut, and Adam's creek, make up the western boundary of "Chisolm's Island." The island itself, about seven miles long and two miles wide, is penetrated by a number of smaller creeks, each having on its margin strips of salt marsh, so that of the superficial area of the island at least three-fourths consist of water in the creeks, of salt marsh between high and low water mark, and of little islets.

There can be little doubt, indeed it was not seriously contested, that all the high land of the island had been granted before the revolution. Original grants of different parcels to different persons were in evidence from the lords proprietors and King George the Second, from 1703 to 1733. These grants had not been actually located, but it was manifest from inspection that they covered lands on the island, being "in free and common socage, with ye privilege of hawking, hunting, fishing, and fowling in ye boundaries of ye same, with all woods and trees and whatever else is thereon standing and growing, or therein being or thereunto belonging or in any manner appertaining, except all royal mines and quarries of gems and precious

stones, and one-sixth part of all base minerals when digged," &c.

The Circuit judge upon this subject says: "Several grants were put in evidence by the plaintiff. While there may be some difficulty in locating some of them with certainty, there is no doubt that part of Chisolm's Island, penetrated by these creeks, is covered by some of these. Those that relate to this part of the island call for metes and bounds that exist by the same names now. They are bounded by 'creeks,' 'marshes,' and 'rivers,' but do not convey 'channels.' The claims of title which have their source in these grants all finally converge to Mary Bull. She owned the fee in all the land penetrated by those creeks under muniments of title, some of which covered the beds of these creeks."

In 1771, Mary Bull executed her will, by which she devised "all the lands included within the ditch of Bull's Island [then the name of Chisolm's Island], in Prince Wil-

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liam's parish, to *Daniel Blake, Miles Brewton, and Arthur Middleton, in trust for her granddaughter, Mary Bull." In 1797, Pierce Butler (husband of Mary Bull) and others conveyed by lease and release to Alexander R. Chisolm "all that plantation, island, or tract of land situate, lying, and being in Prince William's parish, in the state aforesaid, containing by estimation four thousand (4,000) acres, more or less; butting and bounding to the south, southeast, and southwest on Coosaw river; to the east and northeast on Bull's river; north, northeast, north northwest, and west by certain tide-waters flowing from Coosaw and Bull rivers into a creek or channel commonly called by the name of Bull's ditch." Henceforth the island was known as "Chisolm's Island." In 1826, Alexander R. Chisolm executed his will, by which he devised to his son, Edward Neuville Chisolm, the upper one-third of the island, and to his son, Robert Chisolm, the remaining two-thirds, for and during the term of his natural life, with remainder over, &c. The latter is the parcel now known as "Palmetto Hall," which the defendants afterwards purchased, and the present contention is as to creeks running through it.

Within a period comparatively recent, probably less than thirty years, the fortunate discovery was made that the beds and marshes of these marine channels contained large quantities of phosphatic rocks, making that valuable which before had been regarded utterly worthless as property; and, as a consequence, the defendant corporation, in 1869, with a view to mining these deposits, took from the family of Robert Chisolm (through the court) a lease of Palmetto Hall, excepting the residence and one hundred acres adjacent. The lease was for a rental of $5,000 per annum, and included expressly "all and singular the waterways, landings, easements, and rights, members, hereditaments, and appurtenances to the said premises belonging," &c.

It seems that about this time some persons entertaining doubts as to the title of the Chisolms to the marshes on the different creeks not having been included in the grants of their vendors, filed with the clerk of the court for Beaufort County applications for warrants of survey of the same, and on or about July 30, 1869, James Adger, jr., John B. Warren, and Henry K. Silliman each took out a grant from the state of a separate and

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distinct parcel *of the marsh lands aforesaid. All these grants, after reciting that they were issued "in pursuance of an act of the legislature entitled, an act for establishing the mode of granting the lands now vacant in the state," &c., passed 19th day of February, 1791, conveyed marsh lands included within the lines of the plats attached, "and on each and every of said water courses extending to low water mark." Afterwards these grantees all released and relinquished their respective grants aforesaid and all interest therein, to the Chisolms, for the benefit of their lessees, the defendants.

Finally, in 1877, the defendant company purchased the whole property for $70,000, and, by authority of another proceeding in court and through the referee therein appointed, C. H. Simonton, Esq., received a conveyance of the same, which embraced all the right of the Chisolms under the three grants of marsh lands aforesaid, and "all that plantation or tract of land known as Palmetto Hall, situate in Prince William's parish in the state aforesaid, comprising two-thirds of Chisolm's Island (previously and in the will of A. R. Chisolm called Coosaw Island) containing about 1,500 acres of high land and ——— acres of marsh; and butting and bounding to the north on South Wimbee creek, extending to the middle line of said creek; to the east on Bull river, to the north on Coosaw river, extending to low water mark on said rivers, and to the west on that portion of said island now or late belonging to George S. Brown on which are located the works of 'the Coosaw Mining Company,'" &c. The Pacific Guano Company established their works near the mouth of Horse Island creek, or where it connects with the waters known as North Wimbee creek, or Bull river; and commenced to take the phosphatic deposits from the beds and streams of the South Wimbee and the creeks which penetrate into or through the island.

There had been a plat of the whole island made by one Gaspar Trotti in 1781, which being somewhat defaced by the abrasions of time, Mr. Chisolm had copied by W. B. Buckner, surveyor, in 1828. The dividing line between Edward and Robert Chisolm under the will of their father, was plainly marked on this copy plat, which also sets forth from

the old Trotti plat the boundaries, creeks, marshes, little islands, and high land on the

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part of the *island which was given to Robert and is now known as "Palmetto Hall." Other plats of the same were in evidence, viz., a chart of the United States coast survey; resurveys especially with reference to the marsh lands made in 1868 by William Hume, jr., D. S.; plans of South Wimbee creek and the other creeks ranging through the island by Thomas W. Willett; and plat made by John W. Gregorie at the instance of the defendant company and for their use as late as 1883. This plat last named, shows that the whole superficial area of Palmetto Hall is 6.358 acres, of which 1,902 are high land, and that the remainder consists of marsh, little islands, and the creeks aforesaid.

In 1878 the legislature passed "an act to protect the rights and interests of the state in the phosphate rocks and phosphatic deposits in the navigable streams and waters of the state" (16 Stat., 615), of which section 11 (p. 619) provides as follows: "That the stock of the Oak Point Company shall consist, &c., &c.; that said company, when organized in accordance with the provisions of this act, shall have the exclusive right to dig, mine, and remove phosphate rock and phosphatic deposits from the beds of Bull river and North and South Wimbee creeks," &c.

The cause came on to be heard by Judge Wallace, who held, among other things, that "Chisolm's creek and Big creek were not navigable streams. Although the tide ebbs and flows through them, yet the conditions necessary to sustain trade or commerce of any kind do not exist. Flowing out of Coosaw river with the tide into Chisolm's Island, they lose themselves in the marshes with which they are surrounded. They are entirely within the private estate of the owners of the island and make no connection with thoroughfares of travel or trade and are none themselves. With regard to South Wimbee, Horse Island, Haulover, Palmer's, and Fish creeks the case is different. Each of these constitute part of water communications between the two great navigable thoroughfares, Coosaw and Bull rivers. It appears in the testimony that each can be and has been navigated with small craft by any and all who chose so to use them. The navigation of parts of some of them may be difficult, but it has been found to be practicable. South Wimbee connects waters of Coosaw and Bull rivers through Bull's ditch.

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Horse Island creek, *out of Bull river, connects with Palmer's creek out of Coosaw, by means of Haulover creek and Grand-Doll Gutter. That this latter connection has existed from time immemorial is proved by a conveyance of Horse Island by William Bull to John Bull in 1748 in which Horse Island is described as 'bounded to the northeastward on a creek running out of Coosaw river into Bull river,' &c. This is the creek referred to as Horse Island creek, and it reaches Coosaw river now by means of Grand-Doll Gutter, Haulover and Palmer's creeks. Fish creek, too, runs out of Bull river and forms a junction with Palmer's creek. I am satisfied from the testimony, that this latter creek has afforded means of communication from Bull river to Palmer's creek from time immemorial, yet at the point called 'the Hammock' I am equally satisfied that it has been artificially widened. These creeks therefore, to wit, Horse Island, Haulover, Palmer's, Fish, and South Wimbee, are navigable waters in which the tide ebbs and flows," &c.

And as to these last named creeks, overruling the defence that the defendants were entitled to the presumption of a grant from long possession of the high lands with color of title under a plat covering the whole island, the Circuit judge sustained the claim of the state to the beds of these streams, enjoined the defendant company from further mining in and removing therefrom phosphate rocks and phosphatic deposits, and referred it to a referee to take testimony and report what quantity of phosphatic deposits had been taken from the beds of said creeks and converted to the use of the defendants, and the value of the same in its natural state and position—holding that the measure of damages here should be the value of the property less the amount which the trespasser has added to its value by its removal and preparation for market, as the trespass was committed under an honest but mistaken belief of right.

From this decree both parties have appealed to this court, and the novel questions involved have been argued here with exhaustive research and great ability.

Plaintiff's grounds of appeal. 1. "Because his honor erred in not holding that the beds of Big and Chisolm's creeks are the property of the state.

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*2. "Because his honor erred in holding that grants bounding on tide waters, go to the centre of the stream unless the same be navigable in fact; whereas he should have held that grants bounding on any and all tide waters extend only to high water mark.

3. "Because his honor erred in holding that in a suit between the state and an individual, a grant can be presumed against the state from the possession of the defendant or his grantors.

4. "Because his honor erred in drawing a distinction as to the proof necessary to presume a grant to the soil under tide waters navigable in fact, and to the soil under other tide waters.

5. "Because his honor erred in holding that a presumption of a grant can arise from,

and in connection with, constructive possession under color of title.

6. "Because his honor erred in holding that any presumption of a grant can arise in this case, the source of title being known.

7. "Because his honor erred in not holding that the defendants, having accepted valuable grants from the state as part of their title, are estopped from now denying the title of the state to the property so granted to them; and this whether they entered under such grants or not.

8. "Because his honor erred in not holding that even if a grant can be presumed against the state by constructive possession under color of title, the defendants are estopped from claiming under color of title which they now set up below low water mark on the creeks in question; because their grantors, for the very purpose of removing all cloud from their color of title, admitted and defined the extent of the same, by applying for and accepting grants from the state, which limited such claim to low water mark; and this with the concurrence of defendants.

9. "Because his honor erred in not holding that the defendants, having by valuable grants from the state fixed and settled the uncertain boundaries of their territory, are estopped from now claiming beyond the boundaries so fixed and settled."

Defendants' grounds of appeal. 1. "Because, when one is entitled to the presumption of a grant arising from possession under color of title, he stands before the court as if he had in his hands and produced to the court the grant of the state under its

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*seal for all the territory embraced within the bounds of his color of title; and his honor erred in not holding this.

2. "Because possession of an area of territory under color of title for nearly one hundred years will presume a grant for every foot of such territory, and will include all the realty within the boundaries of the color of title; and his honor erred in not holding this.

3. "Because the possession of a part of the territory included within clear and distinct boundaries as color of title, is possession of the whole and every part thereof within such boundaries; and his honor erred in not so holding.

4. "Because the defendants proved an uninterrupted possession and user for nearly one hundred years by their grantors, Alexander Chisolm and Robert Chisolm, and his children, and themselves under color of title of 'all that plantation, island, or tract of land, situate, lying, and being in Prince William's parish, in the state aforesaid, containing by estimate 4,000 acres, more or less, butting and bounding south, southeast, and southwest on Coosaw river, east and northeast on Bull river, northwest and north, northwest, and west by certain tide-waters flowing from Coosaw and Bull rivers into a creek or channel commonly called Bull's ditch,' shown by a deed dated February 24, 1797, and referring to a plat of Gaspar Trotti, dated 1784; and because this creates the presumption of a grant for all the land covered or not covered by water included within these boundaries without exception or reservation; and his honor erred in not holding this.

5. "Because his honor, having found as a question of fact that these instruments (the will of Mary Bull and the deed of the Butlers) described the land penetrated by the creeks in question, and that the defendants had established an unbroken chain of paper title to themselves, down from these papers to the present time, and claim that they and their grantors and themselves have held the land adversely under color of title for a much longer period than is sufficient to raise the presumption of a grant (which claim, as to a part of this land, is not disputed), should have held as a conclusion of law that they

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had established *a grant to the whole territory, land not covered as well as land covered by the waters of these creeks.

6. "Because the defendants put in evidence the deed of Butler and wife and the will of Mary Bull to show the extent of their claim and as color of title, not as evidence of title in the Butlers or in Mary Bull; and his honor erred in holding them to the proof of the validity of the title of Mary Bull.

7. "Because the plaintiff in this case, which is an action to try title, can only succeed on the strength of his own title; and his honor erred in deciding the case on the supposed flaw in the defendants' title.

8. "Because the grants produced by the plaintiff did not cover the territory claimed by the defendants, who, on the contrary, relied on another grant, one proved by presumption, covering all of the territory within certain known clear and distinct boundaries, and including the lands under the creeks in question; and his honor erred in not so holding.

9. "Because his honor erred in not holding that the state can grant the beds of navigable streams, and that a grant can always be presumed of that which is the subject of a grant.

10. "Because his honor erred in holding that if a grant of these beds can be presumed at all, it would require stronger proof than would be sufficient to raise such presumption in relation to the adjacent soil.

11. "Because his honor erred in holding that defendants' color of title, whilst calling for outlines of the island as boundaries, and ignoring the existence of the creeks, should be construed with reference to the light thrown upon the title of Mary Bull by the old colonial grants.

12. "That, on the contrary, his honor erred

in holding that the Butler deed ignored the existence of the creeks, and should have held that the omission to except the beds of the creeks in question from the conveyance, showed an intent to convey them; that being within the color of the title, they were in fact conveyed, and that the grant thus presumed to the whole territory, including these beds, is independent of the colonial grants.

13. "Because his honor erred in holding that whilst the boundaries mentioned in Mary

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Bull's will, and in the deed of the *trustees appointed by her (the Butler deed) included the creeks in question, and that there was subsequent possession under these as color of title for one hundred years, yet this was not of itself sufficient to raise the presumption of a grant of the beds of these creeks.

14. "Because the acts of ownership of the creeks by the defendants and their grantors were such as the nature of the case required, and were sufficient; and his honor erred in not holding this.

15. "That no use of these streams by any other persons than the defendants and their grantors has been shown, except such as is perfectly consistent with their ownership of the soil underlying them.

16. "Because the evidence, taken as a whole, shows that the creeks in question are not such navigable streams, the beds of which are reserved as the property of the state.

17. "Because his honor erred in requiring the defendants to account for all the phosphate rock dug and mined in the beds of the creeks named by him, without distinguishing between rock dug and mined above low water-mark, and in not excepting the former from such accounting.

18. "Because his honor, having found as a question of fact that the defendants and their grantors had held for a period of more than forty years, under deed conveying all the territory penetrated by these creeks in question, and thus including these creeks, he erred in not holding the title of these defendants good as against the world.

19. "Because it having been proved that the state had granted to other persons the exclusive right to dig, mine, and remove phosphate rocks and phosphatic deposits from the bed of South Wimbee creek, the defendants cannot be called to account to the state for phosphate rocks so dug, mined, and removed from said creeks; but if accountable at all, they are accountable to the grantees of the state for such rock.

20. "Because his honor erred in his conclusion of fact that Fish creek had from time immemorial afforded means of communication between Bull river and Palmer's creek.

21. "Because his honor erred in his con-

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clusion of fact that *Palmer's creek, Horse Island creek, and South Wimbee creek, are navigable streams."

We will not undertake to consider separately the exceptions of plaintiff and defendants, but take them up together according to the subject matter.

When the state comes into her own courts to assert a right of property she is, of course, bound by all the rules established for the administration of justice between individuals. This is practically an action for the recovery of real estate, and one of the rules of procedure applicable in such case is that the plaintiff must recover upon the strength of his own title, and not the weakness of the defendant's. Has that rule been violated in this case? The state at the close of the revolutionary war succeeded to all the territorial rights of the British crown and became the owner in fee, upon feudal principles, of all the lands within her limits which had not been granted by her predecessor. She exhibits no paper title. She acquired her right by the strong hand, and her title has been conceded by all the world, and especially by the former owner, by right of discovery and conquest. 3 Kent, 377.

These are historical facts of which the court will take judicial cognizance. Having once been the proprietor of the beds of the streams named in the information as a part of the soil of the state, she still owns them, unless she or her predecessor at some time and in some way was divested of title in them. She is the sovereign, the source of title, and upon this prima facie showing she rests, at least until it is removed by a counter-showing. That is for the defendants to make, if they can. Have they shown that they or those from whom they hold acquired title to these beds, either from the British crown before the revolution, or from the state since that time?

If we clearly understand the scope of the defence, it is not claimed that there ever has been an express grant for the beds in question. Such express grant for lands at all times under water, and as property regarded worthless, until the discovery of the phosphate deposits, was probably never desired or applied for; and if made, would not have been worth the cost of obtaining it, or even the paper on which it was written; but

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*the claim is that the vendors of the defendants were for a very long time—some eighty years—in possession of the high lands of Chisolm's Island, under a plat which covered the whole island, through which most of these channels penetrate, and that such possession of part with color of title to the whole island must be considered as giving title to the beds of these channels in one of two ways: either by construction of the grants of the high lands, that is to say, by force of the doctrine applicable to riparian proprietors, which, in certain cases, gives to

the owner of the soil on both sides of a stream title to the bed of that stream; or, second, that such long possession of the high lands under such color of title authorizes and requires the presumption of a new grant from the state, expressly covering and giving title to the beds of these streams.

Before these defences can be properly considered, it is necessary first to determine what is the character of these channels. Are they merely channels of inconsiderable character through a private estate, or are they public navigable waters? The doctrines of the common law as to the seashore and the soil lying under tide-waters and navigable streams were peculiar. The fundamental idea was that the property in the sea and tide-waters, and in the soil and shore thereof, was in the sovereign. In the view that they partook somewhat of the nature of the sea, the fact alone that the tide ebbed and flowed in a stream, was considered proof of its navigability. Martin v. Waddell, 16 Peters, 367 [10 L. Ed. 997]; 3 Kent, 377. We know of no law or judicial decision which, up to this time, has changed that rule in this state. On the contrary, it has been decided more than once "that as to such waters the common law definition (those in which the tide ebbs and flows) has not been changed by any authoritative decision in this state." McCullough v. Wall (4 Rich., 68 [53 Am. Dec. 715]), which was followed and repeated in the case of Shands v. Triplet (5 Rich. Eq., 78), in which Chancellor Wardlaw said: "The term 'navigable' is equivocal. By the common law, rivers are regarded as navigable only to such extent as the tide flows and ebbs; and the property in the beds of rivers navigable in this sense, is undoubtedly in

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the state. But in our statutes and in *popular speech, 'navigable' rivers mean those which may be navigated by ships or boats," &c.

This doctrine that all tidal streams are navigable, is purely technical, and it would seem has not been regarded as entirely satisfactory even in England, from what Lord Mansfield is reported to have said in The Mayor of Lynn v. Turner, Cowp., 86: "How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so, for there are many places into which the tide flows which are not navigable rivers, and the place in question may be a creek in their own private estate," &c. In the case of King v. Montague, 4 Barn. & C., 602, the court, in speaking of navigability arising from the flowing of the tide, said: "The strength of this prima facies arising from the flux and reflux of the tide must depend upon the situation and nature of the channel. If it is a broad and deep channel, calculated for the purpose of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a short time, and by very small boats, it is difficult to suppose that it ever has been a perfect navigable channel," &c.

Nor has the technical standard of navigability always been adhered to in this country. In the case of The Daniel Ball, 10 Wall., 563 [19 L. Ed. 999], it was said by Mr. Justice Field: "The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test as in England, or any test at all, of the navigability of waters. There no waters are navigable, in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide-water and navigable water there signify substantially the same thing." See also Gould on Waters, § 67.

In the case of The Montello, 20 Wall., 441 [22 L. Ed. 391], the following language occurs: "It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of

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a river *rather than the extent and manner of that use. If it is capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river," &c.

Following these cases, the Circuit judge, notwithstanding the positive rule of the common law as to the navigability of all tidal streams, held that even tidal channels are navigable in law only when they are navigable in fact, and in ascertaining whether they are navigable in fact, adopted the standards indicated in the above stated cases; and we cannot say that this was error of law. Taking the test as thus stated he considered the testimony and reached the conclusion before stated, that Big creek and Chisolm's creek are not navigable waters, but that Palmer's creek, Haulover, and Horse Island creek, making one continuous connection through the island, and Sheephead or Fish creek, a branch of Palmer's creek, making another such passage through the island, and South Wimbee creek, are public navigable waters. These were pure findings of fact by the Circuit judge, and if this is a law case, they must stand as a special verdict, not being

subject to review by this court. In reference to the jurisdiction of this court, the words of the constitution are: "The Supreme Court shall have appellate jurisdiction only in cases of chancery, and shall constitute a court for the correction of errors at law, under such regulations as the General Assembly shall by law provide."

Is this a case in chancery? No matter what else it may be, if it is not a case in chancery, this court has no right to review the findings of fact. We do not understand upon what principle this can properly be called a case in chancery. Before the jurisdictions of law and equity were united, that question might possibly have been determined simply by the court from which the appeal came, but now we suppose it can only be determined by considering whether the

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case belongs to that class which previous *to the union would have been appropriately prosecuted in the court of chancery. There must have been some reason for the distinction in the constitution, probably arising out of the different forms of procedure or the nature of the remedies administered in the two courts; and if so, we must regard the real nature of the proceeding and issues joined, and not merely the form which they assume. "The circumstance that forms of proceedings as it regards law and equity, are assimilated under the code, does not affect the jurisdiction of this court as established under the constitution; but we look to the substantial character of the controversy before us for the purpose of ascertaining the extent of our powers in relation to said case, rather than to the nature of the court from which the case comes, in the technical mould in which the case is cast." Sullivan v. Thomas, 3 S. C., 546.

Notwithstanding the technical mould in which the case comes to us (information by the attorney general on behalf of the state, praying, among other things, for an injunction), the substantial character of the controversy here certainly is an action for the recovery of real estate, which is in no respect equitable. But for the accidental fact that the state is the real plaintiff, the action would have been in form, trespass to try title, pure and simple. The form of information by the attorney general under the statute was adopted only for the reason that the state, on account of its supposed legal ubiquity, cannot be disseized or dispossessed, and therefore cannot maintain the direct action of ejectment or trespass to try title. State v. Stark, 3 Brev., 104; State v. Arledge, 1 Bail., 551. In the case of Stark, Judge Brevard evidently regarded the proceeding by information as in the Court of General Sessions. He says, "I have no scruple in saying, that if any judicial process is necessary, it must issue from the Court of General Sessions, and not from the Court of Common Pleas, because the breach of public rights or those which affect the whole community, considered as a community, is distinguished by the harsh appellation of crimes and misdemeanors. The redress of private injuries is to be sought by civil suit or action, but public wrongs require a more speedy remedy. 3 Bl. Com., 2. An information of intrusion would probably be the most appropriate means of redress," &c.

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*We have not been able to take the view that the case is "in chancery," and therefore we have no right to review the findings of fact by the Circuit judge, which must stand as the established facts of the case. But, considering the unusual nature of the action as one of those prerogative proceedings allowed on the part of the state, in which injunctions are granted; and the earnest manner in which it has been pressed upon us that the proceeding is in analogy to that allowed in England on the equity side of the Court of Exchequer, which had in special charge the revenues of the crown; we have looked through the book of evidence in the case with care, and can only repeat the words of Judge McIver, in the case of Gary v. Burnett, 16 S. C. 632: "We are not to substitute our judgment for that of the Circuit judge as to the comparative weight of the testimony. It is only where there is no testimony to support his conclusion, or where manifest error is shown that this court will undertake to overrule a finding of fact by a Circuit judge. * * * In this case there was certainly much conflict of testimony, and we cannot say that there was any such manifest error on the part of the Circuit judge as would warrant our interference," &c.

Assuming, then, the facts to be as found by the Circuit judge, Big creek and Chisolm's creek, not being navigable waters, go out of the case. We cannot hold that the bed of a creek not navigable, although tidal, belongs to the state to the exclusion of the riparian proprietor. But as to the other creeks found to be navigable, viz., Palmer's creek, connecting with Horse Island creek through Haulover, Fish or Sheephead, and South Wimbee creeks, the question recurs, what are the rights in the beds of these streams of the owners of the high lands of Chisolm's Island? Do they belong to the proprietors of the high lands upon the principle of riparian proprietorship? We think not. These are all channels in which the tide ebbs and flows, and as to such the well established rule is, that a grant of the shore gives title only to the high water mark, the mean between extreme high and low tides. Chancellor Kent says: "It is a settled principle of the English law that the right of owners of land bounded by the sea or on navigable rivers where the tide ebbs and flows, extends to high water mark; and the shore below common, but

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*not extraordinary high water mark, belongs to the public. * * * But grants of land bounded on rivers or upon the margins of the same or along the same above tide water carry the exclusive right and title of the grantee to the centre of the stream," &c. 3 Kent, 426, and authorities.

This is another rule of the common law, but unlike that which we have just considered in regard to navigability it has not, so far as we can understand, undergone any modification whatever in this country. It seems to have been considered that there are not the same reasons here for modifying the rule of the common law as to boundaries on arms of the sea, as exist in reference to that of navigability: some change in the latter being made necessary by the size and importance of the fresh water rivers in our wide and extended territory. But be that as it may, the rule as to boundaries on navigable tide waters or arms of the sea is well established both in England and America. 3 Wash. Real Prop., 634; Tyler on Boundaries, Chap. 2, 3; Angel on Tide Waters, Chap. 2; United States v. Pacheco, 2 Wall., 587 [17 L. Ed. 865].

In this connection it is proper to advert to the new grants, taken out from the land office in the manner usual as to vacant lands, by certain gentlemen in 1869 and assigned to the defendants, which reach below the common law line of proprietorship on such streams, and cover what is generally known as the "flats," "shore," or "marsh," down to low water mark. Upon this subject the defendants complain, in their 17th ground of appeal, that the Circuit judge required them to account for all the phosphate rock dug and mined in "the beds" of the creeks named by him "without distinguishing between rock dug and mined above low water mark and the rock dug and mined below low water mark, and in not excepting the former from such accounting." We think this view is founded upon a misconception of the Circuit decree. It is true that the Circuit judge did not in express terms make the distinction indicated between high and low water mark; but he held that "the beds" of certain creeks, naming them, on Chisolm's Island are the property of the state, and from the decree itself, as well as the course of the argument, and the admission of plaintiff's counsel, who introduced in evidence the grants of 1869, we understand that the state did not claim "the

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marsh" *lands covered by the grants, and that the Circuit judge meant by the phrase "beds of the streams," the bottom proper, or the soil lying below low water mark. Assuming this to be the proper construction of the judgment below, the state did not except upon the point, and therefore the question as to whether the grants of 1869 were issued by proper authority and are binding upon the state, is not before us for adjudication.

The state, however, by her 9th exception, did claim that the defendants, by accepting the grants which reach down to low water mark, thereby acknowledged that to be the full extent of their right; "that having by valuable grants from the state, fixed and settled the uncertain boundaries of their territory, they are estopped from now claiming beyond the boundaries so fixed and settled"; that is to say, beyond low water mark. We do not think that the acceptance of these grants in aid of their title estopped the defendants from setting up any other prior or more extended title if they could do so. Herman on Estoppel, 249, 362, 366; Cruger v. Daniel, McMull. Eq., 157. "It would be too much to say that, if a man who is in possession under a good or even colorable title, buys in a defective title, he will thereby defeat his own object, and be estopped from relying on his better right, as an answer to a prior deed or mortgage of the vendor." Herman Est., § 228; Blight's Lessee v. Rochester, 7 Wheat., 535 [5 L. Ed. 516].

This brings us to the defence most earnestly urged for the defendants—that the possession of the Chisolms from 1797, under a plat extending to the boundaries of the whole island, creates the presumption of a grant from the state for everything within the island, including the beds of these streams, whether they be navigable tide waters or not; or, to state it in the words of one of defendants' counsel: "If we were in possession under color of title of any part of the island or tract of land included within the boundaries of Trotti's plat, we were in possession of every atom of soil, of every blade of the marsh of the land not covered by water, and of all the lands covered by water within these boundaries * * * and such possession presumes a grant, is in fact a grant of the premises embraced in the color of title, and that in an action by the state herself as well

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as by a citizen." *That is to say, as soon as all the different parcels of the island become the property of one person, and he had it, in consolidated form, represented by one plat, calling for the outer boundaries of the island, henceforth that person was in possession of everything within the island, unaffected by the terms of the grants of the different parcels under which he purchased, which, being no longer necessary, might be discarded as the true chain of title, substituting therefor a grant by presumption coincident with the boundaries of the plat.

Upon this subject the Circuit judge held: "It would seem that their color of title, while calling for the outlines of the island as boundaries, and ignoring the existence of the creeks, should be construed with reference to the light thrown upon the title of their grantors by the colonial grants. It is certain

Mary Bull had no title to the creeks, but owned on all sides of them. She could convey only what she had. I would, however, be unwilling to hold that defendants are restricted in their claim by the descriptions in the grants after they had renounced all claim under them, yet it is clear that a chain of paper title, beginning at the paper title of the defendants, can be traced up to existing grants from the lords proprietors to all these lands except the beds of those creeks. The defendants, however, renounce all claim under the paper title and rest upon their claim of a presumption of a grant. These facts are important with reference to the extent of the possession and nature of the holding of defendants' grantors. * * * I do not think, therefore, that defendants have established a state of facts that makes out such an adverse holding of the beds of these streams for a sufficient length of time to entitle them to the presumption of a grant. It follows that the title is in the state."

In this result reached by the Circuit judge we concur, but upon grounds somewhat different from those stated by him. In the first place, it is proper to observe that this defence does not embrace South Wimbee. That is not one of the creeks which penetrates Chisolm's Island, but is one of its boundaries. No claim is made that the defendants or any of their vendors ever owned the soil on both sides of it, or that it is within their color of title. The deed of the defendants

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purports to convey the bed *to the middle of the stream; but assuming the fact heretofore established, that it is a navigable tidal channel, we do not see how the defendants can have in the bed of this boundary any greater right than they have in the beds of the other boundaries, Coosaw and Bull rivers, as to both of which, by the express terms of their own deed, they only claim down to low water mark. That also is the limit of their right in the South Wimbee.

As to the other creeks which penetrate the island, it is clear that the defendants cannot claim their beds, as heretofore explained, against the state, by adverse possession under the statute of limitations. Until 1870, the doctrine of nullum tempus occurrit regi prevailed in this state, and since that time twenty years had not elapsed, so that it is not necessary to consider the scope and effect of the new provision in the code as to when and under what circumstances "the state will not sue." It is also quite clear that down to the year 1869, when the defendants took their first lease from the Chisolms and began to mine for phosphatic deposits, there had been no actual adverse possession of the beds of these channels, unless the building of a bridge across one of them and warning off a sloop which came to pick oysters can be considered as such possession.

But without entering into the question whether the state, having title and theoretical ubiquity to the full extent of her boundaries, could be disseized in such manner as thereby to be divested of that title, either under the statute of limitations or by the presumption of a grant against her remonstrance; and if so, whether that could be effected by mere constructive possession for any length of time under mere color of title, or in any way short of an actual pedis possessio for the whole period required; it seems to us enough to call attention to the peculiar character of the rights to be taken from the state by the proposed presumption of a grant.

The state had in the beds of these tidal channels not only title as property, the jus privatum, but something more, the jus publicum, consisting of the rights, powers, and privileges derived from the British crown, and belonging to the governing head, which she held in a fiduciary capacity for general and public use; in trust for the benefit of

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all the citizens of the state, and in *respect to which she had trust duties to perform. 3 Kent, 377; Martin v. Waddell, 16 Peters, 367 [10 L. Ed. 997]; Commonwealth v. Roxbury, 9 Gray, 451. The absolute rule heretofore referred to, limiting land owners bounded by such streams to the high water mark, unless altered by law or modified by custom, accords with the view that the beds of such channels below low water mark are not held by the state simply as vacant lands, subject to grant to settlers in the usual way through the land office.

There seems to be no doubt, however, that the state as such trustee has the power to dispose of these beds as she may think best for her citizens; but not being, as it seems to us, subject to grant in the usual form under the provisions of the statute regulating vacant lands, it would seem to follow that in order to give effect to an alienation which the state might undertake to make it would be necessary to have a special act of the legislature expressing in terms and formally such intention. In this view, the state, asserting her rights to the deposits "in the beds of the navigable streams and waters of the state," has, by numerous special acts of her legislature, granted licenses to different companies to mine in these beds, imposing penalties on those who undertake to do so without such license. General Statutes, § 65.

Under the proof in this case, the court could not presume a special act of the legislature making the beds of these streams the private property of individuals. The doctrine is well settled that no act of the legislature will be presumed against the policy of the state. It will not be presumed that the law-making power of the state, overlooking the rights and duties of the state, enacted a law in conflict with what was declared

to be the best interest and true policy of the state. Counter presumptions intervene and forbid it. Lyons v. Holmes, 19 S. C., 409; Vinyard v. Passalaigue, 2 Strob., 536. "Presumptions are called the intendments of the law. They are in pursuance of the allowed principles or permissions of the established law; but cannot be permitted when they are in hostility to them." We are not aware that it has been the practice of the state to grant to private individuals absolute title to the beds of these tidal streams. At least we have been cited to no case in which it has been done below low water mark by an

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act of the legislature either passed *in fact or presumed to have been. We see nothing to show an intendment of the law to that effect.

What was so well said of the North Wimbee by Judge Maher in his able circuit opinion never appealed from, in the Oak Point Mine Case,[1] may be appropriately applied to the beds of the creeks in question here: "As to the title to the bed of the creek below ordinary low water mark, I hold that it is in the state. No express grant conveying this land has been produced. No long continued acts of ownership in the bed of the creek have been shown in support of a prescriptive right. Angel Tide Waters, 96; Tyler Bound., 36. The possession for forty (or eighty) years of the adjacent land by those under whom the defendants claim undoubtedly raises the presumption of a grant coextensive with the limits of such possession. But to extend the boundary to the centre of the creek would be to overturn an established principle of the common law, which has never yet been questioned by any court in England or this country. The tendency of the American decisions has been to restrict riparian proprietorship, even upon navigable rivers above the tide, and not to enlarge it in respect to navigable streams in which the tide ebbs and flows. Wherever the common law test of navigability has been repudiated, the common law consequences of navigability have been held to attach. Nothing more can be claimed under the grant presumed from the possession of the upland than would result from an express grant calling for the creek as a boundary, conceding that usage (in this case express grant) would carry the line to low water mark. The principle on which it could be extended further, upon the facts of this case, is not to be found in the common law, nor in any decision that has come within my notice."

Finally, it is urged that the state cannot maintain this action, at least as to South Wimbee, for the reason that she had previously granted to others the exclusive right to dig, mine, and remove phosphate rocks from the bed of that creek, "and the defendants cannot be called upon to account to the state for phosphatic deposits so mined and removed from said creeks; but if accountable at all, they are accountable to the gran-

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tees of the state *for such rock," &c. We do not consider the action as brought to recover the phosphates which have been discovered in the aforesaid streams. That may have prompted the bringing of the action, but its avowed object is to establish the ownership in the soil of the beds. This includes, of course, the phosphates or any other deposits which may happen to be found there, but the right of the state to the soil is the same, whether phosphates exist there or not. The act of 1878 provides that "The Oak Point Company," when organized, "shall have the exclusive right to dig, mine, and remove phosphate rock and phosphatic deposits from the beds of Bull river and North and South Wimbee creeks," &c. It does not appear in the evidence that the "Oak Point Company" ever organized or accepted this grant.

But assuming that they did, they are not here making objection to this action. If they were, however, such objection could not prevail. The act contains no words of grant of the soil, nor of anything that implies it. The right "to dig, mine, and remove phosphate rocks and phosphatic deposits," &c., simply confers an authority, a privilege, or franchise, like the permission to exclude the tide from the Roxbury flats for the purpose of a mill-power. In all grants from the government to the subject, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor, reversing the rule as between individuals, on the ground that the grant is supposed to be made at the solicitation of the grantee, and the form and terms of the particular instrument of grant proposed by him and submitted to the government for its allowance. But this rule applies a fortiori to a case where such grant by a government to individual proprietors is claimed to be not merely a conveyance of title to land, but also a portion of that public domain which the government held in a fiduciary relation, for general and public use. Commonwealth v. Roxbury, 9 Gray, 492. The act conferred upon the Oak Point Mine Company simply a license "to dig phosphates," and did not carry the title to the soil, which remained in the state.

We see no reason to doubt the correctness of the conclusion on the Circuit, that another reference was necessary. It may have the effect of preventing injustice. In regard to

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the principle on *which the judge directed the damages to be ascertained, we see no error. We concur with him that the defendants mined in the beds of these streams running through their lands under an honest but mistaken belief of their right to do so.

[1] Printed in full as an appendix to this volume. —REPORTER.

The judgment of this court is that the judgment of the Circuit Court, as interpreted herein, be affirmed.

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22 S. C. 87

STATE v. DUNCAN.

(April Term, 1884.)

[*Courts* ⇦244; *Habeas Corpus* ⇦113.]

From an order made by two trial justices discharging a prisoner under a habeas corpus proceeding had before them, an appeal cannot be taken direct to the Supreme Court. McGowan, A. J., dissenting.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 733; Dec. Dig. ⇦244; Habeas Corpus, Cent. Dig. § 103; Dec. Dig. ⇦113.]

This was an appeal by the state direct to this court from an order made by two trial justices of Spartanburg County, discharging the defendant, Worth J. Duncan, who had been brought before them under a writ of habeas corpus, he being in the custody of the sheriff, charged with breach of trust with fraudulent intent. The order of discharge bears date February 2, 1884. The only question considered by the court not having been raised by exception or in argument, a fuller statement of the case is unnecessary.

Mr. Solicitor Duncan, for appellant.

Mr. J. S. R. Thomson, contra.

December 21, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. This is an appeal on behalf of the state from the order of two trial justices discharging the defendant without day, who had been brought before them under the provisions of the habeas corpus act. It appeared from the return to the writ that the defendant was in custody under a warrant of commitment for breach of trust with a fraudulent intent.

The preliminary question presented in this case is whether this court has jurisdiction to

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hear this appeal. The constitution *(art. IV., § 4) provides as follows: "The Supreme Court shall have appellate jurisdiction only in cases of chancery, and shall constitute a court for the correction of errors at law, under such regulations as the general assembly may by law prescribe." Now, as it is manifest that this is not a "case of chancery," and as the constitution does not confer jurisdiction upon this court for the correction of errors at law in general terms, but only "under such regulations as the general assembly may by law prescribe," it is necessary to ascertain what regulations the general assembly has by law prescribed, under which this court has power to correct errors at law. These regulations are to be found in section 11 of the code of 1882, which provides as follows: "The Supreme Court shall have exclusive jurisdiction to review upon appeal: 1. Any intermediate judgment, order, or decree, involving the merits in actions commenced in the Courts of Common Pleas and General Sessions, brought there by original process, or removed there from any inferior courts or jurisdiction, and final judgments in such actions," &c., the remainder of the section being immaterial to the present inquiry.

Now, as these regulations provide for an appeal to the Supreme Court only in actions "commenced in the Court of Common Pleas and General Sessions, brought there by original process, or removed there from any inferior courts or jurisdiction," and as the order from which this appeal was taken was not made in any action or proceeding originally commenced, either in the Court of Common Pleas or General Sessions, and was not removed there from any inferior court or jurisdiction, it would seem to be clear that this court has not been invested with power to hear such appeal.

But again, the code in section 358, expressly declares that "when a judgment is rendered by a trial justice's court, by the county commissioners, or any other inferior court or jurisdiction, save the probate court heretofore provided for in this Code of Procedure, the appeal shall be to the Circuit Court of the county wherein the judgment was rendered." While it may possibly admit of some doubt whether two trial justices in granting a writ of habeas corpus could be properly considered as an inferior court, yet it is quite clear that they are exercising inferior juris-

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*diction to that conferred upon the judges of the Court of Common Pleas and General Sessions, or justices of the Supreme Court; for while these judges and justices are authorized to grant the writ of habeas corpus in any case, whether the charge be of felony or otherwise, by virtue of their common law powers, and of the provisions of section 2093, so far as the justices of the Supreme Court are concerned; and even under the habeas corpus act may grant the writ where a person is in confinement under a charge of felony not punishable by death—two trial justices cannot grant the writ in any case of felony, the punishment of which is death, or imprisonment for life. See section 2335 of general statutes. So that it is manifest that they are only invested with a limited or inferior jurisdiction; and being an inferior jurisdiction, an appeal from any order or judgment entered by them must be to the Circuit Court, under the express terms of section 358 of the code above quoted.

It may be urged that the last clause of the habeas corpus act, section 2340 of the general statutes, provides that "an appeal from all final decisions rendered on applications for writs of habeas corpus shall be allowed as is provided by law in civil actions," and that as the power to grant such writs

is expressly granted to two trial justices this section secures the right of appeal in this case. There is no doubt that the section does secure the right of appeal, but the question remains as to what court such appeal shall be taken, to the Supreme Court or to the Circuit Court. It will be observed that the section just quoted only secures the right of appeal in general terms without declaring in specific terms the court to which such appeal shall be taken. But it does not leave that matter in doubt, for it declares that the appeal "shall be allowed as is provided by law in civil actions." Now we have seen that the law prescribes that in civil actions the appeal from a judgment of any inferior court or jurisdiction shall be to the Circuit Court, and therefore when an appeal is taken from an order of two trial justices, which we have seen is an inferior jurisdiction, granting a writ of habeas corpus, the appeal must be to the Circuit Court in the first instance, and not directly to the Supreme Court.

The case of Ex parte Peter Smith, 8 S. C.,
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495, is not in *point, for in that case the appeal was from an order of a Circuit judge discharging a prisoner brought before him under a writ of habeas corpus, and not from an order made by two trial justices. It is true that there is no law providing in express terms that the appeal from an order of a Circuit judge at chambers, made on an application for a writ of habeas corpus, shall be to the Supreme Court; yet this is necessarily implied, as section 2340 of the general statutes above quoted expressly secures the right of appeal in all such cases, and there is no other court to which such appeal could be taken, as it would be anomalous for the appeal to be taken to the Circuit Court, consisting, so far as this matter is concerned, of a judge of co-ordinate and concurrent jurisdiction, and perhaps of the same judge from whose order the appeal would be taken, and therefore the appeal in such case must necessarily be to the Supreme Court. But no such necessary implication arises in case of an appeal from an order of two trial justices, for, as has been shown, the appeal in such a case not only can, but is required to be, taken to the Circuit Court.

From these views it follows that this court has no jurisdiction to hear and determine any of the questions made by this appeal, and therefore the judgment of this court is that the appeal herein be dismissed for the want of jurisdiction.

Mr. Chief Justice SIMPSON concurred.

Mr. Justice McGOWAN. I cannot agree with my brethren as to the right of appeal to this court from the order of two trial justices discharging the defendant Duncan in habeas corpus proceedings. It is undoubtedly the general rule that the state cannot appeal, especially when the defendant has been discharged and is beyond the jurisdiction, making it a useless waste of time to proceed further with the case; but the right to discharge from confinement under habeas corpus is given to two trial justices by express statute, as also the right to appeal from such decision.

Chapter XCIII. of the general statutes upon the subject of habeas corpus provides: "Any two trial justices are authorized and required to grant the writ of habeas corpus as fully, effectually, and lawfully, as any
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judge of the Court of Common Pleas *and General Sessions or justices of the Supreme Court of the state, except in cases of felony, the punishment for which is death or imprisonment for life, in which cases trial justices shall have no jurisdiction in applications for habeas corpus," &c. Section 2340 of the same chapter provides that "an appeal from all final decisions rendered on applications for writs of habeas corpus shall be allowed as is provided by law in civil actions," &c. It is therefore clear that an appeal is allowed from a decision in habeas corpus proceedings made by two trial justices, as well as from an order in such application made by a judge of the Common Pleas and General Sessions or a justice of the Supreme Court.

It is said, however, that such appeal from an order made by a judge or justice of the Supreme Court at chambers is direct to the Supreme Court, while that from an order made by two trial justices under and by authority of the same act must be to the Circuit Court, and can only reach the Supreme Court through the medium of that court. I cannot think that such was the intention of the legislature. If such difference in the character of the appeal provided was intended by the legislature, it would have been easy to say so in express terms, as was done in reference to appeals from a single trial justice, county commissioners, and the probate judge. The appeal is given in general terms "from all decisions rendered on applications for writs of habeas corpus," and it would seem that the proper construction of the section should require all appeals from orders made by authority of the act, no matter by whom, to be taken to the same court, viz., the Supreme Court.

But it is argued that we are required to give the act allowing an appeal the construction contended for because of the words "shall be allowed as is provided by law in civil cases"; that as other provisions of the law direct expressly that appeals from inferior courts or jurisdictions in civil cases shall be made to the Circuit Court, and as the authority in habeas corpus conferred upon two trial justices may be taken to be an inferior jurisdiction, therefore the conclusion must follow that the legislature intended that an appeal from an order made by them must be to the Circuit Court. It re-

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quires a process of reasoning to reach *this result, and it does not seem to me that such circuity was in the minds of the law-makers, or that, in giving the appeal as they did, they intended more than to declare the manner of taking to the Supreme Court the appeal in a habeas corpus proceeding, which is not a "civil action," that is to say, in the manner or "as is provided by law in civil actions." It has been decided that an appeal under this act from an order made by a judge at chambers must be direct to the Supreme Court. Ex parte Smith, 8 S. C., 513. In that case it was said that "there are no words in the section implying that the legislature intended to limit the right of appeal to any particular class of cases," and I do not think there are any indicating a different court to which orders made by trial justices must be appealed.

From the nature of the subject, promptness was intended. It seems to me that the only object of the provision giving the right to execute the habeas corpus act to two trial justices was to meet the possible case of the absence of a judge, and in favor of the liberty of the citizen, to afford at all times speedy relief to any held in custody. If this is true, the very purpose of the provision will be entirely defeated by requiring appeals in such cases to be made to the Circuit Court, to which the application could have been made in the first instance, without invoking the exercise of the authority conferred by trial justices.

Appeal dismissed.

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22 S. C. 92

MOORE v. DAVIDSON.

(April Term, 1884.)

[1. *Executors and Administrators* ⇐272.]

The personal estate is the primary fund for the payment of debts and legacies, but a testator may make both or either a charge upon real estate devised.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1052–1057, 1059, 1065, 1068; Dec. Dig. ⇐272.]

[2. *Wills* ⇐822.]

Where a testator bequeathed to his three sons, in trust for the use and benefit of his three granddaughters, each $10,000, when they arrive at the age of eighteen years, and willed and bequeathed "(my debts being paid) the remainder of my property, both real and personal, to my three sons, to be equally divided amongst them," and appointed his said sons his executors, the legacies to the granddaughters were made a charge upon the real estate devised.

[Ed. Note.—Cited in Jaudon v. Ducker, 27 S. C. 296, 298, 299, 3 S. E. 465; Clarke v. Clarke, 46 S. C. 244, 24 S. E. 202, 57 Am. St. Rep. 675.

For other cases, see Wills, Cent. Dig. § 2120; Dec. Dig. ⇐822.]

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[3. *Wills* ⇐740.]

*Two of the sons having conveyed to the third their interest in the lands devised, in consideration (in part) of liabilities of the estate assumed by the grantee: *Held*, under the facts of the case, that the liabilities so assumed were not intended to include these legacies.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1888–1895; Dec. Dig. ⇐740.]

[4. *Appeal and Error* ⇐1097.]

The judgment in the case of Davidson v. Moore, 14 S. C., 251, held that the legacies were a charge upon the real estate devised; and that question is therefore res adjudicata.

[Ed. Note.—Cited in Earle v. Earle, 33 S. C. 504, 12 S. E. 164.

For other cases, see Appeal and Error, Cent. Dig. § 4358; Dec. Dig. ⇐1097.]

[5. *Executors and Administrators* ⇐513.]

Where a Circuit decree ascertains a balance in an executor's hands based upon a charge of the real estate as assets of the estate, and from this decree no appeal is taken, the question is finally determined as to such executor, and also as to his judgment creditors.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2267–2291; Dec. Dig. ⇐513.]

[6. *Executors and Administrators* ⇐513.]

The executor having been charged in his accounting with the value of the real estate devised, and thus a balance ascertained out of which the legacies (in part) were payable, he did not thereby become the purchaser for value of such real estate until he made payment of this balance.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2267–2291; Dec. Dig. ⇐513.]

[7. *Executors and Administrators* ⇐109.]

The executor cannot claim to be reimbursed for debts of the estate paid by him, where the decree has ascertained a balance due by him individually, and to that extent has charged him with a devastavit.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 435; Dec. Dig. ⇐109.]

[This case is also cited in McFadden v. Hefley, 28 S. C. 321, 5 S. E. 812, 13 Am. St. Rep. 675, and Floyd v. Floyd, 29 S. C. 107, 7 S. E. 42, without specific application, and in Allen v. Ruddell, 51 S. C. 366, 375, 377, 29 S. E. 198, and distinguished therefrom.]

Before Hudson, J., York, July, 1883.

The opinion fully states the case, but see also Davidson v. Moore, 14 S. C., 251. The Circuit decree was as follows, omitting its statement of facts:

The positions taken by the plaintiffs in the complaint, and urged before the referee, are substantially these, viz.: First, that the devise to the three sons in the residuary clause of the will is specific, and is in no way charged with the payment of three legacies of $10,000 each to testator's granddaughters, two of whom are Mrs. Davidson and Mrs. Fickling. Second, that should it be decided that this residuary devise is so charged with the payment of these legacies, nevertheless the devise in the hands of its present sole owner, S. R. Moore, cannot be sold to pay said legacies until the said executor, S. R. Moore, should first be refunded the large amount of money which he has advanced from his personal funds in paying debts of the testator; that he has an equity to be

subrogated to the rights of the creditors whose claims he has paid, and to that extent must be preferred to the said legatees out of the proceeds of this land, if sold. On the part of the legatees it is contended that

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the first *position of the plaintiffs is untenable in law, and the second not founded in fact, and that the conveyance of William A. Moore and Theodore A. Moore to Samuel R. Moore, of May, 1877, and the judgment of Theodore A. against Samuel R. Moore, of September, 1877, are fraudulent and void.

On May 23, 1883, the referee (Patterson) filed his report and with it the testimony, to which said report and testimony reference must be had for the facts of the case in detail. The referee found against the plaintiffs on their positions, and for the legatees, in holding that the legacies are a charge upon the real estate, and take precedence of the judgments against S. R. Moore by Theodore A. Moore and J. F. Wallace, both of which are valid. On exceptions to this report by the plaintiffs, the cause came on before me for full hearing. The legatees (defendants) do not except.

We will direct our attention to the first position of the plaintiffs taken before the referee and renewed here. An examination of the will of John S. Moore and of the opinion of our late Court of Appeals in Laurens v. Read (14 Rich. Eq., 245–270) will readily convince any one that the will of Margaret H. Laurens in that case gives the rule for the construction of the will of John S. Moore in this case, unless the act of 1858 (12 Stat., 700) has the effect, as is intimated by Justice Wardlaw, to convert a residuary devise in a will of a testator, dying after that date, from a specific to a general devise.

The case of Laurens v. Read is so full to the point, and the authorities so learnedly examined, that I do not deem it necessary to do more than to refer to that case as conclusive of this, unless we are driven by the act of 1858 to a different rule of construction. In that case the testator died before the act, but in our case the will being made before the act, the testator died after the act, but betwixt the making of his will and his death acquired no additional real estate whatever. The act therefore has no application, unless it has the effect in all cases to change a residuary devise from what was specific before the act into a general devise, or one not specific. The point was not involved in that case, because the act had no application, nor is the point decided. There is an intimation in the opening of the opin-

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ion *of the court that such is the effect. But at most this a mere obiter dictum of the judge delivering the opinion, and is not of binding authority.

The question, so far as I am informed, has never been directly raised nor decided by our Supreme Court, and I shall deal with it as res integra. Both in England and America devises of real estate, whether by description or in the residuum, have been uniformly treated as specific. Our courts have borrowed their rules of construction from the courts of the mother country in interpreting wills generally, and especially in this particular. Now, under the 24th section of the English wills act (1 Vic., ch. 26)—which makes the will speak as if it had been made immediately before the death of the testator, and is, therefore, in effect, the same as our own act of 1858—residuary devises of land are held to be specific. Hausman v. Fryer, Law Rep., 3 Ch. Ap., 420; Gibbons v. Eyden, Law Rep., 7 Eq. Ca., 374. See note by reporter to Laurens v. Read.

I learn from a full note on page 450 of 3rd Jarman on Wills (5th Am. from 4th Lond. edit.) that at first the courts of England were inclined to take the same view as to the effect on a residuary devise of this wills act, as Judge Wardlaw intimates concerning our act of 1858. But this view was, after some conflict of decisions, abandoned, and it was the settled rule of construction in the courts of England that residuary devises are as well specific since as they were before the act. With this view we concur, as being more in accord with reason and principle, founded in the very nature of real as contra-distinguished from personal estate.

The land embraced in the residuary clause of a will is ordinarily as well defined, as fixed, as certain in the mind of the testator, as tracts specifically named in specific devises, especially when, as in this case, no additions are made by purchase or descent cast. Even when additions are made to it after the publication of a will, still the whole is by no means of that undefined, changing, variable character as is personal estate. Wherefore we see no valid reason, since the act of 1858, to depart from that wise and wholesome rule of construction that prevailed before; and we hold that the devise in

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the residuary clause of *John S. Moore's will is specific, and not chargeable with the payment of the legacies to Mrs. Davidson and Mrs. Fickling.

Now, as to the plaintiffs' second ground, to wit: That, having advanced money out of his private funds towards the payment of the testator's debts, Samuel R. Moore, the executor, is entitled to be subrogated to the rights of the creditors to the extent of the funds so expended. The defendants concede the correctness of the equity, but deny the fact of the outlay. One thing clearly appears from the accounts of the executor as stated by the referee, and that is that he has been charged with the entire value of this real estate. It was appraised at $17,600, and the evidence shows this sum to cover its fair value. Charging him with this sum

in the accounts, and with all other moneys received and goods converted, and giving him credit for all payments and disbursements made, the referee finds a balance against him of a little more than $7,000 in favor of the legatees jointly, viz., in favor of Mrs. Davidson $1,985.53, and in favor of Mrs. Fickling $5,194.14.

Under this method of accounting, S. R. Moore has been made to pay the estate of John S. Moore in full for this land. Clearly, then, it cannot be still regarded as the property of that estate so as to be subject to the satisfaction of the judgments of these legatees. It is so liable, but as the property of S. R. Moore, and not of the estate. In levying on it, therefore, these legatees must treat it as his property, and their liens take rank, among the other judgments against S. R. Moore, according to date; and hence the judgments of Theodore A. Moore and J. F. Wallace must take precedence of these legatees, being four years older.

The findings and conclusions of the referee against the plaintiffs on the two main points herein noticed are overruled; and his finding that the conveyance by Theodore A. Moore and W. A. Moore of their shares in the residuary devise of S. R. Moore is valid, and that the judgment of Theodore A. Moore against S. R. Moore is not fraudulent, not having been excepted to, and being sustained by the proof, is affirmed.

It is therefore ordered, adjudged, and decreed that the residuary devise in the will of J. S. Moore is specific, and not chargeable with the payment of the pecuniary legacies

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in the first clause of *said will, given in trust for the testator's three granddaughters, two of whom are Mrs. Davidson and Mrs. Fickling. It is further adjudged that the said last named legatees, defendants to this action, and R. H. Glenn, as sheriff of York County, be perpetually enjoined and restrained from levying upon and selling said land as other than the individual property of Samuel R. Moore, liable to the payment of his judgment debts in the order of priority as fixed by law. It is further ordered and adjudged that the said defendants, Laura B. Davidson and Buena V. Fickling, do pay the costs of this action.

From the foregoing decree the defendants duly appealed upon the following exceptions:

1. For that his honor held that the interpretation of the will of Margaret H. Laurens, in the case of Laurens v. Read (14 Rich. Eq., 245–270), gives the rule for the construction of the will of John S. Moore in this case, unless the act of 1858 (12 Stat., 700) has the effect to convert a residuary devise in a will of a testator dying after that date from a specific to a general devise; and that such act has no such effect in cases where the will of the testator was made before the passage of the act, and testator died after the passage of the act.

2. Because his honor held that residuary devises are as well specific since as they were before the passage of the act of 1858.

3. Because his honor held that the devise in the residuum of John S. Moore's will is specific, and not chargeable with the payment of the legacies to Mrs. Davidson and Mrs. Fickling.

4. For that his honor held that under the method of accounting adopted by the referee, S. R. Moore has been made to pay the estate of testator in full for the real estate; and that the same cannot still be regarded as the property of the estate so as to be subject to the satisfaction of the judgments of Mrs. Davidson and Mrs. Fickling.

5. For that his honor held that in levying on said real estate, Mrs. Davidson and Mrs. Fickling must treat the real estate as the property of S. R. Moore; and their liens must take rank among the other judgments against S. R. Moore, according to date.

6. For that his honor overruled the findings and conclusions of the referee herein against the plaintiffs.

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*7. For that his honor ordered, adjudged, and decreed that the residuary devise in the will of J. S. Moore is specific, and not chargeable with the payment of the pecuniary legacies in the first clause of said will, given in trust for the testator's three granddaughters, two of whom are Mrs. Davidson and Mrs. Fickling.

8. For that his honor erred in virtually holding that the account taken by the referee to ascertain the value of the estate, real and personal, of the testator, which furnished the assets, real and personal, which were subject to the provisions of the will, was an accounting by the executor of his administration of the estate.

9. For that his honor did not hold that the real estate was a real asset, subject to the provisions of the will, until the legacies and debts were paid.

10. For that his honor held that the real estate had become the private property of S. R. Moore before the debts and legacies had been paid.

11. For that his honor so construed the will of J. S. Moore, and so gave effect to the acts of those named as executors and trustees under said will, as to enable them to defeat the trusts created by the will.

12. For that his honor adjudged that the defendants be perpetually enjoined and restrained from levying upon and selling said land as other than the personal property of S. R. Moore, liable to the payment of his judgment debts in the order of priority as fixed by law.

Messrs. Hart & Hart and James H. Rion, for appellants.

Messrs. Wilson & Wilson, contra.

December 18, 1884. The opinion of the court was delivered by

Mr. Justice McIVER. On September 21, 1859, John S. Moore departed this life, having duly made and executed his last will and testament, bearing date January 7, 1858. The terms of his will are as follows: "1st.

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I will and bequeath to my sons, *Theodore A., Samuel R., and William A. Moore, in trust for the use and benefit of my granddaughters, Amanda J. Springs, Laura B. Springs, and Buena V. Springs, each ten thousand dollars, when they arrive at the age of eighteen years old, for and during their natural lives, and should either of them die, then to her issue; but if either die leaving no issue alive, then to her surviving sisters, my granddaughter, Margaret Lyon, being one of them, or their surviving issue for ever; but if all my said granddaughters die leaving no issue alive, then to revert back to my estate, and be equally divided amongst my sons. My sons, trustees as aforesaid, may, if they deem it necessary and prudent, vest the above legacies in stocks or other property for the use of my said granddaughters severally, but the property so obtained to be held by said trustees upon and subject to the same terms and conditions aforesaid. 2d. I will and bequeath (my debts being paid) the remainder of my property, both real and personal, to my sons, Theodore A., Samuel R., and William A. Moore, to be equally divided amongst them; and I hereby appoint my said sons my executors."

Of the persons named as executors, Samuel R. Moore alone qualified as such, and under proceedings commenced against him in 1876, by the appellants, Davidson and wife and Fickling and wife, to recover the legacies given by the will to these ladies, Judge Aldrich, on June 30, 1881, rendered judgment against the said Samuel R. Moore, individually as well as executor as aforesaid, for the balances due on said legacies.

On May 9, 1877, two of the sons of the testator, Theodore A. and William A., residuary devisees under the will, conveyed to their brother, S. R. Moore, the other residuary devisee, their interest in the real estate so devised to the three sons. The deed by which this conveyance was made recites that "it was agreed in 1863, that in consideration of the said S. R. Moore advancing certain sums of money and assuming certain liabilities on account of the estate of the said John S. Moore, deceased, the real estate of the said deceased, hereinafter mentioned, should be vested in the said S. R. Moore absolutely in fee simple"; and the considerations mentioned in the deed are: "The large sums of money heretofore advanced by S. R.

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Moore to pay the indebtedness of the *estate of John S. Moore, and liabilities of said estate assumed by the said S. R. Moore, and the sum of three dollars."

On August 31, 1877, the respondents, T. A. Moore and J. F. Wallace, entered judgments against the said Samuel R. Moore individually, and not as executor, for large sums of money, and under the executions issued upon these judgments the sheriff levied upon all the property of S. R. Moore, including the real estate devised by his father's will, and advertised the same for sale on the first Monday in November, 1881, as the property of said S. R. Moore. In the meantime, under the executions issued on the judgments recovered by the appellants, Davidson and wife and Fickling and wife, against S. R. Moore, as executor of John S. Moore, deceased, the sheriff had levied on the real estate devised by the will of said John S. Moore, and advertised the same for sale on the first Monday in November, 1881, as the property of John S. Moore, deceased.

Thereupon this action was commenced for the purpose of perpetually enjoining said appellants from selling the said devised real estate as the property of John S. Moore, deceased, or failing in that, to enjoin them from so doing until an account can be taken and decree made for the amount due S. R. Moore for advances made for said estate, and for what sum he is entitled to reimbursement as a prior charge to the judgments of said appellants. The Circuit judge held that the devise was specific and not chargeable with the payment of the pecuniary legacies to the appellants, and that S. R. Moore having accounted fully for the value of the land, it could no longer be considered as part of the estate of said John S. Moore. He therefore granted the injunction asked for. From this judgment Davidson and wife and Fickling and wife appeal on various grounds set out in the record.

The main questions raised by the appeal are, first, whether the legacies in question were charged upon the real estate devised; and second, if so, whether, in his accounting, S. R. Moore has been made to pay the estate of John S. Moore the full value of said real estate and thus acquired an absolute right thereto. Third, if the legacies are a charge upon the real estate, whether S. R. Moore is not entitled by subrogation first to be re-

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imbursed *amounts advanced by him for the purpose of paying the debts of the testator.

There is no doubt that the primary fund for the payment of debts and legacies is the personal estate, but there is as little doubt that a testator, if so minded, may make both or either a charge upon real estate devised. It is true that the rule is that such intention must appear either from the express words of the will or must be clearly inferable from the language therein used. Kirkpatrick v. Chesnut, 5 S. C., 216; Wright

v. Dunn, 10 Wheat., 229 [6 L. Ed. 303]. It is a question of intention to be solved by a consideration of the terms of the will, and if the intention to charge the real estate appears by the express terms used, or is clearly implied by such terms, such intention must be carried into effect, otherwise the general rule must prevail.

Now, as we think the language used by the testator in the will under consideration clearly implied an intention on his part to charge his entire estate, both real and personal, with the payment of the legacies to his granddaughters, we do not deem it necessary to enter into a consideration of the question whether the act of 1858, 12 Stat., 701 (which clearly applies to this case, the testator having died subsequent to the passage of the act, although the will was executed some time before. Bell v. Towell, 18 S. C., 94), has had the effect of changing the rule by which it was held that all devises were specific, by removing the reason for such rule as given by Mr. Jarman in his work on wills (vol. 1, p. 595); or whether the fact stated in the Circuit decree, that the testator acquired no real estate between the time of the making of his will and the time of his death, would affect the question of the applicability of the act of 1858.

For even if it be conceded that the residuary devise here in question should be regarded as specific, we think that the terms of the will clearly show that the intention of the testator was that the legacies should be paid at all events, thus constituting them a charge upon the whole estate, both real and personal. It will be observed that there are but two general dispositions of his estate made by the testator: first, the legacies of specific amounts of money to each of his three granddaughters; second, all the remainder of his estate to his sons. There is

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not even any pro*vision for debts, except incidentally. The intention of the testator as expressly declared is, first, that each of the three granddaughters is to have a certain specific sum of money, and all that is given to the sons is what may remain of his estate, out of which remainder his debts are to be paid. In other words, he gives nothing to his sons except what remains, after the legacies are taken out and after his debts are paid.

It is absolutely certain that the intention was that the sons should only have the remainder of his property. Now that word necessarily implies that something was to be previously taken from the estate. What was that something? There was no previous devise or bequest, except of the legacies to the granddaughters, and therefore there could have been nothing to be taken from the estate, except the legacies. The rather peculiar manner in which the testator provided for the payment of his debts negatives the idea that he had reference to them only in the use of the word remainder; and besides, if everything that remained after the payment of the debts was to go to the sons, then there would be no fund out of which the legacies were to be paid.

Nor is there any warrant for applying the term remainder to the personal estate alone. It is true that, in the absence of any direction to the contrary, the legacies, as well as the debts, would be payable out of the personal estate, and the testator must be presumed to have known that this was the law; but, notwithstanding this, having, as he did have, the right to make other provision for the payment of the debts and legacies, what did he do? He made no distinction whatever between his real and personal estate; but, on the contrary, blended it into one common mass and gave it, or rather what remained of it, after the payment of the legacies and debts, to his sons. His language is: "I will and bequeath (my debts being paid) the remainder of my property, both real and personal, to my sons." Where is the warrant for confining the term remainder to the personal property only? The testator has not done so, but, on the contrary, according to the strict grammatical construction, the term remainder applies equally to the real as well as to the personal property. The testator does not content himself with

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saying simply "the *remainder of my property," but, as if his purpose was to express his intention more fully, he adds the words "both real and personal." So far from saying the remainder of my personal property and all my real estate, he uses language showing that he intended to apply the term remainder to both kinds of property. It was as if he had said: "When I say remainder of my property, I mean the remainder of both my real and personal property."

Now if, as we have shown, the term remainder applies as well to the real as to the personal property, and if, as the will shows, there was no preceding devise of real estate, it follows necessarily that the sons could only take what remained of the estate after the debts and legacies were paid. When we look to the circumstances surrounding the testator, both when he made his will and when he died, we are unable to perceive anything unnatural or unreasonable in the construction which we have arrived at. It is conceded that the testator, at the time he made his will and up to the time of his death, was possessed of a very large estate, amply sufficient to pay the debts and legacies and leave a very handsome residue for the sons. It was quite natural, therefore, for him to determine that, as there would be a large estate for his sons, after making provision for his granddaughters, the best mode of effecting his purpose would be to give to his sons the whole of his estate which would

remain after provision was made for his debts and legacies to the granddaughters, especially as the sons were to be their trustees. If the results of a disastrous civil war, which was not probably anticipated by the testator, or other unforeseen causes, have defeated his plans, it only adds another to the many instances in which human foresight has proved itself incapable of foretelling the future.

Inasmuch as the intention of the testator, as gathered from the words he has used, is the controlling rule in the construction of a will, and inasmuch as it is seldom the case that the same language is used in any two wills, it is often difficult, if not impossible, to find cases precisely in point. General rules may be found which afford aid in arriving at the proper construction to be given to the language of a testator, and for this purpose it is always well to consult the authorities. An examination of the numerous cases cited in the argument will show that the con-

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clu*sion at which we have arrived is not in conflict with any well-settled principle, but, on the contrary, is well sustained by authority. In Laurens v. Read, 14 Rich. Eq., 245, Mr. Justice Wardlaw has collected and reviewed the authorities upon the subject. He arranges the cases in which lands devised have been charged with the payment of legacies under six heads; and we think the case now under consideration falls under his third and fourth heads, for the terms and conditions upon which the legacies are given plainly imply that they are to be paid by the executors, and the real estate is devised to them. So also, as we have said, the testator has blended the real and personal estate together as one mass, and that mass is the only fund out of which the legacies could be paid.

It is true that Wardlaw, J., in the case of Laurens v. Read, held that, under the terms of that will, which it is claimed is very much like Moore's, the pecuniary legacies did not constitute a charge upon the real estate, yet there is at least one material and vital distinction between that case and the one we are now considering. In the will of Mrs. Laurens there was no devise to the executors, while in Moore's will there is. It is true that in the Laurens will the residue was bequeathed and devised to the same persons as those who were named as executors, but the devise was not to them in their own right, but as trustees, without any power to sell, and this circumstance seems to be strongly relied upon by Judge Wardlaw, because the devise being to them as trustees, without the power to sell, they had no means of applying the real estate to the payment of the legacies. But this difficulty would not arise where, as in our case, the devise is to the executors absolutely in their own right. We think, too, that the authorities cited in 3 Jarman on Wills (edit. of 1881, by Randolph & Talcott), 422 and note 10, 427 and note 14, and 429, especially the case of Greville v. Browne, 7 H. L. Cas., 689, fully sustain our view. See also Knotts v. Bailey, 54 Miss., 235.

We do not think that the position taken by one of the counsel for the appellants, based upon the terms of the recital and the consideration stated in the deed from Theodore A. and William A. Moore to Samuel R. Moore,

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can be maintained. The "lia*bilities" there referred to could not have been intended by the parties to that deed to embrace the legacies, because some time prior to that time the executor had, as he supposed, made ample provision for the legacies by setting apart certain notes for that purpose, as appears by the record in the previous case of Davidson v. Moore, 14 S. C., 251, which the parties in this case agreed might be used here. It is true that in that case it was eventually determined that these so-called investments of the said legacies could not be sustained by the court, but still, at the time the deed above referred to was made, the executor was stoutly contending that the legacies had been thus fully provided for, and therefore we do not think that the term "liabilities" used in that deed could have been intended to embrace the legacies.

But we think there is much force in another of his positions, that the respondent, S. R. Moore, is estopped by the judgment in the former case of Davidson v. Moore, supra, from raising the question whether the legacies constitute a charge upon the real estate. In that case the Circuit judge held that "the assets and the real estate were sufficient in amount, as I have heretofore found, to pay all debts and the legacies provided in the will. Hence I adjudge the recovery against the defendant personally and as executor." This plainly shows that the Circuit judge in that case regarded the real estate liable to the payment of the legacies, and in effect so decreed. In appealing from that decree the executor, Samuel R. Moore, who was then the sole owner of the residue of the real estate, took no exception to such ruling, based upon any alleged error in holding the real estate chargeable with the legacies; and the Supreme Court in rendering its judgment, after modifying the account in some particulars, not material to the present issue, uses this language: "How the accounts will stand after these modifications, it will be for the Circuit Court to ascertain, and until that is done, it is impossible to say whether the decree should be against the executor personally as well as in his representative character. If it shall appear that assets of the estate of the testator, including therein the real estate, and excluding the value of the slaves, have come, or ought to have come, into the hands of the executor, sufficient to enable him to pay the debts and the legacies, then

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the decree should be *against him personally, as well as in his representative character." This was a plain recognition and affirmation of the ruling of the Circuit judge that the real estate constituted assets for the payment of the legacies, as well as the debts.

Again, when the accounting thus ordered by the Supreme Court was taken, in which the real estate was charged as part of the assets, and when the result of such accounting was, with certain modifications, not material to the present inquiry, confirmed by the decree of Judge Aldrich, from which there was no appeal, it seems to us that the question was concluded. S. R. Moore not only then had the opportunity, but it was his duty, to have raised the question now raised, and not having done so then, he is estopped from doing so now. If the position now taken—that the real estate is not chargeable with the legacies—could have been maintained, it is manifest that no decree could have been rendered by Judge Aldrich in favor of Davidson and wife and Fickling and wife against S. R. Moore individually, for unless the real estate was charged as part of the assets, the balance would have been in his favor. The decree of Judge Aldrich, therefore, must necessarily have been based upon the theory that the real estate was chargeable with the legacies, and as there was no appeal from that decree, the question was finally determined, at least so far as the parties to that case are concerned.

It is true that none of the plaintiffs in the present case, except Samuel R. Moore, were parties to that case, but they are claiming here solely through S. R. Moore, and if he is estopped, they are so too. They can only claim whatever rights S. R. Moore may have, and as it has been already adjudged, by a court of competent jurisdiction, in a proper proceeding, that his rights are subordinate to those of the appellants, they can take in this proceeding nothing more than the rights so adjudged to S. R. Moore.

2nd. Respondents contend that, even if it be conceded that the legacies constitute a charge upon the real estate devised by the residuary clause of the will, yet that S. R. Moore having been charged in the accounting with the full value of the real estate, he has been made to pay the estate of John S. Moore the full value thereof, and has thus acquired an absolute right thereto freed from the

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charge of the legacies. We do not *see how this position can be maintained. The main object of the accounting was to ascertain whether sufficient assets had gone into the hands of the executor to enable him to pay the debts and legacies, and the fact that the value of such assets, including the real estate, has been charged in the account against the executor certainly does not constitute him a purchaser of such assets until he has paid the debts and legacies chargeable thereon. Under the terms of the will, as we have construed it, he had no claim upon any of the assets until all of the debts and legacies were paid; and as the account shows that a sufficient amount of assets did go into his hands to pay both debts and legacies, it is quite clear that such assets in his hands are liable to pay whatever balances have been found due the legatees, before any portion thereof can be claimed by him as his individual property.

Finally, it is contended that S. R. Moore, the executor, upon the principle of subrogation, is entitled first to be reimbursed the amounts advanced by him in paying the debts of the testator, before the legatees can claim anything. Without questioning the legal principle upon which this position is based, it appears to us to be without any foundation in fact. There is not only no proof that the executor has advanced from his own funds money to pay the debts of the testator, but the proof is conclusive the other way. On the accounting a devastavit has been fixed upon him, as is conclusively shown by the fact that the decree is against him not only as executor, but individually, and how, under these circumstances, he can claim to be in advance of the estate we are at a loss to conceive. If he was in advance of the estate then, clearly no decree should have gone against him individually; and the fact that such a decree has been rendered against him, from which there was no appeal, is conclusive of the fact that he could not be in advance of the estate.

The judgment of this court is that the judgment of the Circuit Court be reversed and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

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*WILKS v. WALKER.

(April Term, 1884.)

[Reported and Annotated in 53 Am. Rep. 706.]

[1. *Assignments for Benefit of Creditors* ⇨23.]

The manifest object of section 2014 of the general statutes is to prevent an insolvent debtor from transferring or assigning his property for the benefit of one or more creditors to the exclusion of others, and whether this object is sought to be effected by a formal deed of assignment or in any other mode, can make no difference.

[Ed. Note.—Cited in Austin, Nichols & Co. v. Morris, 23 S. C. 405, 407; Lamar v. Pool, 26 S. C. 445, 447, 2 S. E. 322; Magovern & Co. v. Richard, 27 S. C. 285, 3 S. E. 340; Putney v. Friesleben, 32 S. C. 494, 496, 11 S. E. 337; Archer v. Long, 38 S. C. 281, 16 S. E. 998; Armstrong v. Hurst, 39 S. C. 504, 18 S. E. 150; Leake v. Anderson, 43 S. C. 455, 21 S. E. 439; Porter v. Stricker, 44 S. C. 189, 21 S. E.

635; Perkins v. Douglass, 52 S. C. 133, 29 S. E. 400; Secrest v. Hartford Fire Ins. Co., 68 S. C. 381, 47 S. E. 680.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 75–77; Dec. Dig. ⟸23.]

[2. *Assignments for Benefit of Creditors* ⟸ 104.]

Where an insolvent debtor transfers all of his property to one creditor by means of a chattel mortgage and, at a later date, by a bill of sale and a deed of conveyance, all under a design originally determined on by himself and the favored creditor, for the benefit of such creditor and another, to the exclusion of all other creditors, the transaction is void because in violation of the statute that prohibits assignments for the benefit of creditors from giving preferences.

Mr. Chief Justice Simpson dissenting.

[Ed. Note.—Cited in Verner v. McGhee, 26 S. C. 249, 2 S. E. 113; Lamar v. Pool, 26 S. C. 441, 2 S. E. 322; Meinhard Bros. & Co. v. Strickland, 29 S. C. 495, 497, 7 S. E. 838; McGahan v. Crawford, 47 S. C. 582, 25 S. E. 123.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 354, 355; Dec. Dig. ⟸104.]

[This case is also cited in South Carolina Loan & Trust Co. v. McPherson, 26 S. C. 436, 2 S. E. 267; Lamar v. Pool, 26 S. C. 446, 2 S. E. 322; Magovern & Co. v. Richard, 27 S. C. 284, 3 S. E. 340; Meinhard Bros. & Co. v. Strickland, 29 S. C. 497, 7 S. E. 838; Threatt v. Brewer Mining Co., 49 S. C. 130, 26 S. E. 970, without specific application, and in Verner v. McGhee, 26 S. C. 250, 251, 2 S. E. 113; Hairston v. Hairston, 35 S. C. 306, 14 S. E. 634, and distinguished therefrom.]

Before Fraser, J., Chester, October, 1883.

The opinion sufficiently states the case. The appeal was taken upon the following exceptions:

1. Because his honor ruled and decided that the following question propounded by the attorney for the defendants to Addison F. Kitchens, a witness for the plaintiff, on cross-examination, to wit: What property did you own on the 5th day of October, 1882? was incompetent and irrelevant.

2. Because his honor refused to allow or require the said witness to answer the said question.

Messrs. Patterson & Gaston, for appellants, cited General Statutes, ch. 72, §§ 2014–16; 1 McCord Ch., 441; Bump Fr. Conv., 355–6; Burr. Ass., 495–500; 30 Ala., 199; 22 Pick., 269; 8 Iowa, 96; 42 Me., 445; 12 S. C., 5; 13 Id., 368; 22 Pick., 275.

Mr. John M. McNeel, contra.

At common law, a debtor may prefer one creditor to another. 1 McCord Ch., 441, 475; 1 Bail., 571; Rice Ch., 7, 300; 2 Hill Ch., 444; 2 S. C., 354. This right has been taken away only where there is an assignment for the benefit of creditors generally. An assignment is a transfer in trust to pay cred-

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itors; *a formal paper with certain essential parts. Dudley, 51. The papers in question here are not such an assignment. Bump. Fr. Conv., 330; 10 Paige, 445; 1 Coms., 201; 3 Sumn., 345; 4 Watts & S., 383; 7 Id., 335; 23 Pick., 446; 13 N. H., 298; 10 Conn., 280; 26 Vt., 686; 18 Ga., 668; 2 Metc., 99; 3 S. C., 266. This action has nothing to do with the land of Kitchens, and these several papers cannot be construed together. If they were, the statute makes void assignments giving preferences, that is, where the deed of assignment by its own terms declares a preference. Whatever the law ought to be, this case is not reached by the law as it is. The court can only say, ita lex scripta est; and should carefully avoid the evils of judicial legislation.

January 6, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. On October 5, 1882, one A. F. Kitchens, being indebted to the plaintiff in the sum of fifteen hundred and forty-three dollars, a large portion of which had been antecedently contracted, executed a mortgage on sundry articles of personal property, including the cotton which is the subject matter of the present controversy, to secure the payment of said debt on or before the first day of January, 1883. On February 10, 1883, the said Kitchens, in consideration of said indebtedness, and of a credit of fourteen hundred and ninety-eight dollars on the mortgage debt, executed a bill of sale for the property mentioned in the mortgage to the plaintiff—all of the cotton having been ginned and packed in bales, except so much thereof as was estimated to be sufficient to pay certain agricultural liens held by Barber & Drennan, the payment of which was assumed by the plaintiff. On or about February 23, 1883, the said cotton was seized by the defendant Walker as sheriff under a warrant of attachment issued by the defendants, Cousar & Son, against the said Kitchens, and upon repeated demands made therefor by the plaintiff he refused to deliver it up to the plaintiff. On April 5, 1883, the said sheriff levied upon the cotton under an execution obtained in the case in which the above mentioned warrant had been issued, and a bond of indemnity having been executed

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to him by Cousar & Son, with the de*fendant, Allen Beard, as surety, he sold the same to Cousar & Son, they being the highest bidders therefor. Whereupon this action was brought to recover the value of the said cotton.

The defendants, in their answer, allege that on October 5, 1882, the said Kitchens was insolvent, and that plaintiff had good reason to believe that he was so, and that the transfers of property above mentioned embraced all of the personal property of the said Kitchens subject to execution: and that on the same day the said Kitchens conveyed to the plaintiff all his real estate subject to execution, in consideration that the plain-

tiff would pay an antecedent debt due to the estate of Robert Patterson by the said Kitchens, and they therefore claim that these transactions between the plaintiff and Kitchens were in violation of section 2014 of the general statutes and therefore void.

At the trial, defendant's counsel proposed to ask Kitchens, while on the stand as a witness, the following question: "What property did you own on the 5th day of October, 1882?" which, upon objection being interposed by the counsel for plaintiff, "the presiding judge stated that he would have preferred to meet the question on a demurrer to the answer, but thought he ought to meet it in the shape he found it; that he thought the answer, if made out by the testimony, was no valid defence to the plaintiff's case, and that he would treat the matter in the same way he would have done if there had been a demurrer to the answer, for want of facts sufficient to prove a defence. The point to which the question was directed, and it was so conceded, was to establish the facts set out in paragraph VII. of the answer, which transactions it was claimed constituted such an assignment as was contrary to the provisions of chapter LXXII., section 2014, of the general statutes of this state, and therefore void."

The Circuit judge ruled that the said question was incompetent and irrelevant under the pleadings, and refused to allow or require the witness to answer the question. After this ruling, the defendants, of course, offered no further testimony, and the plaintiff had a verdict. The sole question, therefore, raised by this appeal is as to the correctness of this ruling.

Treating the question as if it arose upon a demurrer to the answer, that being the way

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in which it was considered by the *Circuit judge, and should be by us, all of the material allegations of the answer must be taken to be true. It is there alleged that at the time of the transactions between the plaintiff and Kitchens the latter was insolvent and the former had good reason to know that fact, and that these transactions "were had and made in pursuance of an original design and intent of the said Addison F. Kitchens and John W. Wilks, determined on by them in the beginning, to transfer and assign all the property of Addison F. Kitchens, subject to execution for debt, to John W. Wilks, for the benefit of the said John W. Wilks and the estate of Robert Patterson, to the exclusion of all the other creditors of the said Addison F. Kitchens."

Assuming these allegations to be true, they amount to an admission that Kitchens and Wilks intended to effect the precise object which is declared to be illegal and absolutely null and void by section 2014 of the general statutes, which reads as follows: "Any assignment by an insolvent debtor of his or her property, for the benefit of his or her creditors, in which any preference or priority is given to any creditor or creditors of the said debtor by the terms of the said assignment over any other creditor or creditors, other than as to debts due to the public, or in which any provision or disposition of the property so assigned is made or directed, other than that the same be distributed among all creditors of the said insolvent debtor equally, in proportion to the amount of their several demands, and without preference or priority of any kind whatsoever, save only as to debts due to the public, and save only as to such creditors as may accept the terms of such assignment and execute a release of their claim against the debtor, and except as hereinafter provided, such assignment shall be absolutely null and void and of no effect whatsoever."

The manifest object of the act is to prevent an insolvent debtor from transferring or assigning his property for the benefit of one or more of his creditors to the exclusion of all others; and whether this object is sought to be effected by a formal deed of assignment, or in any other mode, can make no difference. Any other view, it seems to us, would sacrifice substance to mere form, and enable insolvent debtors, by evasion, to

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effect a pur*pose declared by statute to be unlawful. The statute is a remedial one, and should be so construed as to suppress the mischief which it was manifestly designed to prevent. It being conceded, as we have seen, that the object of Kitchens and Wilks was, by the means of the papers above referred to, determined on in the outset, to effect an assignment of the property of A. F. Kitchens, who was then insolvent, for the benefit of Wilks and the estate of Patterson, to the exclusion of all the other creditors of Kitchens, the transaction was in violation of the statute, and therefore void.

The judgment of this court is that the judgment of the Circuit Court be reversed and that the case be remanded to that court for a new trial.

Mr. Justice McGOWAN. I concur upon the additional ground that the conveyance of the land to Wilks, in consideration that he would pay the donor's debt to the Patterson estate, was substantially "an assignment" for the payment of that debt. It has none of the characteristics of a sale pure and simple, but rather of an assignment, in which priority was given to a certain creditor, to the exclusion of all others. It seems to me that if parties could escape the consequences of this just provision of the law, simply by avoiding the use of the word "assignment," the act would soon become a dead letter.

Mr. Chief Justice SIMPSON, dissenting. One A. F. Kitchens, an insolvent debtor, be-

ing indebted, among others, to the plaintiff, for the purpose of securing said indebtedness, on October 5, 1882, executed and delivered to the plaintiff a paper styled in the complaint a chattel mortgage, conveying to the plaintiff a considerable quantity of personal property—in fact, as is stated, all that Kitchens possessed. This mortgage was regularly recorded, and was executed upon the condition "that if the sum of $1,543, the amount of plaintiff's claim, was not paid by the 1st day of January, 1883, with the interest thereon, then the said plaintiff was empowered to sell the property, or so much thereof as might be necessary to satisfy said indebtedness." On the same day the said Kitchens conveyed to the plaintiff certain

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real *property, all that he owned, subject to execution for debt, in consideration of thirty-five bales of cotton to be delivered by the plaintiff to the estate of one Robert Patterson, another creditor of Kitchens.

On February 10, 1883, the mortgage debt secured by the chattel mortgage above mentioned, not having been paid, in consideration thereof, and further, the plaintiff having agreed to credit said indebtedness with $1,498.99, Kitchens transferred by bill of sale to the plaintiff the greater part of the property embraced and described in said mortgage, including among other articles a considerable quantity of cotton, some twenty-five bales, then on the railroad platform at Richburg, in said county.

On April 5, 1883, the defendants, Cousar & Son, having obtained a judgment against Kitchens, and having executed an indemnity bond to the sheriff, with the defendant Leard as surety thereto, caused this cotton to be levied and afterwards sold in satisfaction of said judgment, Cousar & Son being the highest bidders, at 9⅝ per pound, the whole purchase amounting to $1,071.45—no part of which was paid to the plaintiff. Under this state of facts, the action below was commenced, the plaintiff having demanded possession of the sheriff more than once before the cotton was sold. In the complaint plaintiff prayed judgment for the sum of $1,071.45, with interest from the day of sale and costs.

The defendants alleged in their answer that Kitchens was insolvent at the time the papers above referred to were executed, and that such being the fact the said papers, covering as they did the entire property, both real and personal, of Kitchens, and making provision for the payment of a debt to the estate of Patterson, another creditor of Kitchens, on the delivery of twenty-five bales of cotton to said estate by the plaintiff, were executed in fraud of chapter 72 of the general statutes in reference to assignments for the benefit of creditors, and therefore void.

At the trial the defendants (endeavoring to sustain the allegations in the answer, i. e., that Kitchens had embraced all of his property in the conveyances to the plaintiff), when Kitchens was on the stand as a witness, propounded to him the following question, i. e., "What property did you own on

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the 5th of October, *1882?" Upon objection, this question was ruled incompetent and irrelevant under the pleadings, the Circuit judge holding that, admitting the truth of the allegations interposed in the defence, yet they would constitute a legal defence, as the transactions therein charged, even if true, were not violative of chapter 72 of the general statutes. Upon this ruling, no further evidence was offered, and a verdict was rendered for the plaintiff for the sum of $899.98. The appeal assigns error to this ruling.

The sole question, therefore, before us is, Do the facts of the case, as herein above stated, bring the case under the provisions of chapter 72 of the general statutes? If so, the appeal must be sustained, otherwise the judgment below must be affirmed. We will confine ourselves to this question, anything further would be obiter and misleading.

Chapter 72 of the general statutes contains twelve sections, and it is entitled "Of assignments for the benefit of creditors." The most important sections, and the only ones necessary to be considered here, are sections 2014 and 2015. Section 2014 imperatively forbids an insolvent debtor from giving a preference to any one creditor over another in any assignment made for the benefit of creditors, except to the public, and to such creditors as may release their claims upon accepting the terms of the assignment; and it declares that any assignment executed by an insolvent debtor, with a preference other than as stated, shall be absolutely null and void. Section 2015 provides that if any insolvent person shall, within ninety days before the execution of an assignment for the benefit of creditors, prefer one debtor, by procuring or suffering any part of his property to be attached, sequestered, or seized in execution in his behalf, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, &c., &c., the person securing such payment, pledge, &c., having cause to believe that such debtor is insolvent, the same shall be void; and the assignee may recover the said property, or the value of it, from the person so benefited.

It is hardly necessary to refer to authorities for the position that a debtor, as a general rule, may pay one creditor in advance and in preference of another. Nor can it be denied that he can sell and transfer his prop-

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erty, in part or in whole, as he may *desire,

without consulting, and even in defiance of, his creditors, provided the transaction is based upon a sufficient consideration and is bona fide. This acknowledged right springs from that recognized dominion which every person has over his own property, and which is so necessary to the pursuits and duties of life. It is true that it is difficult to harmonize this dominion of the debtor with the just claims of creditors in all cases, and sometimes injustice no doubt is done in the application of the above principle. Yet, as a general principle of law, it has been long established and is well recognized.

Where, however, a man becomes insolvent, and he finds it necessary to surrender his property, in whole or in part, to his creditors, either voluntarily or by force of law, equity demands that creditors of all grades and classes should come in for a share of his estate, and all insolvent laws should be enacted to this end. The act under discussion seems to have recognized this principle, and was based upon it. But this act does not undertake to repeal the common law right referred to above except to the extent of prohibiting a preference within ninety days prior to the execution of an assignment for the benefit of creditors generally. At any time before ninety days prior to such assignment the right of debtors is the same since the act as before its passage.

This does not seem to be denied by the appellants, and it is not contended by them that the mere fact that Kitchens preferred the plaintiff in the mortgage and bill of sale of his personal property, and that he made provision for the payment of the estate of Patterson in the sale of his real estate to the plaintiff, per se renders said sales invalid and void. These sales, if regarded as ordinary transactions, and governed by the common principles in such cases, if founded upon valuable considerations and bona fide, would be unimpeachable. It is, however, urged that all of these papers must be considered together as one transaction, and it is insisted that when so considered they constitute in substance an assignment for the benefit of creditors, and a preference being given therein to the plaintiff and to the estate of Patterson over other creditors, they must be held void under the express terms of the act. If this be the proper construction of these papers, then this position of appellants is well founded.

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*But can such construction be sustained? Do these papers, when considered as a unity, amount to an assignment for the benefit of creditors, with a preference expressed in favor of the plaintiff and the estate of Patterson over all other creditors, and therefore in violation of section 2014 of the act? There is no pretence that the other section, 2015 has been violated, as there is no allegation of a sale or transfer by Kitchens within ninety days previous to the execution of the papers relied on as constituting the assignment, the position being, that all of the papers must be regarded as one transaction, and in that way constituting an assignment. Nor can it be seriously urged that these papers, when united and considered as one instrument, with the provisions in each examined as if contained in a single paper, are characterized with the form or any of the features of a general assignment for the benefit of creditors, such an assignment as the act under consideration was intended to regulate and control.

When these instruments are examined separately, the first is a mortgage in form and in all of its features, and was intended to secure the payment of a single debt to a single creditor; the second is an ordinary conveyance of real estate upon the consideration that the purchaser would pay a debt of the grantor to a third party, a valuable and legal consideration, and the third is a bill of sale of a portion of the property embraced in the mortgage, in payment of the debt intended to be thus secured. When taken together, they amount to a sale and conveyance by Kitchens to the plaintiff of the property therein described, upon a sufficient consideration and upon a fair and just valuation, there being no allegation that the debts secured and paid were fictitious, or that the property was taken by the plaintiff at an undervalue. In an assignment for the benefit of creditors it is usual to name the creditors specifically and individually, or at least to provide for them as a class, and generally an assignee is nominated and appointed, who upon accepting the appointment becomes a trustee, holding for the creditors who are cestui que trusts, and who are invested with rights under and by virtue of the assignment, which they must seek either through or against the assignee, as the facts may require.

Now, there is not an expression in either

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of the papers, when *considered singly or together, which indicates that it was the purpose of Kitchens to execute an assignment for the benefit of his creditors generally, under the act of assembly above. No creditors are named either individually or as a class, otherwise than as in an ordinary sale. No assignee is nominated or appointed, nor do the papers possess a single feature in form of an assignment. On the contrary, as we have already stated, nothing more appears than a sale by an insolvent debtor of his entire property to one of his creditors, in consideration of an antecedent debt due said creditor and the payment by said creditor of a debt due another creditor; the effect of which transaction, it is true, is to place the property beyond the reach of all other creditors. Such a transaction may or may not be fraudulent at common law and under

the statutes of Elizabeth, dependent upon the fact of its bona fides, but it cannot be ...ed under chapter 72 of the general ...tes, as the main feature which that act requires to be present in order to be applicable is absent, i. e., an assignment for the benefit of creditors.

The appellants in their argument seem to feel the force of this position when they urge that the transaction, if not against the letter of the act, is certainly against its spirit, insisting that it is a patent evasion of the manifest purpose of the act. This may or may not be true, but yet the act is specific in its terms, and describes in well understood and in precise language the class to which its sections are intended to apply, and this court cannot enlarge its provisions by embracing other classes under the light of what may be termed the spirit of the act. This would be judicial legislation instead of judicial construction. The latter power we possess, but not the former.

It was urged by appellants, as a second position, "that the transactions were void under the provisions of 13th and 27th Elizabeth." This question was not raised in the pleadings, nor was it made before the Circuit judge, or ruled upon by him. It cannot, therefore, be considered here. Whether the dealings between Kitchens and the plaintiff were fraudulent at common law or under the statutes of Elizabeth, which in substance were but legislative declarations of the common law, depend upon altogether different facts and circumstances from those

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which would *render them invalid under chapter 72 of the general statutes. The appellants in this case have seen proper in their pleadings to rest their defence on the provisions of the latter act, and they must stand or fall upon the case as made.

With these views I am unable to concur with the majority of the court, and this is filed as a dissenting opinion.

Judgment reversed.

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22 S. C. 118

WALDROP v. LEONARD.

(April Term, 1884.)

[*Parties* ⇐96.]

Where there is a misnomer in defendant's name, but the summons is served on the party intended and he fails to appear and object to the misnomer, and suffers judgment to be obtained by default, he is concluded; and in all future litigation, he may be connected with the judgment by proper averments.

[Ed. Note.—Cited in Genobles v. West, 23 S. C. 167; Benson v. Carrier, 28 S. C. 122, 5 S. E. 272; Simmons Bros. v. Cochran, 29 S. C. 34, 6 S. E. 859; State v. Scheper, 33 S. C. 575, 11 S. E. 623, 12 S. E. 564, 816.

For other cases, see Parties, Cent. Dig. § 177; Dec. Dig. ⇐96.]

Before Witherspoon, J., Spartanburg, April, 1883.

The opinion fully states the case.

Messrs. J. S. R. Thomson and McCrary & Calvert, for appellants.

Messrs. Bobo & Carlisle, contra.

January 6, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. The plaintiff undertook to sue one Jonas P. Leonard for an alleged trespass. The writ was issued against James P. Leonard, but served on Jonas. Upon being served he went to a lawyer to file his answer, when it was discovered that the defendant named in the writ was James, and not Jonas Leonard, and thereupon he made no appearance or answer, and the verdict was rendered for the plaintiff by default. Judgment and execution were issued on the verdict against James P. Leonard, and the execution returned "unsatisfied."

About that time it was discovered that the name of the party intended to be sued was Jonas P. Leonard, and the plaintiff, desiring to take out supplementary proceedings

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against him, A. *B. Calvert, Esq., one of his attorneys, made the usual affidavit, and an order was obtained requiring "Jonas P. Leonard, alias James P. Leonard, to appear and answer concerning his property," &c. A copy of this order was served on Jonas P. Leonard, who appeared and denied "that he had been served in any case in which the plaintiff had obtained judgment against him, or that he had ever been known by any other name than Jonas P. Leonard. The deputy sheriff proved that Jonas P. Leonard was the party served in the action of trespass; that afterwards Leonard said that he had gone to his lawyer to prepare his answer, when it was discovered that the summons ran against James Leonard, and they concluded to pay no attention to the proceedings.

The plaintiff's attorney moved for leave to amend the judgment and execution by inserting the name of Jonas in place of that of James P. Leonard. This Jonas P. Leonard's attorney resisted, and moved for an order declaring the judgment absolutely void as against him, and dismissing the supplementary proceedings, which latter order was granted by the Circuit judge, and the plaintiff appeals to this court, alleging error: "I. In ruling that the judgment was absolutely void, and the record thereof not subject to amendment. II. In refusing to rule that Jonas P. Leonard was estopped from denying himself the party defendant in said judgment. III. In ruling that supplementary proceedings would not lie on account of the misnomer. IV. In not allowing Jonas P. Leonard to be examined regarding his prop-

erty. V. In dismissing the proceedings herein supplementary to execution."

There is no doubt whatever that the action would have been dismissed if Jonas P. Leonard, when served with the summons addressed to James, had made the objection of misnomer to set aside the service, by answer, in lieu of the former plea in abatement. Norris v. Graves, 4 Strob., 32; Bull v. Franklin, 2 Speers, 46. It is equally clear that if Jonas had answered to the merits, he would be held to have waived the objection of error in the process served upon him. Myers v. Sealy, 5 Rich., 476. But it is not so clear as to what should be the result where one person, served with a complaint

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issued against another, makes no *appearance, objection, or answer; but simply disregards the proceeding as no concern of his.

It is certainly remarkable how little can be found in the reports upon this precise point. The cases are numerous as to what is and what is not a fatal misnomer when the parties in the case make the question; but we have been referred to no case in this state where the misnomer was in the name of the party intended to be sued, and he disregarded it as not binding him. There are some authorities outside of the state, but they are not only conflicting, but absolutely contradictory. For instance, Mr. Freeman says: "The weight of authority is that if the writ is served on the party by a wrong name, intended to be sued, and he fails to appear and plead the misnomer in abatement, and suffers judgment to be obtained, he is concluded, and in all future litigation may be connected with the suit or judgment by proper averments," &c. Freem. Judg., § 154. While Mr. Wait says: "If the defendant appears and does not set up this defence in his answer, he will be deemed to have waived the objection. But a failure to appear and defend does not deprive the defendant of the right to prevent the sale of his property on an execution not directed against it. Thus where a defendant sued by a wrong name fails to appear in the action, he does not waive his right to object to the misnomer even after judgment and execution." 1 Wait Prac., 473; 32 Barb., 277.

This wide difference of opinion seems to arise out of the view which is taken as to whether error in the summons as to the defendant's name should be considered as a mere misnomer, or as going deeper and touching the very jurisdiction of the Court. It is familiar doctrine that there can be no binding judgment against a party, unless the court has jurisdiction of the person of the defendant. Does service upon a party by the wrong Christian name bring the person so served within the jurisdiction of the court, where he is himself entirely passive, doing no act that can be construed into a waiver, as appearing and answering, &c.?

As before stated, the authorities are not in accord, but all the authorities hold that it is the duty of the party served to inform

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*the court of the error and have the service discharged; and it would seem to follow that there should be some liability on his part for omitting to do so, and that when the party intended is served, the proper principle is announced in one of the oldest cases on the subject. Crawford v. Satchwell, 2 Strange, 1218 (18 Geo. II.). In that case the defendant, whose real name was Arthur Satchwell, was sued in trespass by the name of Archibold Satchwell. Held, "that if the defendant omits to plead misnomer, he may be taken in execution by the wrong name."

Doo v. Butcher, 3 T. R., 611 (1790), was a rule calling on the plaintiff to show cause why the proceedings should not be set aside for irregularity, because the declaration was against the defendant by the name of Thomas, and that in which he was served was John: held, "that if the plaintiff sue defendant by a wrong Christian name and the defendant appear by his right name, the plaintiff may declare against him by the right name; secus, if the plaintiff file common bail for him, according to the statute by his right name."

Corbett v. Bates, 3 T. R., 660 (1790), held that "if the latitat be sued out against the defendant by one Christian name, and the alias by another, and the plaintiff afterwards proceeds, the court will set aside the proceedings for irregularity."

Cole v. Hindson, 6 T. R., 234 (1795), holds that "if a defendant be sued by the wrong Christian name and fails to appear to the action, he is not concluded." In this case Lord Kenyon said that in the case from Strange, above cited, the party had appeared in the original action, but this does not appear from the report of the case.

Oakley v. Giles, 3 East., 167 (1802), holds that "if a defendant be sued with process by a wrong Christian name, and afterwards the plaintiff enter an appearance for him, and serve him with notice of declaration by his right name and proceeds to judgment and execution, the court will not set aside the proceedings for irregularity merely on the ground that the defendant never appeared; because he ought to have pleaded such misnomer in abatement." The defendant was, however, let in to defend upon payment of costs, and upon affidavits that he was misled by advice of counsel, and of merits in the case.

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*Smith v. Bowker, 1 Mass., 76 (1804), holds that "mistakes in the addition of place, must be pleaded in abatement; and cannot be ground for maintaining trespass against an officer who serves an execution issuing on the judgment." In that case one Samuel

Switzer brought an action against Aaron Smith on a note, which was admitted to have been signed by Smith, but in the writ as well as in the judgment and execution obtained thereunder, he was described as Aaron Smith of "Orange," in the county of Hampshire, whereas in fact he was of "Athol," in the county of Worcester. It appeared that the summons for his appearance was left at the residence of Smith in Athol in the county of Worcester. Under the execution issued upon the judgment thus obtained, the defendant, as deputy sheriff, levied on certain cattle of Smith, and this action was brought for trespass in seizing the property of Smith under an execution against Aaron Smith of Orange in the county of Hampshire. The court held as above, saying: "If he was not properly described in the writ, he should have taken advantage of the mistake by plea in abatement. This he did not do, but permitted judgment to be rendered against him." And the only authority cited is the case of Crawford v. Satchwell, 2 Strange, supra.

Delanoy v. Cannon, 10 East., 328 (1808), holds that "after a writ sued out and common bail filed against a defendant by the name of 'J,' it is irregular for the plaintiff to declare against him by the name of 'R,' sued by the name of 'J,' and the defendant may set aside the proceeding before plea." The court, in answer to plaintiff's counsel, who relied upon Oakley v. Giles, supra, observed that "the application to set aside the proceedings for irregularity was not made until after judgment and when the defendant might have before pleaded in abatement; but here it is before plea." This would seem to indicate that if the motion had not been made before plea or until after judgment, the motion would not have been entertained. The case of Summers v. Wason, 1 Bos. & P., 105, was cited as authority.

Dring v. Dickenson, 11 East., 225 (1809), holds that "if a defendant be served with a writ by a wrong Christian name of 'W,' and do not appear to it, the plaintiff cannot file common bail for him in his right name of

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'E,' sued by the name of 'W,' *nor declare against him de bene esse in that form, and the proceedings were set aside for irregularity after interlocutory judgment signed for want of a plea." This decision was made by a court very nearly identical as to the judges with that which had previously decided Oakley v. Giles and Delanoy v. Cannon, supra; and although these cases were cited and relied on by counsel, no notice is taken of them in the decision of the court, and no effort made to distinguish them. In fact, no authority is cited or reasons given by the court. The only distinction apparent between this case and that of Oakley v. Giles is, that here there was only an interlocutory judgment, while there it was final.

Smith v. Patten, 6 Taunt., 115, 1 E. C. L. R., 330 (1815), holds that "where a defendant sued by a wrong name omits to plead in abatement and suffers the plaintiff to proceed to judgment, though he never has appeared to the wrong name, this court will not interfere to set aside the proceedings." In this case, however, it did appear that the plaintiff had addressed a letter to the defendant by the name of Joseph Patten, to which the defendant replied, promising payment of the debt and not complaining of any misnomer. The plaintiff sued him by the name of Joseph Patten, and served him with notice of the declaration, entered an appearance for him (which it appears from some of the cases was authorized by statute) signed interlocutory judgment and executed a writ of inquiry, the defendant during all these proceedings remaining wholly passive, having done no act to countenance them. The motion was to set aside the whole proceeding upon the ground that they were a nullity, the defendant's real name being John and not Joseph, and in support of it the case Greenslade v. Prothero, 2 New R., 132, and Cole v. Hindson, supra, were cited. The counsel for the plaintiff rested his argument upon the fact that the defendant had misled the plaintiff by not noticing the misnomer in the letter addressed to him. "The court did not adopt the argument that the defendant by not noticing the misnomer had misled the plaintiff, but they decided on the ground that the defendant might have pleaded the misnomer in abatement, and that not having availed himself of that opportunity, he could not now come to set aside the proceedings. It would be of the worst consequence if defend-

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ants should be permitted, instead *of pleading in abatement, to lie by and increase expenses, and then to move to set aside the proceedings; they therefore refused to interfere." While it does appear by implication that this was an action to recover a debt, from defendant's answer to plaintiff's letter, "promising payment of the debt," yet it does not appear whether the debt was due by open account or by some instrument of writing signed by the defendant. It could hardly have been the latter, for if the debt was represented by a note or bond signed by the defendant, he could have been sued by the name signed, and if signed by his correct name John, it is barely possible that, with the paper before him, the plaintiff would have addressed him as Joseph.

Griswold v. Sedgwick, 6 Cowen, 456 (1826), holds: "If process against the body, out of any court, do not on its face authorize an arrest, it is void, and will not protect any person concerned in the arrest, even the officer to whom directed. Where Daniel S. Gris-

wold was arrested on process of attachment, issued out of the equity side of the Circuit Court of the United States against Samuel S. Griswold: held, that an action of false imprisonment lay by Daniel S. Griswold against the marshal, his deputy, and the solicitors concerned in the arrest, and this, though Daniel S. Griswold was the person intended." This decision is rested on the ground that Daniel S. had not appeared in the action, for if he had, the decision would have been otherwise (citing Cole v. Hindson, 6 T. R., 234; Shadgett v. Clipson, 8 East., 328; Wilkes v. Lorck, 2 Taunt., 400; Scandover v. Warne, 2 Camp., 270; Margans v. Bridges, 1 Barn. & Ald., 647); the court saying, upon the authority of Lord Kenyon in Cole v. Hindson, "that in Crawford v. Satchwell, 2 Strange, 1218, the defendant had appeared, and that the same remark might be made as to Smith v. Bowker, 1 Mass., 76," which fact, however, does not appear in the report of either of the cases. The court also attempts to distinguish the case from that of Reynolds v. Corp, 3 Caines Cas., 267, by the remark that in the latter case the court held that the judgment was not void, but voidable only, and that the sheriff should, therefore, have first applied to have the writ (which is supposed to have been issued in the wrong name) set aside.

Guinard v. Heysinger, 15 Ill., 228 (1853),

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holds "that if a *party suffers a judgment to pass against him by the wrong name, he is estopped from availing himself of the misnomer in an action on that judgment." There is nothing in the case from which it can be discovered whether the defendant did or did not appear in the original action.

Lafayette Ins. Co. v. French, 18 How., 404 [15 L. Ed. 451] (1855), was an action brought in Indiana on a judgment obtained in Ohio, and it appeared that the judgment had been recovered in Ohio against the company by an erroneous name; held, that "if the judgment was recovered in Ohio against the company by an erroneous name, but the suit upon the judgment was brought in Indiana against the company, using its chartered name correctly, accompanied with an averment that it was the same company, this mistake is no ground of error. It could only be taken advantage of by a plea in abatement in the suit in which the first judgment was recovered," &c. It is not distinctly stated that the defendant corporation did not appear to the action in which the judgment was recovered against it, in the Commercial Court of Cincinnati, in the state of Ohio, but it is plainly inferrible from what is said in the case, especially from the language of the second ground of objection to the introduction of the record of the Ohio judgment in these words: "Because said judgment record does not show or evidence the service of process upon this defendant as required by law, nor the appearance of this defendant by attorney or otherwise in said action or suit in said Commercial Court, and that said judgment, as a judgment, is therefore a nullity," &c. Of course, if the defendant corporation had appeared and pleaded to the action, this must have appeared in the record. It may be proper to explain also, that the service of process was made upon the agent of the company in Ohio under a law of that state which made it a condition of allowing foreign insurance companies to do business in the state, that they should have an agent there, upon whom process could be served. In delivering the judgment of the court, Mr. Justice Curtis uses this language: "The only question open here is, whether, if a mistake be made in the name of a defendant and he fails to plead it in abatement, the judgment binds him, though called by a wrong name. Of this we have no doubt. Evidence that it was an errone-

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ous name *of the same person must therefore be admissible; otherwise a mistake in the defendant's name, instead of being assailable only by a plea in abatement, would render a judgment wholly inoperative."

Barry v. Carothers, 6 Rich., 332 (1853), one of our own cases, was somewhat like the one just quoted, the principal difference being that in our case the alleged misnomer was in the name of one of the plaintiffs. This was also an action upon a judgment, which had been recovered in North Carolina by a co-partnership in the firm-name of J. H. Barry & Co. The defence was nul tiel record: that Andrew G. Gingles, one of the partners named as a plaintiff, was not the same person called Samuel G. Gingles in the original proceeding in which the judgment was obtained. In delivering the judgment of the court, Judge Wardlaw said: "A name is, however, but the designation of an individual. The judgment in North Carolina establishes the indebtedness to the plaintiff; no death, assignment, nor other change supervening that judgment, could be shown by the plaintiffs here, to maintain their action; and if proof, under proper allegations, that they are in fact the persons who recovered that judgment, should be held not to suffice for the plaintiffs here, the result would be that the defendant in an action on a judgment would make an impenetrable shield of a misnomer, which he waived in the first action when he failed to plead it in abatement."

In Hammond v. People, 32 Ill., 473 (1863), it is said, upon the authority of Ex parte Kellogg, 6 Vt., 511, "That matter in abatement, if there be notice to the defendant in fact, is waived if not pleaded, and cannot be assigned for error." This was said in a case where the party, whose name was Joseph Vacaro (an Italian), had been sued by the name of Joseph only. The right man was

served, but made default, and judgment having gone against him, he was arrested under a Ca. Sa.; and this was a proceeding to obtain his discharge under the writ of habeas corpus. At page 472 it is said, after stating the facts as above: "What, under the circumstances, was it his duty to have done? It was to have appeared and pleaded the misnomer in abatement of the suit and give in his name in full."

First National Bank of Baltimore v. Jaggers, 31 Md., 38 (1869), holds that "where a

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party is served by a wrong name, *and the writ is served on the party intended to be served and he fails to appear and plead the misnomer in abatement, and suffers judgment to be obtained by default against him in the erroneous name, he is concluded, and execution may be issued on the judgment in that name and levied upon the property and effects of the real defendant." In the opinion of the court it is said: "There is no doubt that when a party is sued by a wrong name and he appears to the suit and does not plead the misnomer in abatement, and judgment is rendered against him in the erroneous name, execution may be issued upon it in that name and levied upon the property and effects of the real defendant; but there is some conflict in the decisions, whether the same result will follow if he does not appear and the judgment is obtained by default. The weight of authority, however, is that this makes no difference, and if the writ is served on the party intended to be served, and he fails to appear and plead in abatement, and suffers judgment to be obtained by default, he is concluded, and in all future litigation may be connected with the suit or judgment by proper averments."

The language just quoted is approved and incorporated into section 154 of Freeman on Judgments, which was cited in the beginning of this opinion. We agree that this view is sustained by the weight of authority, extending back certainly to the reign of George II. It is true that there are some New York decisions to the contrary, but it seems to us that they are not sustained by principle, and we do not see that the code should have any effect in that direction, section 194 of which provides that "the court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case," &c.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and the case remanded for such further orders as may be necessary to carry out the conclusion herein announced.

22 S. C. *128

*DAVIS v. SCHMIDT.

(April Term, 1884.)

[1. *Pleading* ⇐355.]

A reply without an order of court and alleging no counter-claim, may be improper, but a refusal by the Circuit judge to formally strike it out, is not error of law.

[Ed. Note.—Cited in Kingman v. Lancashire Ins. Co., 54 S. C. 602, 32 S. E. 762; Norris v. Hartford Fire Ins. Co., 57 S. C. 368, 35 S. E. 572.

For other cases, see Pleading, Cent. Dig. § 1109; Dec. Dig. ⇐355.]

[2. *Judgment* ⇐585.]

An issue raised by the lienor under a warrant to enforce an agricultural lien, and an action by such lienor against the lienee for damages for not advancing supplies under the contract of lien, are two distinct actions and not founded upon the same cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1095; Dec. Dig. ⇐585.]

[3. *Appeal and Error* ⇐1008.]

Findings of fact by the Circuit judge in a law case, tried by him without a jury, cannot be reviewed on appeal.

[Ed. Note.—Cited in Ollever v. Duval, 32 S. C. 276, 10 S. E. 1070; Speer v. Meschine, 46 S. C. 511, 24 S. E. 329.

For other cases, see Appeal and Error, Cent. Dig. § 3964; Dec. Dig. ⇐1008.]

Before Aldrich, J., Richland, November, 1883.

This was an action by Calvin Davis against Margaret Schmidt. The Circuit judge rendered the following judgment:

The plaintiff, a negro farmer, on March 6, 1883, entered into an agricultural lien with the defendant, who was to furnish him advances for agricultural purposes to the amount of $200. He complains that the defendant did not keep her part of the contract, whereby he was damaged in the sum of $250. The defendant, in her answer, admits the lien, denies that she refused to furnish supplies, and claims the benefit of a receipt for $150, and that the plaintiff is still indebted to her in a large sum of money, for which suit is now pending. The plaintiff replies to the answer and denies the same.

The facts and merits of the case will more fully appear in the testimony. The plaintiff's statement is that the defendant's husband, by her sanction and as her agent, offered to sell him a mare for $150, which he warranted as a good work animal, and was to advance him $50 worth of provisions, in instalments of ten dollars a month, and wait on him for payment until he made his crop; that on the assurance that the mare was a good work animal, he gave the receipt for $150, and got $8 worth of provisions, and took the mare home; that when he tried to plough her, he found she would not work, but did nothing but paw and kick up; that he carried her back, and the defendant's husband, still acting as her agent took the mare back and offered him a poor mule, which plaintiff was

unwilling to receive, but by persuasion he

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was *induced to try her, and found she was not able to do a half day's work; that he returned the mare, and Schmidt, still acting as his wife's agent, promised to get him a mule; that when he went for the mule, he was refused both the mule and further advances on the crop; that as it was getting late in the season, Mr. Maxcy, from whom he had rented 30 acres of land, said that if he could not get a work animal and advances he would have to take his land back; that after some efforts, he was able to get a mule from Harmon, about March 20; that by his 13 year old boy ploughing the mule, and his daughter ploughing him, the plaintiff was able to get in his cotton by May 25, but could only put in 25 of the 30 acres rented from Mr. Maxcy. He also states that in consequence of the refusal of the defendant to let him have provisions, he was forced to work out for wages to get supplies for his family and farm; that he would have made 12 bales of cotton if he had been able to get in his crop in time, but in consequence of the delay occasioned by defendant he did not make one-half as much as his neighbors.

Mr. Maxcy corroborates plaintiff's statement, and says he ought to have made 8 bales, if he could have got his crop in in time. That Schmidt acts as the agent of his wife, is so considered generally, and was present at the time her husband had the transactions with the plaintiff. Sheriff Rowan said that the husband of the defendant transacts all of her business, and is regarded by the community as her agent. Mrs. Schmidt, the defendant, was examined, but her statement was so unsatisfactory that it made no impression on the court at all favorable to her.

I am satisfied in my own mind, that while Mrs. Schmidt may be a very industrious and hard-working woman, she is simply held out to the community as a blind; her husband is the real actor, and does all the dirty work. My theory of the case is, that learning from Mr. Maxcy that the plaintiff is a hard-working, industrious man, and a good farmer, he tried to put off on him two worthless mares at an extortionate price. Failing in that, he refused to let him have supplies. The only question is, how much has the negro plaintiff been damaged by his conduct? Mr. Maxcy's lowest estimate is that he would have made 8 bales. He made 3. His loss, therefore, is

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at least 5 bales, which, at *$40 a bale, the lowest price paid, is $200, and it is so adjudged. Let the plaintiff, Calvin Davis, have judgment against the defendant for $200 and costs.

The defendant appealed upon the exceptions set forth in the opinion.

January 10, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, respondent, in March, 1883, gave an agricultural lien to the defendant, who was to furnish advances for agricultural purposes to the amount of $200. The plaintiff complains that defendant did not keep her part of the contract, having failed to furnish the advances agreed upon, to his damage $250. The defendant in her answer admits the lien, but denies that she refused to furnish the supplies, and claims that she holds a receipt for $150, advanced in money, and that there is due her a large sum by the plaintiff, for which she has instituted suit, now pending. To this answer the plaintiff filed a reply, in which he denied the advance of $150 in money, but admits that he gave a receipt for $150, alleging that this receipt was given for a mare valued at that sum, which mare defendant warranted to be suitable for the purposes for which she was bought; which proved to be untrue. He further admitted that there was a proceeding pending in the Court of Common Pleas, under the provisions of the agricultural lien law (his crop having been levied upon) under which he had raised the issue of the amount due.

At the trial the defendant moved to strike out the different paragraphs of this reply on various grounds. He also demurred to so much thereof as admitted the pending action on the "ground of insufficiency, because the defendant in her answer alleged that there was an action then pending between the same parties under this lien, which, being admitted by the plaintiff, shows that he had no right to bring this action; and further, that the complaint does not state facts sufficient to constitute a cause of action, because the plaintiff in his reply admits his indebtedness to the defendant, and that he had previously applied to the court to determine the amount."

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The Circuit judge reserved his opinion *upon the motion and demurrer, and the trial proceeded before him on the merits. At the conclusion of the testimony, he decreed that plaintiff have judgment for $200 and costs.

The defendant has appealed upon ten exceptions: "1. Because his honor erred in not striking out paragraphs 1, 2, 3, and 4 of the reply. 2. Because he did not dismiss the complaint when the plaintiff admitted in his reply that there was another action pending between the same parties for the same cause. 3. Because the plaintiff having admitted that he was indebted to the defendant and that action had been instituted by him to determine the amount under the agricultural lien, his honor should have dismissed the complaint. 4. Because his honor erred in not stating his conclusions of law submitted in the motions and demurrers. 5. Because his honor erred in decreeing that the only question is, how much the negro plaintiff has been damaged. 6. Because his honor erred in decreeing that Margaret Schmidt was liable to $200 damages and costs, after

finding as matter of fact that it was by the conduct of Frederick Schmidt that the damage was caused, he being no party to the action. 7. Because his honor erred in decreeing as matter of law that the agency of Frederick was legally established by his being so regarded by the community. 8. Because his honor erred in judicially fixing the lowest price of a bale of cotton to be forty dollars, and basing the amount of damages on such estimate, when no evidence had been introduced to prove the lowest value of a bale of cotton to be forty dollars even. 9. Because his honor erred in finding that the plaintiff would have made five bales of cotton on five acres of land, if he had planted them, when, as matter of fact, he only made three bales of cotton on twenty-five acres which he did plant, the land all being about equal. 10. Because the judgment is erroneous, over forty dollars costs having been taxed up without notice to the defendant."

The case was submitted upon the pleadings, testimony, and exceptions, without argument, either oral or printed, and without reference to any authority; counsel should not be surprised, therefore, if the court has failed to see the pertinency and force of many of the exceptions. In addition to this, notwithstanding the case was one at law,

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and consequently as we have often said *in such cases, could involve on appeal only questions of law, yet several questions of fact are raised in the exceptions. These questions cannot be considered, as the authority of this court under the constitution in cases at law extends only to errors at law, made through omission or commission, and properly brought before us.

We see no error of law in the Circuit judge failing to rule on the motion and demurrer interposed by the defendant to the reply of plaintiff. It is true the reply was not put in under the provisions of the code, there being no statement that a reply was ordered by the court on account of new matter in the answer constituting a defence by way of avoidance. Nor was there a counter-claim set up in the answer requiring a reply. Code, §§ 174, 175. The reply therefore was wholly unnecessary and perhaps improper, but we do not see that it should have been formally stricken out. In fact, the motion to strike out certain portions of it was not made on the ground of improper pleading, but upon other grounds. This motion, as well as the reply, as far as we can ascertain from the meagre statement in the case submitted, seems to have been ignored by the Circuit judge, and the case was tried by him on its merits, independent of the reply. Besides, the reply amounted to nothing but a denial in substance that the defendant had furnished the plaintiff $150 in money under the agricultural lien, as alleged in the answer, and which the plaintiff no doubt would have had the right to deny by testimony without the reply, in the issue raised by the complaint and the answer.

As to the demurrer based on the 5th paragraph of the reply, we have not discovered that there was a pending action between the same parties for the same cause, when the action below was commenced. There appear to be two actions going on between these parties, it is true, but they are not founded upon the same cause. In the first, the defendant here is the plaintiff endeavoring to enforce an agricultural lien for alleged advances, in which the plaintiff in this action has, under the special proceeding provided in the lien law for that purpose, raised the question of the amount due. Gen. Stat., § 2398. In the other, the plaintiff here has instituted suit to recover damages for the

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breach of defendant's *contract to furnish the supplies agreed upon, on account of which he alleges that he failed to make the crop which he could have made if these supplies had been furnished.

Disregarding, then, the reply, and the motion and demurrer made thereupon, the only real question in the case was one of fact, i. e., "whether the plaintiff had been damaged." This question might have been submitted to a jury, had the parties demanded it, but it was tried by the judge, by consent, as we suppose, and being a case at law his finding of fact is beyond our review, as would have been the finding of the jury, had the jury tried the case, both as to the fact of damages and its amount, based upon the price of a bale of cotton, and the number of bales the plaintiff might have made on five acres of land, had he planted them, referred to in exceptions 8 and 9.

We do not see the pertinency of the exceptions 6 and 7, founded upon the remarks of the Circuit judge as to the agency of Frederick Schmidt, defendant's husband.

Exception 10 raises an objection as to the amount of costs taxed in the case. The Circuit judge made no ruling as to the amount of the costs. He simply adjudged damages to the plaintiff with costs. In this there was no error. If too much has been taxed, of which we have no means of knowing from anything that appears in the case, yet this could not have resulted from the rulings of the court.

It is the judgment of this court that the judgment of the circuit court be affirmed.

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22 S. C. 133

SMYTHE v. TOLBERT.

(April Term, 1884.)

[1. *Ejectment* ⟸15, 90.]

In action for recovery of land, plaintiff need not trace his title back beyond a common source; when it is not admitted in the pleadings that both parties do claim under such common

source, it is then a question of fact to be determined by the evidence. Martin v. Ranlett, 5 Rich., 541 [57 Am. Dec. 770], recognized and followed.

[Ed. Note.—Cited in Rhett v. Jenkins, 25 S. C. 458; Bradley v. Drayton, 48 S. C. 243, 245, 26 S. E. 613; Thomas v. Dempsey, 53 S. C. 221, 31 S. E. 231; Bryce v. Cayce, 62 S. C. 563, 40 S. E. 948; Kilgore v. Kirkland, 69 S. C. 84, 48 S. E. 44; Bethea v. Allen, 95 S. C. 484, 79 S. E. 639.

For other cases, see Ejectment, Cent. Dig. §§ 59, 254; Dec. Dig. ⟸15, 90.]

[2. *Evidence* ⟸271.]

Declarations by defendant that he claimed title under S. (a common source) were admissible in evidence against him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1078; Dec. Dig. ⟸271.]

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[3. *Appeal and Error* ⟸1050.]

*The admission of incompetent testimony that could not have affected the result, is not sufficient ground for reversing the judgment.

[Ed. Note.—Cited in Wardlaw & Edwards v. Rayford, 27 S. C. 186, 3 S. E. 71.

For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. ⟸1050.]

Before Aldrich, J., Edgefield, October, 1883.

This was an action by J. Ellison Smythe against John R. Tolbert. The case was brought to this court upon the following exceptions: "1. Because his honor erred in admitting any testimony as to any claim of title by the defendant, John R. Tolbert, to the land in dispute; there being no such claim set up in the pleadings when they were submitted to the jury. 2. Because his honor erred in admitting the testimony of O. Sheppard, Esq., as to a claim of title by the defendant, John R. Tolbert, to the land in dispute, without requiring the deed, under which said claim is alleged to have been made, to be first produced or its loss accounted for; said deed being the highest evidence of said claim of title. 3. Because there was no competent proof of title claimed by the defendant, John R. Tolbert, to the land in dispute, such as to show that such title came from a common source with that of the plaintiff. 4. Because defendant having set up no claim of title to the land, and having denied the title of the plaintiff, his honor erred in refusing to charge the jury that the plaintiff could not recover in this case without proving a perfect title—tracing it to a grant from the state, or a presumed grant. 5. Because his honor erred in not instructing the jury that plaintiff had failed to prove a perfect title in himself to the land in dispute. 6. Because the plaintiff failed to prove such title in himself as would trace his title to a common source with a title of the defendant. 7. Because, if the defendant does not set up a claim of title to the land in dispute, the plaintiff cannot set it up for him, and the defendant may rely upon his defence of denial of title in plaintiff, and his honor erred in refusing to instruct the jury accordingly."

Mr. A. J. Norris, for appellant, cited 1 Tread. Con. R., 90, 125; 1 McMull., 450; 5 Rich., 545; 9 S. C., 440; 15 Id., 263; 17 Id., 89; 19 Id., 411; 7 Wheat., 547.

Messrs. Sheppard Bros., contra, cited 5 Rich., 541; 1 Hill, 382; 1 Strobh., 1; 2 Rich., 581; 12 Id., 474; 3 Strobh., 367.

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*January 10, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, respondent, brought the action below to recover possession of a certain tract of land situate in Edgefield County, and for damages for the unlawful withholding thereof. The defendant, appellant, denied respondent's title, and the case at the trial turned upon the question of title.

The respondent relied upon the following papers as evidence of title, to wit, a deed from Johnson & Leopold to one J. L. Shumate, sheriff's deed to Leopold, a mortgage from Shumate to George H. Walter & Co., the foreclosure of this mortgage and a deed from the master of foreclosure sale to the respondent. Some days before the trial an agreement was entered into between the attorneys of respondent and appellant as follows: "We agree to admit the execution of the deeds to be offered in this case by the plaintiff, to wit, mortgage by J. L. Shumate to George H. Walter & Co., and deeds of J. D. Johnson and F. M. Leopold & Leopold to J. L. Shumate, and sheriff's to the Leopolds. Also deed from the master to Smythe—four papers. Also execution of deed from J. L. Shumate to J. R. Tolbert, defendant's deed." This paper was submitted to the court by the plaintiff as evidence.

The plaintiff here introduced as a witness O. Sheppard, Esq., one of his attorneys, who testified that the defendant Tolbert told him that he had bought the land in dispute from J. L. Shumate, under whom plaintiff claims, and that he had a deed from Shumate; that during the litigation to foreclose the mortgage of Shumate to Walter & Co., and up to the present time this deed had never been recorded, and, further, that defendant Tolbert told him that when he bought the land from Shumate, Shumate assured him that the said mortgage had been satisfied, and that thereby Shumate had fooled him. He further testified that he had seen the deed from Shumate to Tolbert, and that it was junior to the mortgage to Walter & Co.; and, further, that at the foreclosure sale the defendant Tolbert was present and competed in the bidding, offering to take the land at the last bid. This testimony was objected to by the defendant upon several grounds.

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*The defendant introduced no testimony, and no objection was taken to the charge,

except "that his honor refused the following request: 'We ask the court to charge the jury that plaintiff cannot recover in this case without proving a perfect title, tracing it to a grant from the state, or a presumed grant.'" Upon which the judge endorsed as follows: "The general rule contended for is correct, but it does not apply to this case, and the request is refused." The jury found for the plaintiff the land in dispute and two hundred dollars damages.

The appeal involves, first, the legal question, whether in an action for the recovery of real estate upon the ground of title, where the pleadings do not show that both parties claim from a common source, the plaintiff may be released from the necessity of going back to a grant from the state by proving at the trial by testimony that the defendant, notwithstanding he has not set up in his answer title derived from a common source, yet that such is his claim in fact.

There is no doubt that as a general rule the plaintiff, in an action to recover possession of real estate on the ground of title must show a complete and perfect title in himself, going back to a grant either actual or presumed. To this rule, however, there are several exceptions, one of which is that where both parties claim from a common source, the plaintiff need go no further back than this source, and having done so, the question then is, which of the two has the superior title. Hill v. Robertson, 1 Strobh., 1. These principles are not denied, but the question here is, how shall it be made to appear that both parties claim through a common source, so as to bring the case under the exception above referred to? Must this fact appear in the pleadings, or can it be shown in the evidence on the part of the plaintiff?

The case of Martin v. Ranlett, 5 Rich., 541 [57 Am. Dec. 770], is decisive of this question. In that case, which was an action of trespass to try title, like this one, Marsh was the original owner of the land in dispute. In 1829 Rogers & Latimer recovered a judgment against Marsh. In 1837 Marsh mortgaged the land to one Gary, and in 1840 Gary recovered a judgment on the bond secured by the mortgage. Under this latter judgment the land was sold in 1843, and was purchased by Gary. This sale was held void,

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*and the land was afterwards sold under the older judgment and bought by Martin. The heirs of Gary were in possession through their tenant, Ranlett. The plaintiff gave in evidence no title beyond the sheriff's deed, which conveyed the interest of Marsh. To supply the deficiency and to show that both parties claimed under Marsh, he introduced and proved, 1st, that Gary at the sale, under his judgment, exhibited a paper which he said was a mortgage from Marsh to himself; 2d, notice to the defendant to produce this mortgage; and, 3d, the book of the register where this mortgage was recorded. Upon this testimony the question was made whether the plaintiff had made out title in himself, and the court held that the evidence developed the fact that both parties traced their title to a common source, sufficiently to render it improper to grant a non-suit. The court further held, however, that this did not preclude the defendant from showing that he had acquired a better title than that which he derived from Marsh, which the defendant, having failed to show, the plaintiff recovered simply upon the sheriff's deed, and the proof that defendant claimed under Marsh.

The facts of the case now before the court are somewhat similar to those of Martin v. Ranlett, and the rule applied there must govern here. Whether, then, the general rule or the exception is to govern in any special case must depend upon the fact whether or not the parties claim through a common source. If they do not, then the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary, and must trace back to a grant; if they do, then the plaintiff may stop in the first instance at the title of the common grantor; and whether they thus claim or not, is a question of fact to be determined (unless admitted in the pleadings) by the jury upon the evidence.

Such being the law, it will be seen at once that the Circuit judge could not have charged as requested by the appellant. The request was that he should charge "that plaintiff could not recover in this case without proving a perfect title, tracing it to a grant from the state, or a presumed grant." The judge might have charged the general proposition that, in the absence of a common claim, or rather a claim from a common

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source, this was *necessary; but to have charged this as necessary in this case he must have assumed the fact that the parties did not claim from a common source, which he could not do without invading the province of the jury, on the question of fact involved.

II. Was there error in admitting the testimony of the witness, Mr. Sheppard? That testimony consisted of declarations of the defendant showing that he, the defendant, had bought the land from Shumate; that he had a deed from Shumate, executed after the mortgage under which plaintiff claimed, which mortgage the defendant, when he bought, supposed had been satisfied. Mr. Sheppard also testified that he had seen the deed from Shumate to the defendant, and that it was junior in date to the mortgage. As to the declarations of the defendant, we know of no rule of evidence which could

have excluded these. They were not objectionable as hearsay, nor were they irrelevant, nor were they obnoxious to any rule governing the introduction or competency of testimony. There was no error, therefore, in admitting this testimony to the extent of these declarations.

It may be, however, that the witness's statement that he had seen the deed of Shumate to the defendant, and that it was junior to the mortgage, was incompetent, in the absence of notice to produce it, on the ground that there was better evidence of the fact of the date of the deed, i. e., the deed itself. Admitting this, yet we do not think that this should reverse the judgment. This witness had already testified as to declarations of the defendant, in which the defendant admitted that his deed was junior to the mortgage. He said that Shumate had told him before he bought that this mortgage had been satisfied, and in this he had been "fooled." With this admission before the court, the evidence of Mr. Sheppard as to the date of the deed could not have affected the result. With that stricken out, there is enough left to sustain the finding.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

22 S. C. *139

*PIESTER v. PIESTER.

(April Term, 1884.)

[1. *Interest* ⟸37.]

A sealed note payable one day after date, "with interest at the rate of two per cent. a month," carries the stipulated rate of interest after maturity.

[Ed. Note.—Cited in Smith v. Smith, 33 S. C. 216, 11 S. E. 761; Gibson v. Hutchins, 43 S. C. 296, 21 S. E. 250; Dyson v. Jones, 65 S. C. 310, 43 S. E. 667.

For other cases, see Interest, Cent. Dig. §§ 77, 78; Dec. Dig. ⟸37; Bills and Notes, Cent. Dig. § 281.]

[2. *Mortgages* ⟸175.]

A subsequent creditor for valuable consideration without notice of an unrecorded mortgage is protected by the act of 1843, not only as to the land covered by the mortgage, but also as to the general assets of the estate of the mortgagor after his decease.

[Ed. Note.—Cited in King v. Fraser, 23 S. C. 570; Carraway v. Carraway, 27 S. C. 583, 5 S. E. 157; Norwood v. Norwood, 36 S. C. 343, 15 S. E. 382, 31 Am. St. Rep. 875.

For other cases, see Mortgages, Cent. Dig. §§ 417, 418; Dec. Dig. ⟸175.]

[3. *Mortgages* ⟸169.]

Proceedings in the Probate Court and an order therein directing a sale and requiring a mortgage for the purchase money, do not constitute constructive notice of an unrecorded mortgage taken pursuant to such order.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 386; Dec. Dig. ⟸169.]

[4. *Executors and Administrators* ⟸264.]

A mortgage as such has no precedence in the administration of the estate of one deceased, except to the extent of its specific lien upon the property mortgaged; that being exhausted, it ranks according to the grade of the demand secured thereby. Kinard v. Young, 2 Rich. Eq., 258, approved, and Edwards v. Sanders, 6 S. C., 316, reversed.

[Ed. Note.—Cited in McLure v. Melton, 24 S. C. 559, 565, 566, 568, 58 Am. Rep. 272; Wheat v. Dingle, 32 S. C. 479, 11 S. E. 394, 8 L. R. A. 375.

For other cases, see Executors and Administrators, Cent. Dig. § 1007; Dec. Dig. ⟸264.]

[This case is also cited in State ex rel. George v. Aiken, 42 S. C. 228, 20 S. E. 221, 26 L. R. A. 345, without specific application.]

Before Hudson, J., Newberry, November, 1883.

The opinion fully states the case.

Messrs. Suber & Caldwell, for R. H. Wright.

Mr. Geo. S. Mower, contra.

January 10, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action in the nature of a bill to marshal the assets of David B. Piester, who died intestate in 1873. In his life-time, November, 1869, the intestate executed a mortgage of 400 acres of land to John T. Peterson, probate judge for Newberry County, to secure his bond as guardian of Laura Lake, and on December 21, 1869, he executed another mortgage of the same land to the said judge of probate, to secure his other bond as guardian of Robert G. Lake. The intestate had been appointed guardian of these minors, upon his own ex parte petition in the said Probate Court.

These mortgages were not recorded in the register's office of the county until August 7, 1872; and in the meantime, April 7, 1871, the intestate having borrowed money from

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Robert H. *Wright, in order to secure it, executed a sealed note to him as follows: "$400.00. One day after date I promise to pay to the order of R. H. Wright four hundred dollars, with interest at the rate of two per cent. per month, for value received. Witness my hand and seal, 7th August, 1871. (Signed) D. B. Piester. [L. S.]" Wright had no actual notice of either of the mortgages at the time he loaned the money and took the above note, or indeed until they were produced in this action in 1884. The Circuit judge ruled that the Wright note bore interest after as well as before maturity, at the rate of two per cent. per month; and, second, that the guardianship bonds should rank equally with the Wright note (all being specialty debts) as to the 400 acres of land embodied in the mortgage; but that the guardianship bonds should, under the act of 1789, take precedence as "debts of mortgage" over the mere specialty demand of

Wright, as against Piester's general estate outside of the mortgage.

The parties appeal to this court upon two grounds: First. That his honor, the Circuit judge, committed error in allowing interest on the Wright note after its maturity at a greater rate than seven per cent. per annum. Second. That his honor, the Circuit judge, erred in not allowing the demand based upon the sealed note of Wright to rank equally with the guardianship bonds in regard to the general estate of the intestate Piester.

I. In regard to the interest on the Wright note, we concur with the Circuit judge that it should bear interest as specified after it fell due. It is well settled by numerous cases that in general an obligation to pay interest at any other rate than seven per cent. per annum only carries that interest to the date of its maturity, unless the obligation contains an agreement of the parties that the peculiar rate shall run as well after as before maturity, if this latter is also provided for. And whether the obligation expresses such agreement is simply a matter of construction. Langston v. R. R. Co., 2 S. C., 248; Briggs v. Winsmith, 10 Id., 133 [30 Am. Rep. 46]; Sharpe v. Lee, 14 S. C. 341.

Do the terms of the note in this case, properly construed, contain such an agreement? We think they do. The phrase "one day after date" is generally adopted to express a due note, and it seems unreasonable to sup-

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pose that the parties intended that the *note should bear interest only for one day, if so much. But without putting much stress on this, it is a well-recognized rule of construction that every word, if possible, should have attached to it some meaning. The note really does not bear interest at all until the day after its date, April 8, 1871, when it fell due. There is no such expression as "interest from date," but the words are "one day after date, with interest at the rate of two per cent. per month."

It is a mistake to suppose that the case of Briggs v. Winsmith, 10 S. C., 133 [30 Am. Rep. 46], was in this respect similar. The report of that case shows that the note was payable twelve months after date, "with interest from date at the rate of twelve per cent. per annum." As this note has no such statement, the interest indicated could only begin to run on the day of its maturity. "The general rule is that when a sum is liquidated and ascertained and to be paid on a day certain, without any reference to the subject matter of the contract, interest is allowed from the day fixed for payment. It is a compensation by way of damages for the detention of another's money after the time at which by law or contract it should have been paid." Schmidt v. Limehouse, 2 Bail., 276. The words "per month" may possibly have reference only to the rate and not the time, but, as we have seen, it could only be the time after the maturity of the note, the interest to accrue thereafter.

II. As to the rank of the bonds to the probate judge to secure which the mortgages not registered within time were given. The act of 1843 provides that "no mortgage or other instrument of writing in the nature of a mortgage of real estate shall be valid so as to affect the rights of subsequent creditors or purchasers for valuable consideration without notice, unless the same shall be recorded in the office of the register of mesne conveyance for the district wherein such real estate lies within sixty days from the execution thereof," &c. There can be no doubt that in 1871, when Wright loaned his money and received the note of the intestate (Piester), he became a subsequent creditor for valuable consideration without notice of the mortgages, which were not recorded until August 7, 1872. There is no allegation that he had actual notice.

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*It is insisted, however, that constructive notice would suffice, and he must be charged with that, for the reason that these mortgages were executed under an order made in a case in the Probate Court, which being a court of record, all the world must take notice of what transpired therein. There are several answers to this view, but it cannot be necessary to do more than to refer to the express terms of the act of 1843, which declares mortgages "invalid as against subsequent creditors for valuable consideration," unless the same shall be recorded in the office of the register of mesne conveyance, &c.; which was not done until after Wright's debt was contracted, and the case does not belong to that class which holds that actual notice supersedes the necessity for recording.

Assuming, then, that Wright was a subsequent creditor without notice of the mortgages, they were as to him "invalid," and, as we think, he stands precisely as if they had never been given. The Circuit judge admits this, so far as concerns the alleged lien on the 400 acres of land covered by the mortgages. He says: "The act of 1843 declares that mortgages shall not be valid, so as to affect the rights of subsequent creditors without notice, unless recorded in sixty days after execution. It is conceded that if these mortgages had been recorded before Wright's note arose, though later than sixty days after execution, this would have constituted constructive notice. But this was not the case, and as the act declares them 'invalid' so as to affect the rights of one in Wright's position, it seems impossible to escape the conclusion that these mortgages cannot affect Wright's claim as to the estate of the debtor therein conveyed. The terms are broad and sweeping, but they necessarily restrict the operation of such mortgages to

the property specifically embodied in them," &c.

But, as we understand, the judge goes further and holds that the judge of probate, as mortgage creditor, must take precedence of ordinary specialties, as to all other property of the intestate outside of the land embraced in the mortgage. He says: "The act of 1789 declares the relation of mortgage creditors to all other creditors of a decedent, and it would be erroneous to hold that the mortgages in these cases became inoperative as to the property specifically embraced in them,

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and should lose rank as *mortgages, as to everything not embraced in them. In marshaling the assets, the mortgages retain their rank except as to the Wright note, and as to that they lose their rank only as a lien on the land conveyed. In the fund arising from the sale of that land Wright will share ratably with them as specialty claims. All other specialty claims are excluded from such participation, because as against such these mortgages are valid," &c.

In this we cannot concur. We do not mean to say that, the mortgages, having been recorded (although out of time), may not have a valid lien on the land embraced, as to such creditors as do not come within the category of subsequent creditors without notice; but it seems to us that it was error to hold that the bonds secured by mortgages should have precedence over other specialties, as to the general property of the estate, outside of the mortgage. As we understand it, a mortgage is a pledge, a mere security quoad the property mortgaged, and takes rank only by virtue of its lien on the specific property embraced in it. As soon as the property pledged is exhausted or destroyed, the lien ceases to exist. With its subject matter expunged and its lien gone, a mortgage cannot possibly be more than the sealed covenant of the party. There is nothing in principle or in the nature or terms of the instrument itself, which authorizes the mortgagee to foreclose it upon any other property of the mortgagor, while living; and why should it be otherwise after his death?

If such arbitrary right exists, it can only be by the express terms of the act of 1789. As stated in several of the cases, that act was very badly drawn and abounds in obscurities, but we fail to see that there is anything in it which requires us to confer upon a mortgage a distinct grade attaching to the instrument itself, as distinguished from its lien upon the property embraced in it. In classifying the debts of a decedent, and fixing the order in which they shall be paid, the act says: "Judgments, mortgages, and executions, the oldest first." * * * Section 4. "No preference shall be given among the creditors in equal degree where there is a deficiency of assets, except as to judgments, mortgages, and executions, the oldest of which shall be paid first, mortgages to date from the day of recording, and executions from the day when entered in the sheriff's

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office, saving *to creditors their rights under any special lien," &c. Does this give a mortgage, apart from the property embraced, a rank with judgments?

Mortgages were properly, if not necessarily, placed in the class with judgments, for the reason that they had liens, and to that extent should be paid—"the oldest first." But the lien of a mortgage is special, while that of a judgment is general, and the reason for the classification ceases as soon as the special lien is discharged. Why say that the oldest should be first paid, unless reference was especially to the lien? After they were discharged there could be no propriety in requiring that the oldest should be first paid. Can it be contended that a mortgage on land is not only made a preferred claim on personalty, but even in this new character must be paid according to registry, which of course can give no notice as to property not embraced in the instrument recorded? Other specialties take rank according to dignity, not their age. We think that a creditor of a decedent's estate, whose claim is secured by a mortgage on particular property, has under the act a lien upon that property; but when that is exhausted the mortgage as such is functus officio; and in further marshaling the assets, the demand must rank according as it may be a single contract or specialty.

This construction, as we think, is in accordance with principle and supported by the weight of authority. Tunno v. Happoldt, 2 McCord, 188, was a law case, an action of assumpsit on promissory notes against the representative of John M. Happoldt, the maker. The administrator obtained leave to file the plea of plene administravit præter, and the question was whether a certain instrument of writing (a mortgage) was to be ranked in the legal order of payment of intestate's debts among bond creditors. There was a special verdict, finding that the intestate left "one obligation or sealed instrument of mortgage and covenant to Thomas Ogier;" that the administrator had paid off all the other demands, and had in hand a certain sum of money, to be divided in average proportion among the simple contract creditors. If the court should be of opinion that the aforesaid sealed instrument to Thomas Ogier is an obligation, and to be preferred to simple contract creditors, we find for the defend-

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ant on his second *plea. But if the court should be of opinion that the said instrument to Thomas Ogier is to be paid in average and proportion only with the simple contract creditors, then we find for the plaintiff." It was held, "that a mortgage upon certain property to secure a note (not under seal) will not, under our administration law, give

such creditor a priority as in the nature of a deed, to simple contract creditors."

In Kinard v. Young, 2 Rich. Eq., 258, Chancellor Johnston rendered a circuit decree criticising and construing the act of 1789 differently, but the old Court of Appeals in Equity, including that distinguished Chancellor himself, reversed the judgment, sustaining Tunno v. Happoldt, supra, and holding that "in the assets of an insolvent testator or intestate, mortgages as mortgages, are not entitled to priority over rent, specialties, and simple contract debts, except so far as they are liens on any particular part of the estate. After the lien is exhausted the grade of the demand must be determined by the nature of the instrument which the mortgage was given to secure," &c.

We think we may safely say that this was regarded as the settled construction of the act of 1789 until as late as 1875, when the judgment of this court was pronounced in the case of Edwards v. Sanders, 6 S. C., 316, which disregarded the cases above cited and held, that "under section 26 of the act of 1789 prescribing the order in which debts of a decedent are to be paid, mortgages rank in the third class and are entitled to payment out of the general estate in preference to specialty and simple contract debts." This is the case upon which the Circuit judge rested his decree; but with all due respect, and an anxious desire to maintain consistency in the adjudications of this court, we are constrained to say that, in our judgment, the case of Edwards v. Sanders is not only unsustained by proper rules of construction, but is in direct opposition to the decided cases, and what was at that time considered the settled law of the state.

The judgment was rested mainly on the view that "the order of priority prescribed by the act was only to be observed in the application of such general assets in the hands of the executor or administrator as were not bound by any specific lien. * * * It is then not the lien which the act

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deals with, but the character *of the debt, and it is that which is to determine its rank in the order of payment," &c. We think that the most cursory reading of the act will show that this is a mistake. If the order prescribed only referred to such general assets as were not bound by liens, why mention "judgments, mortgages, and executions" at all? And as the rights of liens are declared, by what authority can it be said that there was no declaration as to the rights of specific liens? We see no authority for such assumption and think mortgages were only classed with judgments on account of their liens.

So strong was the general opinion of the profession upon the subject that in 1878, soon after the judgment was published in the case of Edwards v. Sanders, the legislature passed an act reaffirming the doctrine of Kinard v. Young and declaring: "That in the administration of the assets of a decedent, mortgages shall not be entitled to a priority over rents, debts by specialty, or debts by simple contract, except as to the particular parts of the estate affected by the liens of such mortgages. That after the property covered by the liens is exhausted, the grade of the demand shall be determined by the nature of the instrument which the mortgage was given to secure." 16 Stat., 686. It is true the facts of the case at bar arose before that act was passed, and therefore they are not in terms controlled by it. But the act seems to be somewhat in the nature of a declaratory law, upon a subject as to which there were differences of opinion; but whether that is so or not, in our judgment the act only declared what has been the law of the state since the act of 1789.

The judgment of this court is that the judgment of the Circuit Court be modified according to the conclusions herein announced.

Mr. Chief Justice SIMPSON concurred.

Mr. Justice McIVER. As to the first question involved I concur generally, but as to the second question I concur in the result only, preferring to rest my conclusion upon the effect of the act of 1843, which in terms declares that unrecorded mortgages shall not be valid, "so as to affect the rights of subsequent creditors or purchasers for valuable

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consideration without notice." *The necessary effect of this declaration is that an unrecorded mortgage is void—is in fact not a mortgage—whenever the effect of so regarding it would be to affect the rights of a subsequent creditor without notice. Now as Robert H. Wright is conceded to be such a creditor, it seems to me that it follows necessarily that his rights cannot, in any way, be affected by the mortgages of which he had no notice, and therefore in determining his rights these papers cannot be treated as mortgages, but must, as to him, take only the rank of sealed claims.

Judgment modified.

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22 S. C. 147

TODD v. DAVENPORT.

(April Term, 1884.)

[*Guardian and Ward* ⇐174.]

An amount due by an administrator to the widow of his intestate was assigned by this widow to her infant son, of whose estate this administrator was also the guardian. *Held*, that the debt due by the administrator as such was paid and the amount became assets in his hands as guardian, for which he and the sureties on the guardianship bond were liable.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 595; Dec. Dig. ⇐ 174.]

Before Hudson, J., Laurens, September, 1883.

This was an action by Patrick H. Todd against Ludy P. Davenport, the former guardian of plaintiff, John Davenport, a surety on the guardianship bond, and the executors and devisees of Martin Shaw, the other surety. The action was instituted in May, 1882. The cause was referred to C. D. Barksdale, master for Laurens County, to take the testimony and to determine all the issues and report the same to the court. Several issues were passed upon by the master, but it is unnecessary to state any except that he found that the mother of plaintiff had assigned her interest in the estate of Dr. Todd, her deceased husband, to the plaintiff, then a boy of five years of age, about the time that L. P. Davenport was appointed guardian, the whole personal estate of Dr. Todd then consisting of a note due by said Davenport; that the defendant, John Davenport, was not released from his liability by reason of his discharge in bankruptcy, because there

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*was not such a breach of the guardianship bond prior to the adjudication of bankruptcy as would have created a liability provable against his estate; and the master recommended judgment against all of the defendants for $3,922.82, with interest from August 30, 1883, the executors and devisees of Martin Shaw not to be chargeable beyond the value of assets received on property descended.

To this report the defendants filed several exceptions, the seventh being as follows: "In not finding that John Davenport was discharged as to this debt by his discharge in bankruptcy."

Judge Hudson filed the following decree: "After hearing the report of the master in this case, and exceptions thereto filed on the part of the defendants, and after full argument of counsel, it is ordered and adjudged that all the exceptions to the report be overruled except the seventh exception, which is sustained under the authority of Jones & Calhoun v. Knox, 46 Ala., 53, and which is not at variance with the principles laid down in the case of Greenville and Columbia Railroad Company v. Maffett, 8 S. C., 307; and with this exception, it is ordered and adjudged that the report of the master be confirmed and made the judgment of this court, and that the plaintiff have his judgment against the defendant, Ludy P. Davenport, guardian, for the full amount reported by the master, and against the estate of Martin Shaw, the surety, for the amount of the penalty of the guardianship bond, to wit, the sum of thirty-six hundred dollars and four cents, and disbursements. It is ordered that the report of the master, in so far as it creates a liability against the surety, John Davenport, be overruled, with costs."

The defendants, other than John Davenport, appealed.

Messrs. Ball & Watts, for appellants.

Messrs. B. D. Cuningham and Holmes & Simpson, contra.

February 14, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. Some time in 1858 Dr. Patrick Todd died intestate, leaving as

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his heirs at law and distributees his *widow and his son, the plaintiff in this action. Ludy P. Davenport administered on his estate, and entered into bond with John Davenport and Martin Shaw as his sureties. On an accounting before the ordinary, on January 30, 1860, it was found that said administrator was indebted to the widow in the sum of $573.99 as her distributive share of her deceased husband's estate, and to the plaintiff, then an infant of tender years, in the sum of $1,147.99, as his distributive share of his father's estate. On April 5, 1861, John Wharton was appointed guardian of the plaintiff, who settled with Ludy P. Davenport, as administrator as aforesaid, for the distributive share of his ward, by taking the note of said Ludy P. Davenport for the amount due by him as administrator.

John Wharton, the first guardian, having died some time in 1863, the said Ludy P. Davenport became the guardian of the plaintiff, and entered into bond for the faithful discharge of his trust, with John Davenport and Martin Shaw as his sureties; and a few days thereafter had a settlement with the executor of the first guardian, in which the executor turned over to him his own note previously given by said Ludy P. Davenport to the first guardian, and paid the small balance due the ward in Confederate money, which balance was scaled on the accounting. About the time that Ludy P. Davenport was appointed guardian of the plaintiff, his mother, the widow of Dr. Patrick Todd, assigned all of her interest in her deceased husband's estate to her son, the plaintiff in this action.

All the other grounds of appeal having been abandoned at the hearing, the only question presented for our determination is whether the court below erred in charging the guardian with the amount found due by him as administrator to the widow, which had been assigned to the ward, less the amount admitted to have been paid to the widow by the administrator prior to such assignment. There can be no doubt that the administrator, as well as his sureties on his administration bond, were liable to the widow, and if so, to her assignee, for the amount thus found due to her; and that when, by such assignment, such liability was transferred to Ludy P. Davenport as guardian of the plaintiff, he united in himself the character of both debtor and creditor,

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and that by *operation of law the debt was paid, and the amount thereof cash in his

hands as guardian. Schnell v. Schroder, Bail. Eq., 334; Enicks v. Powell, 2 Strob. Eq., 206; Griffin v. Bonham, 9 Rich. Eq., 77; Jacobs v. Woodside, 6 S. C., 490.

It is argued here, in behalf of appellants, that it would be a great hardship to allow the widow, by assigning her interest to her son, to recover a debt, which she could not recover from an insolvent administrator, by transferring the liability to his guardianship bond. But in the first place, there is no evidence before us that Ludy P. Davenport is insolvent even now, and certainly none that he was insolvent in the early part of 1864, when the assignment was made. So far as we can perceive there was nothing to prevent the widow in 1864 from recovering the amount found to be due her by the administrator by action on the administration bond; and even if it should be conceded that Ludy P. Davenport was all the while insolvent, when it is remembered that the same persons who were sureties on his administration bond are the sureties on his guardianship bond, we are unable to perceive any ground whatever for the imputation that this assignment was made with a view to secure a bad debt by transferring the liability for it from the administration bond to the guardianship bond, for in either case the same persons would be called upon to meet such liability. If the claim is good now against the sureties on the guardianship bond, there is certainly no reason to suspect that it would not have been equally good in 1864, when it was assigned, against these same persons as sureties on the administration bond.

Again it is urged that the sureties on the guardianship bond only intended to assume liability for the amount received from the first guardian, and not for the additional amount transferred to the ward by his mother. It is a sufficient answer to this to say that such was not the condition of the bond. By it they become responsible for the faithful administration of the ward's whole estate, whether it comes to him before or after the execution of the bond. McDowell v. Caldwell, 2 McC. Eq., 55 [16 Am. Dec. 635]; Administrators of Johnson v. Executors of Johnson, 2 Hill Eq. 287 [29 Am. Dec. 72]; Crenshaw v. Crenshaw, 4 Rich. Eq., 14. But, in addition to this, the facts do not seem to

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support the assumption of *appellants. The guardianship bond was for thirty-six hundred dollars, which is a little more than double the amount due the ward, including the amount assigned to him by his mother, and as it is usual to take a bond in double the value of the ward's estate, and as the assignment was made about the time Davenport was appointed guardian—according to the widow's testimony, the same day that he was appointed—the reasonable inference would be that the widow's interest was included in the estimate of the value of the ward's estate.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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22 S. C. 151

SHIELL v. SLOAN.

SAME v. CARDERELLI.

(April Term, 1884.)

[1. *Dower* ⟸16.]

A widow is dowable of her deceased husband's interest in lands held by him in joint-tenancy during coverture.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 61; Dec. Dig. ⟸16.]

[2. *Dower* ⟸46.]

But where such right attached at the marriage upon land then subject to a charge, a subsequent sale in satisfaction of such charge defeated the right of dower.

[Ed. Note.—Cited in Brown v. Cave, 23 S. C. 258; Shell v. Duncan, 31 S. C. 563, 10 S. E. 330, 5 L. R. A. 821.

For other cases, see Dower, Cent. Dig. § 145; Dec. Dig. ⟸46.]

[3. *Dower* ⟸46.]

A and B were devisees of a city lot, charged with the duty of paying to their mother an annuity of $500 during her life, and of providing for her a comfortable house to live in. A afterwards married. The buildings having been destroyed by fire, the two sons filed a bill against their mother and the contingent remaindermen, praying a sale of portions of the lot for the purpose of enabling complainants to build upon the remainder, and to pay arrears of the annuity; in this prayer the mother joined, and portions of the lot were sold. B died and A subsequently filed a second bill against the same defendants for a sale of other portions of said original lot to complete the payments due for the building erected and for arrears of the annuity; and other unimproved portions of the lot were sold. Afterwards A died and his widow claimed dower from these purchasers. *Held*, that she was not entitled to dower in the portions of the lot so sold.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 92, 145–153; Dec. Dig. ⟸46.]

[This case is also cited in Holley v. Glover, 36 S. C. 417, 15 S. E. 605, 16 L. R. A. 776, 31 Am. St. Rep. 883, without specific application.]

Before Hudson, J., Richland, April, 1883.

The opinion fully states the facts of these

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two cases. In the *case of Shiell against Sloan and Seibels, the Circuit decree, omitting its statement of facts, was as follows:

By the terms of the will of Adam Edgar, the annuity to Elizabeth Shiell, and her right to a dwelling house, were clearly charged upon the entire lot of land devised to William Shiell and John A. Shiell, and their seizin was consequently to that extent burdened with the rights of Elizabeth Shiell under the will itself; and the inchoate right of dower of the wife of one of the devisees, though strongly favored in law, could not rise higher or be superior to the seizin of her husband.

The right is indeed but an inchoate interest in the lands of which the husband is seized during coverture, and if his seizin is, in its inception or before her inchoate right attaches, encumbered with a charge, her interest is subordinate to that, and if the land be sold to satisfy the charge, her right is entirely defeated.

This principle has been repeatedly recognized by our courts of last resort. In Crafts v. Crafts, 2 McCord, 54, it was held that the wife is not entitled to dower in lands purchased by the husband and immediately mortgaged for the purchase money. Under the foreclosure of such a mortgage the purchaser would take the property divested of the wife's right of dower, and she would have to resort to the surplus proceeds of sale if her estate was consummated at the time. In Mey v. Mey, Rich. Eq. Cas., 378, the right of dower of the widow of a devisee of lands was held to be subject to the debts of the devisor. And in the recent case of Jones v. Miller, 17 S. C., 380, it was held that a purchaser at an execution sale under a judgment recovered against the husband before his marriage, takes the land divested of the wife's right of dower.

It is, however, urged by the plaintiff in this case that the sale under the decree in the cause above mentioned, was not for the purpose of paying off the annuity to Elizabeth Shiell, but for the improvement of the remaining portions of the lot for the benefit of the complainants in that action. I, however, am forced to the conclusion that the object of the proceedings and sale was to provide the means for meeting the annuity to Elizabeth Shiell and providing her with a dwelling house, as directed by the will, and that the purchasers at the sales under the decree

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in said *cause took the lots purchased by them divested of plaintiff's inchoate right of dower therein. Nor would the result be different if the question could have been determined upon purely equitable principles, for the lot brought its full market price and the proceeds went directly to enhance the value of the remainder of the lot, thereby largely increasing the value of plaintiff's right of dower in that, and having derived the benefit, she should also bear the burden.

It is therefore ordered and adjudged that plaintiff's complaint be dismissed, and that the defendants have the costs of this action.

In the case of Shiell against Carderelli and wife, the decree was as follows:

This cause came on to be heard before me in connection with the case of Caroline M. Shiell v. John T. Sloan, jr., and John T. Seibels, upon pleadings substantially the same, and an agreed statement of facts. In this case I am forced to the conclusion that the sale to the defendant, Felix Carderelli, was but carrying out the purposes of the proceedings in the case of William Shiell and John A. Shiell v. Elizabeth Shiell et al.; and, therefore, for the reasons stated in the decree in the case of Caroline M. Shiell v. John T. Sloan, jr., and John T. Seibels, it is ordered and adjudged, that plaintiff's complaint be dismissed, and that the defendants have the costs of this action.

The plaintiff appealed in both cases upon the exceptions stated in the opinion of this court.

Mr. W. A. Clark, for appellant, contended that the sale of these lots were not sought for the purpose of enabling the complainants to satisfy the charge imposed upon the devise, but for the purpose of selling one portion of the lot for the development and improvement of the other, with a possible ulterior object of enabling the devisees the more conveniently to meet their obligations to their mother. A manifest object of the proceedings was to bar the rights of the contingent remaindermen. The proceedings show no purpose on the part of Elizabeth Shiell to enforce the payment of her annuity as a paramount lien; and that alone could divest plaintiff's right of dower. 1 Scrib. Dow., 528, 529, 533; 2 Halst.,

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392; 18 Ohio, 567; 1 Id., 99; 1 Dutch., *47. The devisees might privately have sold these lots for the purpose of meeting their obligations to their mother; and yet it would be admitted that by such a sale dower would not have been divested. The second sale was for the purpose of meeting payments which in the first decree were made chargeable upon the life-tenants and the building by them erected. Dower being a legal right cannot be divested upon mere equitable principles growing out of proceedings to which the demandant was not a party.

Mr. W. H. Lyles, contra.

Dower depends upon the husband's seizin, and being a derivative estate, cannot rise higher than its source. 1 Hill. 200; Chev. Eq., 37; 2 Hill Ch., 250. The decrees under which the sales were made chiefly considered the rights of Elizabeth Shiell. Again, the right of dower was subject to the right of the joint-tenant and the contingent remaindermen to have sale made for partition or change of investment. To such proceeding this plaintiff was not, and could not have been, a party; but her estate was in privity with her husband and therefore bound by the decrees. 12 S. C., 481; 6 Rich., 266.

Mr. Clark, in reply cited 1 Scrib. Dow., 326, 327; Gen. Stat., § 1801; 2 Strob., 69.

February 16, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. These were actions brought by the plaintiff, Caroline M. Shiell, the widow of the late John A. Shiell, for dower in different parcels of land in the city of Columbia, and being by the same demandant, in the same right, against defend-

ants who made similar defences, were heard together.

It appeared that Adam Edgar, late of the city of Columbia, departed this life in 1852, leaving a will, by which, among other things, he devised certain lots in the city therein described to William Shiell and John A. Shiell, sons of his niece, Betsey Shiell, "subject nevertheless to the following annuities, say five hundred dollars per annum, to be paid by

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them to their mother, *Betsey Shiell, each and every year during her natural life; and also that their said mother be furnished with a comfortable house to live in. Should she remove from her present abode, it is my wish that she shall occupy the house and outbuilding at the corner of Lady and Sumter streets. But should the said William Shiell and John Shiell die leaving no child or children, then and in such case I give, devise, and bequeath the houses and lots described in this item unto Adam Edgar Hardy and Margaret E. Hardy," &c.

William and John A. Shiell as devisees took possession of the lots, as well as other property devised and bequeathed to them. When Columbia was burned, during the late war, all the buildings on the lots were destroyed by fire, and the lots thereby made valueless to the devisees, who, in order to enable them to pay the taxes and the annuity of $500 to their mother, and to furnish her a comfortable house for her to live in, as required by the will, made application to the court to sell a portion of the said real estate, "the proceeds of sale to be applied towards the erection of such stores and buildings on the corner of Richardson and Lady streets, as might be advisable, by a referee appointed by the court." This proceeding was instituted in 1869, entitled William Shiell and John A. Shiell v. Elizabeth Shiell et al., under which an order of the court was obtained to sell a certain portion of the lands devised. At the sale by the sheriff, the subdivisions known as lots Nos. 1, 2, 3, and 4 were purchased at full market price by Mary B. Denny, who paid the purchase money and received from the sheriff a deed for the same pursuant to the decree. She sold, and by mesne conveyance those lands came into the possession of John T. Sloan, jr., and John T. Seibels, and for dower in this parcel the action named first in the title was instituted against the said defendants.

The proceeds of this sale were expended, under the direction of the court, in erecting valuable buildings on the other part of the lands devised; but there was still a balance due the builders, which was assigned to the Citizens' Savings Bank, and by John Fisher, trustee thereof in bankruptcy, judgment was recovered upon it for $1,710, besides interest. In order to pay this judgment, another application of similar character was made to

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the *court in the proceeding entitled John Shiell v. Elizabeth Shiell et al., for the sale of two other small lots, Nos. 5 and 6. The referee recommended that the lots be sold, saying: "Said lots are of no profit and are comparatively unimproved, but if sold would probably produce a sufficient fund to satisfy the amount still due and unpaid on the building aforesaid." An order was passed directing the sale, and at the sheriff's sale, Felix Carderelli became the purchaser, paid the purchase money, and received titles. He afterwards conveyed one of the lots to Emma M. Carderelli; and for dower in those lots the action named second in the title was instituted against the said defendants.

William Shiell died in 1873, intestate, unmarried, and without issue; and John A. Shiell died in 1875, intestate, leaving as his heirs at law one child, William G. Shiell, and a widow, Caroline A. Shiell, the plaintiff, with whom he had intermarried after the death of Adam Edgar. The portion of the lands devised whereon the improvements were erected was occupied by the brothers as long as they lived, and, after the death of John A., by his widow and child, until May, 1882, when it was sold as the property of John A., under a judgment obtained against him in his life-time, and purchased by William G. Shiell. The defendants admitted the marriage and possession, but denied unqualified seizin in the husband, John A. Shiell, during the coverture. They insisted that the lands were devised subject to the charge, and the portions purchased by the defendants respectively having been sold by order of the court to satisfy the charge, the plaintiff therefore was not entitled to dower in those parcels.

The cause was heard by Judge Hudson, without a jury. He held with the defendants and dismissed the complaints. The plaintiff appeals upon the following grounds: "1. Because his honor erred in holding that the object of the proceedings in the case of William Shiell and John Shiell v. Elizabeth Shiell et al., and the sale thereunder, was to provide the means for meeting the annuity to Elizabeth Shiell and providing her with a dwelling-house as directed by the will; and that the purchasers at the sale under the decree in said cause took the lots purchased by them divested of plaintiff's inchoate right of dower. 2. Because his honor, the presiding judge, erred in holding that the plain-

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*tiff's demand could not be allowed upon equitable principles, inasmuch as the lot in question brought its full market value, and the proceeds went directly to enhance the value of the remainder of the lot, thereby largely increasing the value of plaintiff's right of dower in that portion; and having derived the benefit, she should also bear the burden. 3. Because his honor erred in holding (in the second case) that the sale to the defendant, Felix Carderelli, was but carrying out the purposes of the proceedings in the

case of William Shiell and John A. Shiell v. Elizabeth Shiell et al."

There is nothing in the view urged that the plaintiff is not entitled to dower in the interest of her husband, John A. Shiell, for the reason that he was joint tenant with his brother William in the devise of the land. Reed v. Kennedy, 2 Strob., 69; 1 Scribner on Dower, 327.

It appears, however, from the will of Adam Edgar, that the devise to William and John A. Shiell was subject to a charge of five hundred dollars per annum to be paid by them to their mother, Betsey Shiell, each and every year during her natural life, and also to provide a comfortable house for her to reside in. This devise so charged vested before the defendant intermarried with John A. Shiell, and therefore her right of dower attached subject to that charge. Her right, coming through the marriage, could not be in a greater estate than that which the husband owned at the time of the marriage, and consequently the sale of the lands in satisfaction of that charge would defeat that right. Crafts v. Crafts, 2 McCord, 54; Mey v. Mey, Rich. Eq. Cas., 378; Jones v. Miller, 17 S. C., 380; Tibbetts v. Langley Man. Co., 12 S. C., 466; Davidson & Simpson v. Admiral Graves, Baron Vandersmissen, et al., Riley's Eq., 246. In the case last cited, Judge O'Neall states the doctrine in terms which clearly include this case. He says: "Notwithstanding we think she is entitled to dower, we do not think she takes it discharged from the encumbrances existing actually or constructively at the time of the marriage. Her rights arising from the marriage cannot be in a greater estate than the estate which her husband then owned. His estate in the land was encumbered at the time of the marriage with Vandersmissen's mortgage,

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Hasell's mort*gage, and with the value of her stock, which has been considered and allowed as a charge on the land at the time of the marriage. His real estate, therefore, of which she was dowable was its value after the payment of these then existing encumbrances," &c.

But it is insisted that, although the lots were sold under orders of the court, they were not sold to provide the means for meeting the annuity to Elizabeth Shiell and furnishing her with a dwelling house as directed by the will. This was a question of fact, to be determined by a proper construction of the legal proceedings and the orders of sale made therein. Upon this subject the Circuit judge says: "It is, however, urged by the plaintiff that the sale under the decree in the cause was not for the purpose of paying off the annuity to Elizabeth Shiell, but for the improvements of the remaining portions of the lot, for the benefit of the complainants. I am, however, forced to the conclusion that the object of the proceedings and sale was to provide the means for meeting the annuity to Elizabeth Shiell and providing her with a dwelling house as directed by the will, and that the purchasers at the sale under the decree in said cause took the lots purchased by them, divested of plaintiff's inchoate right of dower therein," &c. We cannot say that this was error.

It may be true that the erection of the building enured incidentally to the benefit of the sons, in furnishing them as well as their mother a home, but we cannot doubt that the main object was to furnish a home for the mother and to raise the money to pay her annuity. It is quite certain that such sale was necessary to enable the devisees to perform their duty to their mother in reference to the charge. It is true that Mrs. Shiell did not herself file the bill to charge her annuity upon the lands. It was filed by her sons, the devisees, whose duty it was to raise the money to satisfy the charge, but Mrs. Shiell was made a party defendant, and all the parties being before the court, the same object could be accomplished in that way. We are not at liberty to assume, as suggested, that she waived her rights under her uncle's will. On the contrary, she joined in the prayer of the bill, and prayed affirmative relief, stating that "her annuity was due and unpaid since the year 1864."

It is true also, that the bill contains the

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statement, that the *complainants "were unable to make perfect titles to the said lots, inasmuch as they were limited over to Adam Edgar Hardy and Margaret Hardy in the event of both the devisees dying without child or children," &c.; but upon that subject nothing was said either in the prayer of the bill or the orders of court, and we cannot assume merely from the statement in the bill that the main object of the proceedings was to bar the rights of the remaindermen. If that were one of the purposes, it only arose out of the question of sale, which, for the purposes indicated, was clearly the main object of the proceedings.

We also concur with the Circuit judge, that the second sale to the defendant Carderelli was only carrying out the purposes of the proceedings in the original case of William Shiell and John A. Shiell v. Elizabeth Shiell, et al. That sale was made for the express purpose of paying the balance still due for the erection of the building previously authorized.

The judgment of this court is that the judgment of the Circuit Court, in the case of Caroline M. Shiell v. John T. Sloan, jr., and John T. Seibels, and also in the case of Caroline M. Shiell v. Felix Carderelli and Emma Carderelli, be affirmed.

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JORDAN v. LANG.

(April Term, 1884.)

[1. *Trial* ⇐295.]
The meaning of one portion of a charge determined by comparison with another.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703 717; Dec. Dig. ⇐295.]

[2. *Waters and Water Courses* ⇐137.]
The use of running water for irrigating purposes for twenty years establishes a prescription, although the same amount was not actually used during every year of that period.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 149; Dec. Dig. ⇐137.]

[3. *Appeal and Error* ⇐1066.]
Alleged error in a hypothetical charge not considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ⇐1066.]

[4. *Trial* ⇐256.]
An omission to charge a proposition not requested, not considered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628 641; Dec. Dig. ⇐256.]

[5. *Waters and Water Courses* ⇐139.]
An adverse use of water for twenty years against successive owners of the servient soil, is sufficient to establish a prescription.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇐139.]

[6. *Adverse Possession* ⇐47.]
Ineffectual protests short of the assertion of a legal right can have no effect in preventing the presumption of a grant from adverse use, but rather tends to strengthen the character of the use as adverse.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 234; Dec. Dig. ⇐47.]

[7. *Waters and Water Courses* ⇐78.]
The owner of a dominant tenement has the right to divert and use so much water as he has by his labor added to the quantity in the running stream.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 69; Dec. Dig. ⇐78.]

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*Before Hudson, J., Kershaw, February, 1883.

This was an action by Valentine S. Jordan against Thomas W. Lang, commenced in 1882. The facts of the case appear in the opinion of this court.

At the trial the plaintiff submitted the following requests to charge:

I. That a riparian proprietor has the right to have a stream which passes into and through his land, to flow in a volume not materially diminished in quantity.

II. That plaintiff has the right to use the water of Jumping Gully Creek for purposes of irrigation, and that while defendant has the same right, he must return the water to its channel in a sufficient quantity for the use of plaintiff.

III. That Gillis Ditch is the natural channel of Jumping Gully Creek, the water having run in that channel for so long a time, and that the defendant should prove that there had been another channel, and that he or his privies in estate had made Gillis Ditch an artificial channel.

IV. That if the waters of Jumping Gully had run in Gillis Ditch for twenty years, that ditch thereby became a natural channel, and plaintiff has the right to have it to flow in that channel.

V. That to establish adverse use, the defendant must prove that during twenty years, he, or those under whom he claims, have used all the water of Jumping Gully Creek as they pleased; that they have so used it continuously every year; that such use prevented a like use by the plaintiff during all that time; and that such use was acquiesced in by the plaintiff all that time.

VI. That the jury may consider all protests against the use of the water by defendant, by the plaintiff, or other riparian proprietors, or any acts from which there may be inferred that he did not claim an adverse right, as rebutting that claim.

In answer to plaintiff's requests to charge, his honor said:

Request 1.—Correct.

Request 2.—I charge you that.

Request 3.—This is submitted to jury as a question of fact.

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*Request 4.—This depends on circumstances. If its running depends on the annual labor of Lang, the case would be altered.

Request 5.—I cannot charge you this, for it depends on circumstances. It is not necessary for defendant to prove that he used all the water, but only so much as he or they desired, or their wants required.

Request 6.—The jury must consider all the evidence, and give to it such force as they may deem it entitled to, but protests of the plaintiff against the defendant's use of the water for purposes of irrigation, if the use was persisted in in spite of these protests, is rather a circumstance going to show adverse use than to show the contrary.

The presiding judge charged that the proprietor of land through which a natural water course runs has the right to have the water of the stream flow into his land, so that he may use it for domestic purposes, irrigation, or in any other way he may need it. So that if the jury believed that the defendant diverted the waters of Jumping Gully Creek, running in what is called Gillis Ditch, and thereby caused the plaintiff to lose his rice crops, as he claimed, the plaintiff should have a verdict, unless the defendant had established a right to the use of the water by prescription or some other way. That defendant set up, in defence, the right to the water by adverse use for twenty years, and if he proved this to their satisfaction, plaintiff could not recover. Defendant claimed that he, and those under whom he claims, had for twenty years used the wa-

ters for irrigating rice. Such use must have been open, notorious, and without the acquiescence of plaintiff and those under whom he claims title. Any use of the water of the stream, by defendant and those under whom he claims title, by which they diverted from the stream any water which they could not return to it when it left their land, was injurious to plaintiff and therefore adverse and an unreasonable use of the water by defendant.

To establish such adverse use it was not necessary that defendant should prove that he, and those under whom he claimed title, had each year used all the water or any definite quantity of the waters of the creek, or in any definite manner; but it was sufficient if he proved that they had, during any

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year prior to the *one complained of, used all the water, or as much as was used that year, or could have used it through their gates if they wished, and they had, during the time, used such quantity of the water as they desired or their wants required; in other words, that they used and had vents of sufficient capacity to use all the water as they pleased for irrigation during the twenty years. It was not necessary to prove that the water was thus used continuously every year by them; but it was sufficient to prove that they were in the habit of using the water, and if they failed to use the water at any time, because their dams were out of order and needed repairs, or because their business did not require it, or they did not wish to use the water, such temporary break in the use did not defeat the prescription or interrupt the adverse use. Such use need not have been against the plaintiff during the whole twenty years, but it is sufficient if it was against those under whom plaintiff claims title for a portion of the time, provided they were of age and in a condition to assert their rights.

The jury may consider all the evidence and give to it such force as they may consider it entitled to, but the protests of the plaintiff against the defendant's use of the water, if the use was persisted in in spite of those protests, is rather a circumstance going to show adverse use than the contrary. If the plaintiff had every day in the year gone to Lang and said: "Mr. Lang, I protest against the use you are making of the water of the creek, and forbid you so using it," but did not take steps to interrupt the use by some legal means, the continued use by defendant, in spite of these protests, only strengthens the adverse use. The same is true of the submission of the question of riparian rights to arbitration. The offer to submit, the arbitrators never having acted, and the fact that defendant persisted in the use of the water in spite of such offer to submit to arbitration, is a circumstance going to strengthen the adverse use, because the defendant's willingness to submit to arbitration might have been due to his consciousness of his right.

If the jury believe from the evidence that water passing through Gillis Ditch was created, or brought into use, by the annual labor of Lang and those under whom he claims, and but for the labor and expense

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of Lang and those under whom he *claims, it could not have been utilized, that would tend to give him the right to the use of the water, and if he does not disturb the natural flow, but increases it, he would have the right to such increase, as by annual purchase, and Jordan would not have the right to complain.

The jury rendered a verdict for defendant, and plaintiff appealed.

Messrs. J. T. Hay and W. H. Lyles, for appellant.

Messrs. J. D. Kennedy and J. R. Abney, contra.

February 16, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action brought in 1882 against the defendant for diverting the water of Jumping Gully Creek, which, as the plaintiff alleged, he had the right to use and to have the same flow through his land in the natural and usual manner. The defendant's land lies above that of the plaintiff, and he admitted that in the dry year of 1881 he had used all the water as to which complaint was made in irrigating his rice fields, but insisted, first, that the water was not drawn from the natural stream of Jumping Gully Creek, but from an artificial channel known as "Gillis Ditch," which his ancestors, at least thirty years ago, had dug and banked and kept repaired through his land, in order to divert most of the water of the creek from its natural channel for their own use; that the plaintiff's land was not located on the creek proper, but below that of the defendant, and somewhere near the lower terminus of this artificial channel, and therefore plaintiff had no right to complain of defendant's use of water, which he and those under whom he claims had at great expense provided for themselves. And, second, if it should be determined that the plaintiff has any rights of the nature claimed in the water running in Gillis Ditch, then that the defendant had a prescriptive right to the use of the water for purposes of irrigation, arising from the use of the same by himself and those under whom he claims for more than thirty years.

The case came on for trial before Judge

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Hudson and a jury. *The plaintiff made requests to charge, some of which were charged as presented, some with modifications, and others were declined. Under the charge the

jury found for the defendant and the plaintiff appeals. As to the first defence the judge charged that a riparian proprietor has the right to have a stream which passes through his land flow in a volume not materially diminished in quantity, and left it to the jury to say whether Gillis Ditch was the natural channel of Jumping Gully Creek, remarking that if the waters of Jumping Gully Creek had run in Gillis Ditch for more than twenty years, the ditch thereby became the natural channel, unless it was made to run there by the annual labor of Lang, the defendant. If they should find that the ditch was in fact Jumping Gully Creek, then the plaintiff had the right to use the water for the purposes of irrigation, and that while defendant had the same right it was incumbent on him to return the water to its channel in a quantity sufficient for the use of the plaintiff. As to the second defence, the prescriptive right to the use of the water claimed by the defendant, the character of the charge will be considered in the examination of the exceptions to it, which will be considered in their order.

The first exception charges that his honor erred in instructing the jury that such use of any of the water of Jumping Gully Creek by the defendant, so that he could not return it to the creek after it had been used, was an unreasonable use of said water, and as such adverse to plaintiff.

We are not quite sure that we clearly apprehend what is the meaning of this exception, but as we understand it, the alleged error consists in charging that the failure to return any of the water, even the one-thousandth part of the flow of the stream, was an unreasonable use of the water, and as such adverse to plaintiff. If this be the point made, we think it very manifest that the judge meant adverse quoad hoc, and nothing more. He says not returning "was an unreasonable use of said water, and (to that extent) was adverse." As matter of fact none of the water drawn from the ditch by the defendant was ever returned. It seems that the Langs, in digging Gillis Ditch to carry the water of the creek, located it on higher ground than the lowlands cultivated in rice, upon which the water was used, so that

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*when the water was drawn off it could never be returned, but passed in the opposite direction and fell into another (big) ditch. The defendant had the right to irrigate his fields and is not chargeable with what water was absorbed or evaporated, and none of the remainder was returned. We must consider all the parts of the charge as a whole, and we find that the judge adopted the second request to charge "that the plaintiff had the right to use the water of Jumping Gully Creek for the purpose of irrigation, and that while the defendant had the same right, he must return the water to its channel in a sufficient quantity for the use of the plaintiff."

The second exception charges that "the judge erred in instructing the jury that the defendant, to establish adverse use as against the plaintiff, need not prove that he used any definite amount of water, or in any definite manner, but only that he and those under whom he claimed, used so much as he or they desired, or their wants required, during the twenty years." Under this charge the jury must have found that the defendant and those under whom he claimed used so much water as they required for twenty years—we suppose every year for that time. We think that was enough to establish the prescription without showing how much was used each year. Doubtless more was needed in one year than another, and there would always be difficulty in gauging the precise amount. In such cases the prescription is held to apply to the capacity rather than actual user. Cowell v. Thayer, 5 Metc., 258.

It seems to us that the easement to use water for the purpose of irrigation is somewhat analogous to that of backing water for mill privileges. In such cases the principle is thus stated by Chief Justice Shaw in the case above cited: "Upon the whole we think the true rule is this, that when one has acquired a prescriptive right to a constant mill privilege by keeping up and using a dam more than twenty years, which dam, in its usual operation, would raise the water to a given height, and has used it at his own pleasure at that height, without any claim of right on the part of any other person, to have it drawn, or kept drawn, for any part of the year, or upon any definite occasion, he has a right to retain it at the same height although from

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the former leaky con*dition of the dam, the rude construction of the machinery, or the lavish use and waste of the stream, the water has not in fact been constantly or usually kept up to that height. If, therefore, he repairs the dam without so changing it as to raise the water higher than the old dam when tight and in repair would raise it, or uses it in a different mode, and thereby keeps up the water more constantly than before, it is not a new use of the stream for which an adjacent owner can claim damages, but a use conformable to his prescriptive right," &c.

The third exception is that his honor "erred in instructing the jury that the defendant, to establish adverse use, need not prove that he and those under whom he claims used the water of the creek continuously every year for twenty years, but it was sufficient for him to prove that he or they were in the habit of using the water, and if they failed so to use it any year on account of any accident, such as the breaking of the dam, or because their business did not require it, or they did not wish so to use it, that such break

in the use did not defeat the prescription." This charge was entirely hypothetical, as it does not appear that there were any facts in the case tending to show that there was any neglect of, or accident to, the dam for a single year, or that there was any intention to abandon the use of the water. It was a question of intention. Parkins v. Dunham, 3 Strobh., 224.

The fourth exception relates to an alleged omission to charge upon a point not made in the requests, and therefore need not be considered.

The fifth exception complains that it was "error to instruct the jury that the adverse use did not have to be proved against the plaintiff during the twenty years; but if proved for twenty years against the plaintiff and those under whom he claims, it was sufficient to establish the prescription." The plaintiff did not acquire his title until 1864, nor commence regularly to cultivate rice (for which the water was desired) before 1879; so that unless the use of the defendant and those under whom he holds affected Whittaker, the grantor of plaintiff, there could be no easement as against the plaintiff or any recent purchaser. But the use in the manner and for the time required affected the land itself. "If there has been the use of an ease-

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ment for twenty years unex*plained, it will be presumed to be under a claim of right and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant, unless contradicted or explained," &c. Chalk v. McAlily, 11 Rich., 153; Angel, 214; Washburn, 157, 160; and the burden of proof is on the party resisting the claim after use for twenty years is proved. Washburn, 135, 136.

The sixth exception complains that it was error to instruct the jury "that the protests of plaintiff against the use of the water by the defendant and the fact that controversies had arisen between the proprietors of the lands along the stream as to the use of the water, and the plaintiff and defendant and other proprietors had agreed to submit their rights to arbitration if the use was persisted in, have a tendency to show adverse use rather than the contrary; while it is contended that the facts shown should have been submitted to the jury as tending to show a non-acquiescence by the plaintiff in such use, and thereby rebutting the presumption of a grant," &c.

It appears that the complaint of McRae was not that the water which he had the right to use had been taken from him, but that his corn lands had been overflowed with too much water, and that the protests of the plaintiff were not probably made before he commenced cultivating rice in 1879, which was after the necessary use for twenty years had expired.

But if not, we do not see that the judge was in error. While the cases are not in accord upon the subject, it seems to us that the weight of authority is in favor of the proposition as announced by the judge, that ineffectual protests short of the assertion of a legal right can have no effect in preventing the presumption of a grant from adverse use, but rather tends to strengthen the character of the use as adverse. The question is fully considered in the case of Lehigh Valley R. R. Co. v. McFarlan, 43 N. J., 616, where it is said: "Protests and remonstrances by the owner of the servient tenement against the use of the easement rather add to the strength of the claim of a prescriptive right; for a holding in defiance of such expostulations is demonstrative proof that the enjoyment is under a claim of right hostile and adverse; and if they be not accom-

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panied by *acts amounting to a disturbance of the right in a legal sense, they are no interruptions or obstructions of the enjoyment." Again, "If such protests and denials, unaccompanied by an act which in law amounts to a disturbance and is actionable as such, be permitted to put the right in abeyance, the policy of the law will be defeated, and prescriptive rights be placed upon the most unstable of foundations." Ibid, 629.

The seventh and last exception complains that the "judge erred in instructing the jury that if it was proved that the quantity of water in the channel of Jumping Gully Creek was increased by the annual labor of defendant and those under whom he claimed, that the defendant might claim the right to use such water as by annual purchase, without further instructing them that such use must be limited to the quantity so increased, and that such annual purchase did not authorize the use of the entire creek." It seems that the only matter here objected to was an omission to charge expressly the limitation "as to the quantity so increased." As to this point there was no request to charge, and therefore the omission, if it was one, could not be the subject of exception as error. But it seems to us that the judge did make the limitation suggested in the charge itself admitted to have been given. He instructed the jury that if it was shown "that the quantity of water in the channel was increased by the annual labor of the defendant, he might claim the right to use such water as by annual purchase," &c.; "such water," that is to say the quantity of water which had been so added by labor, &c. The peculiarity of this case is that the Langs dug Gillis Ditch and kept the same in running order, and yet we have been under the necessity of applying to it some of the doctrines which properly belong only to natural streams. We cannot say that it was error of law to hold that the defendant had the right to use the water which he and his family caused to

flow out of its natural into this artificial channel at least within the period of twenty years.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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*CHILDS v. ALEXANDER.

(April Term, 1884.)

[1. *Assignments* ⟸121.]

The Code of Procedure has not made things legally assignable which were not so before, but has only adopted in all the courts the practice formerly existing in the Court of Equity; and therefore it is only where an assignment, however evidenced, makes the assignee the real party in interest that such assignee must sue.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 200–205; Dec. Dig. ⟸121.]

[2. *Mortgages* ⟸417.]

Where A. and B. purchase a bond and mortgage and then take in their own names a second mortgage on the same land to secure the same debt, and afterwards A. dies, B. alone may maintain an action of foreclosure whether the money used by A. was her own or that of an estate of which she was executrix.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1236; Dec. Dig. ⟸417.]

[3. *Executors and Administrators* ⟸129.]

But where, under an order from B.'s administrator, the bonds and mortgages were delivered to C., as administrator de bonis non of the estate of B.'s testator, C., as such administrator, may in equity maintain an action of foreclosure, joining B. as a party defendant, he having declined to unite with C. as plaintiff.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 533–536; Dec. Dig. ⟸129.]

[4. *Evidence* ⟸459.]

A party may show that notes and mortgages taken in her individual name in reality represented funds of an estate of which she was executrix.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1908; Dec. Dig. ⟸459.]

[5. *Banks and Banking* ⟸270.]

Interest alleged to be usurious having been paid to a national bank, the defence of usury cannot afterwards, in action by the assignee of such bank, be interposed as a defence pro tanto, i. e., to the extent of the usurious interest so paid.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1031; Dec. Dig. ⟸270.]

[6. *Mortgages* ⟸415.]

An outstanding claim of dower pending in suit is no ground for abatement of price in action brought by the vendor to foreclose the purchase money mortgage.

[Ed. Note.—Cited in Lessly v. Bowie, 27 S. C. 197, 200, 3 S. E. 199; Moss v. Jefferies, 32 S. C. 199, 10 S. E. 939; Bethune v. McDonald, 35 S. C. 94, 14 S. E. 674; Computing Scales Co. v. Long, 66 S. C. 382, 44 S. E. 963, 65 L. R. A. 294; Coleman v. Whittle, 79 S. C. 213, 216, 60 S. E. 523, 128 Am. St. Rep. 841; Brown v. Thompson, 81 S. C. 382, 62 S. E. 440; Godfrey v. E. P. Burton Lumber Co., 88 S. C. 138, 70 S. E. 396.

For other cases, see Mortgages, Cent. Dig. § 1221; Dec. Dig. ⟸415.]

[7. *Judicial Sales* ⟸4.]

In counties where the office of master does not exist, the court may order a sale for foreclosure to be made by the sheriff.

[Ed. Note.—Cited in Fort v. Assmann, 38 S. C. 257, 16 S. E. 887.

For other cases, see Judicial Sales, Cent. Dig. § 16; Dec. Dig. ⟸4.]

[8. *Assignments* ⟸121.]

[Under the Code, the assignee of a contract may sue on it in his own name.]

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 201; Dec. Dig. ⟸121.]

[9. *Assignments* ⟸129.]

[Under the Code, which has abolished the distinctions between law and equity, an assignee of a part of a contract may join with the assignor in suing on it.]

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 219; Dec. Dig. ⟸129.]

Before Fraser, J., Chester, October, 1883.

This was an action for the foreclosure of two mortgages given by the same defendant on the same land to secure the same indebtedness. The action was commenced in February, 1883.

The cause was referred to A. G. Brice, Esq., as referee, who, after a statement of the facts to be found in the opinion of this court, reported as follows:

The first issue raised is as to the right of the plaintiff, as administrator de bonis non of R. A. Springs, to maintain this action. It is claimed by defendant, Alexander, that as his mortgage is made to S. Jane Conner, and signed by her under seal, the loan must have been out of her individual funds, and

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and *would be estopped from denying that the mortgage was her individual property. I thought admissible and received evidence to show that Mrs. Conner made the investment, and took the mortgage in trust for the estate of her testator. From the testimony of G. J. Patterson, who was Mrs. Conner's attorney, and acted for her in making the investment, and collecting a payment thereon, and from the fourth annual return of Mrs. Conner, as executrix, it appears that the $1,572 invested by her in the purchase of the Alexander note, was money belonging to the estate of her testator, and that the note and mortgage of Alexander were treated by her as an investment of the undistributed assets of said estate. And the mortgage and other papers in this case seem to have been delivered to the plaintiff as assets of the estate of R. A. Springs, by agreement with, and order of, the administrator of Mrs. Conner.

My conclusion is that the note and mortgage belong to the undistributed assets of the estate of R. A. Springs, and must have been received and held by Mrs. Conner as executrix for said estate. But the plaintiff is the guardian of his wife, who is the daughter and residuary legatee of Mrs. Conner, and by the agreement of the plaintiff with F. A.

Conner, the administrator with the will annexed of Mrs. Conner, the note and mortgage herein, if they had been part of the individual estate of Mrs. Conner, have been delivered to plaintiff, and are held by him as a portion of her residuary estate, bequeathed to his wife and ward, so that in any event he holds the legal title in trust.

Giles J. Patterson, a joint mortgagee with Mrs. Conner in the mortgage made to them by Alexander, refused to join in the action as plaintiff; he was properly made a defendant, and the mortgage can be thus foreclosed and his interest in the mortgaged premises barred in this action.

The third issue raised is that the administrator of Geo. W. Melton is a necessary party to this action. This altogether depends upon the terms of the assignments from Melton to Clark and from Clark to Patterson. These assignments are absolute and unqualified, though they were made as an indemnity, and according to the rules laid down in Pomeroy's Remedies the administrator of Melton would not be a necessary

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party in this *action. It would only add to the costs of the case to bring him in as a party. The record in this action will show that Alexander's bond and mortgage to Melton have been fully exhausted under his assignment, and that the latter's administrator could not have any interest in it, which will be full protection to the defendant.

The rate at which the notes of Melton and Alexander were discounted in the Carolina National was fifteen per cent. per annum: the defendant alleges that this rate was usurious, and that the whole amount of interest so paid on these notes and their renewals can be offset or recouped in this action, and thus deducted from the plaintiff's claim.

[Here follows a quotation from the national banking act, citation of numerous authorities upon the subject of usury in discount by national banks, and the conclusion reached that the defence cannot prevail.]

The last issue raised is as to the right of the defendant to set off in this action the dower claimed by Mrs. Heald as breach of the covenant of warranty in Melton's deed to him for the mortgaged premises. Whenever dower is recovered against the defendant, there will be a plain breach of Melton's covenant of warranty to him, and this breach can be set up as an offset or counter-claim pro tanto in an action by the assignees, upon defendant's bond, given for the purchase money of the land. But the direct cause of action in this case is, not upon the bond for the purchase money, but upon Alexander's note, purchased from the bank, and his mortgage to Mrs. Conner and Patterson. For some purposes it might be regarded that Alexander had paid his bond and mortgage to Melton for the purchase money the time he made the new mortgage to Mrs. Conner and released the endorsers upon his note, and it would not have affected the rights of the parties to this action if that bond and mortgage had been then cancelled.

I therefore find as matters of fact:

1st. That the note and mortgage sued on are the property of the estate of R. A. Springs, deceased, and of the defendant, G. J. Patterson.

2d. That the defendant, G. J. Patterson, refused to join in this action as a plaintiff.

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*3d. That the rate of interest at which the Melton and Alexander notes were discounted at the Carolina National Bank was fifteen per cent. per annum.

4th. That the deed from Melton to the defendant, Alexander, for the mortgaged premises, contained the usual covenant of warranty, and that the bond of Alexander to Melton spoken of herein, was given for part of the purchase price of said premises.

5th. That one Mrs. Heald is now prosecuting an action for dower in a part of the mortgage premises.

And as matters of law:

1st. That the plaintiff, as administrator de bonis non, with the will annexed of R. A. Springs, can maintain this action.

2d. That G. J. Patterson, being an unwilling plaintiff, was properly made a party defendant.

3d. That the administrator of Geo. W. Melton is not a necessary party to this action.

4th. That though the interest paid by Geo. W. Melton and defendant, Alexander, to the Carolina National Bank upon their notes was illegal and usurious, it is now barred by the lapse of more than two years from the payment thereof, and cannot be recovered back, or offset in this action.

5th. That the claim of dower made by Mrs. Heald is not an offset or counter-claim to this action.

6th. That the amount due and unpaid on the note and mortgage of defendant, Alexander, at this date, is three thousand and seven hundred and forty-five and 18-100 dollars ($3.745.18), of which twenty-four hundred and fifty-three and 10-100 dollars ($2,-453.10) is the property of the plaintiff, and the balance, twelve hundred and ninety-two and 8-100 dollars ($1,292.08), is the property of the defendant, Giles J. Patterson, and that the plaintiff and Giles J. Patterson are entitled to recover the respective amounts as aforesaid in this action.

To this report the defendant, Alexander, filed the following exceptions:

1. Because the referee admitted in evidence the fourth annual return of Mrs. Sarah J. Conner as executrix of R. A. Springs in order to contradict the recital of the mortgage made by C. H. Alexander to Giles J. Patterson and S. Jane Conner by showing

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*that said note and mortgage was in part the property of the estate of R. A. Springs, and not of Mrs. S. Jane Conner, and because he admitted the testimony of Giles J. Patterson for the same purpose.

2. Because the referee erred in finding as matter of law and fact, that the legal title to the note and mortgage of Alexander was in L. D. Childs, the plaintiff, as administrator de bonis non, with the will annexed, of the estate of R. A. Springs, in contradiction of the mortgage signed by Mrs. S. Jane Conner and G. J. Patterson.

3. Because the referee did not find that the legal title to said note and mortgage was in F. A. Conner, as administrator, with the will annexed, of Mrs. S. Jane Conner.

4. Because if said referee did not find that said note and mortgage was the property of the estate of Mrs. S. Jane Conner, that he did not then find that said note and mortgage had passed to her daughter, Mary Elizabeth Springs (now Childs, wife of the plaintiff), under the residuary clause of the will of Mrs. Conner.

5. Because referee found that the plaintiff in this action, as administrator of Springs, could maintain the action.

6. Because he found that if the plaintiff had not the legal title to the note and mortgage, as administrator of Springs, yet as guardian of his wife, Mary Elizabeth Childs, the residuary legatee, he was entitled to recover in his present form of action.

7. Because the referee erred in finding that Giles J. Patterson could be a party defendant in this action to foreclose the mortgage of C. H. Alexander to George W. Melton, of May 17, 1876, as the said bond and mortgage were assigned to Giles J. Patterson alone, and he is the only person entitled to prosecute the action as party plaintiff.

8. Because Giles J. Patterson not having answered the complaint, or claimed any affirmative relief in this action, has no right to recover in these proceedings.

9. Because the original note of George W. Melton discounted at the Carolina National Bank was $5,068.75—discounted for thirty days at 15 per cent., and the net proceeds of which being five thousand dollars, and the interest reserved being $68.75, the referee erred in not finding that the transaction was

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usurious *under the national bank law, and the taint of usury affected all the notes given in renewal of and substitution for the original note, and this defendant was entitled to recoup all of the illegal interest either renewed or paid to said bank.

10. That the referee erred in holding as matter of law, that under the national bank law, this defendant is barred from a recoupment of the usurious interest reserved by the Carolina National Bank from the amount of the defendant's bond and mortgage, because two years and more have elapsed since the usurious contract of lending was made.

11. Because the referee erred in not allowing the defendant to set up as a defence to the recovery in this action on the bond and mortgage of May 17, 1876, made by C. H. Alexander to George W. Melton, by him assigned to W. A. Clark, and by him assigned to G. J. Patterson, that the defendant holds a warranty title from George W. Melton to a house and lot in the town of Chester, covered by both mortgages sought to be foreclosed, and that an action has been commenced in the Probate Court against the defendant by Anna Heald for her dower in said house and lot, and that he erred in not allowing the defendant to set off against said bond for the purchase money of said lot in part, any recovery which may be had against him by said Mrs. Heald in said Probate Court.

The plaintiff also excepted to the referee's report, upon the ground that the referee erred in reporting and finding that a national bank in this state during the years 1876 and 1877 could not lawfully charge or receive a higher rate of interest than 7 per cent. per annum, even when the contract for specific interest of a higher rate was reduced to writing and signed by the party to be charged therewith.

The Circuit decree upon these exceptions was as follows:

This case was heard by me at the term of the Court of Common Pleas held for Chester County in October, 1883. The case came up on a report of A. G. Brice, special referee, and exceptions filed by plaintiff and the defendant Alexander, the co-defendant Patterson not having answered the complaint.

The exceptions of the defendant Alexander will be considered first, and in the order in which they are stated. The exceptions

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*really are not taken to the findings of facts by the referee, but to the legal effects of the facts set out in the report. The facts are so fully set out that it is not important to re-state them here.

Exception 1. It appears to me to be clearly competent to show, by the acts and declarations of Mrs. Conner, that a bond, note, or mortgage held by her in her life-time, and payable to her individually in whole or in part, was in fact, as to so much thereof as was so held, an investment of funds belonging to the estate of R. A. Springs, of whose will she was executrix; or, that having been originally an investment of her own funds, they were set apart by her as an investment for the estate. This exception is overruled.

Exceptions 2 and 3. Even if Mrs Conner had been the owner of these claims at her death in her own right, and not as executrix, it was entirely competent for her executor, F. A. Conner, to turn them over on a

settlement to the plaintiff as administrator de bonis non cum test. annexo of R. A. Springs, in payment for funds held by her in her life-time for that estate. This transfer would be a sufficient title for plaintiff in this action. These exceptions are overruled.

Exception 4. If these claims had ever been the property of Mrs. Conner, and had been given in her will to her daughter, Mrs. Childs, the title of the latter would not be complete until there is an assent to the legacy by the executor, of which there is no proof. This exception is overruled.

Exception 5. This exception has been disposed of above, and is overruled.

Exception 6. This exception would have been well taken if plaintiff had no other valid title on which to stand, as neither Mrs. Childs nor the plaintiff, as her guardian, has shown any title to the property, except as she may be interested in it as legatee.

Exceptions 7 and 8. I regard it as clearly established by the evidence in the case, that the mortgage of Alexander to Geo. W. Melton was assigned to W. A. Clark, as collateral security to himself and others, as endorsers on the original note, and that the same was transferred by W. A. Clark to Patterson for the purpose of securing himself and Mrs. Conner, who had taken up the original note, the note having been transferred

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to them by the *bank; the bond and mortgage held as security passed with it, as a matter of course, unless there was some agreement to the contrary; the only proper way, therefore, when Patterson refused to become a party plaintiff, was to make him a defendant, as has been done here, and the court is bound to adjudge to him all the rights which are established in his favor, even if he fails to answer. These exceptions are overruled.

Exceptions 9 and 10. The usurious interest complained of in these exceptions has already been paid to the bank, and the defendant, Alexander, now proposes to set up the amount as pro tanto a defence against the note in the hands of the assignees of the bank, and in an action to which the bank is not a party. I regard this question as definitely settled in the recent case of Driesback v. Nat. Bank, and Stark v. Nat. Bank, 104 U. S., 52. The Supreme Court of the United States in these cases says "this cannot be done." These exceptions are overruled.

Exception 11. It is claimed that there ought to be an abatement on the claims in consequence of a suit for dower now pending in favor of a Mrs. Heald, the wife of one who had been seized of the mortgaged premises, before Melton bought and conveyed to Alexander. The authorities referred to by counsel do not sustain his position. In Polk v. Sumter, 2 Strob., 81, the action was for specific performance, and in Jeter v. Glenn, 9 Rich., 381, and Lewis v. Lewis, 5 Rich., 12, there had been an eviction, before suit brought on the warranty. In Whitworth v. Stuckey, 1 Rich. Eq., 409, Chancellor Harper says: "The law courts, it is said, will not grant an abatement of price, in such case, in a suit for the purchase money. I have no doubt that the decisions of the law courts were perfectly correct, but with proper deference, I think the dicta of some of the judges, that relief will be afforded in equity are founded on a mistaken view. Relief is to be afforded in no court, because there is no grievance."

It is to be remembered, however, that there are, in this case, two mortgages of the same land—one given originally to Melton, who warranted the title to Alexander, and one given by Alexander subsequently on the same land, and to secure the same debt in the hands of Mrs. Conner, and the defendant Patterson, who had no more to do with

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Melton's warranty than with the warran*ty of any other land Alexander may have owned, and which in the same way he may have mortgaged to secure this debt. This exception, therefore, is overruled; having held that the interest paid to the bank on these notes cannot be set up as a defence in this action, it is not necessary to consider whether it was or was not usurious under the act of Congress.

It is therefore ordered and adjudged, that the report of the referee be confirmed, so far as it affects the rights of the plaintiff and the defendant Patterson, to recover under the mortgages in this case. It is further ordered and adjudged, that the mortgaged premises described in the complaint in this action, or so much as may be sufficient to pay the amount reported to be due, with interest thereon, and the sum of ——— dollars, costs, and the expenses of sale, be sold by the sheriff of Chester County, after due advertisement, on sales day in February next, etc.

To this decree defendant Alexander excepted upon the same grounds substantially as were taken in his exceptions to the referee's report, with the additional exception that "his honor erred in ordering the land sold by the sheriff of Chester County, and not by the clerk of the court for said county."

Mr. S. P. Hamilton, for appellant.

Mr. T. C. Gaston, contra.

February 24, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The facts of this case, so far as is necessary to the proper understanding of the judgment herein, are as follows: George W. Melton, in May, 1876, discounted his note in the Carolina National Bank of Columbia, for the sum of $5,068.75, receiving a net amount of

$5,000, the interest for thirty days from date, at fifteen per cent., amounting to $68.-75, having been added to and embraced in the note. The note was payable to J. E. Curtis & Co., and was by them endorsed, with the defendant, Alexander, Robison & Atkinson, I. L. Gunhouse, and W. A. Clark as second, third, fourth, and fifth endorsers. This note was afterwards renewed by Melton at thirty days. At the time of the dis-

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count, Melton pledged as *collateral a bond and mortgage on C. H. Alexander for $5,-000, executed by Alexander on the purchase from Melton of a tract of land situate in Chester County and a house and lot in the town of Chester, which property was covered by said mortgage.

Melton died in July, 1876, before his renewal note fell due. On January 3, 1877, W. A. Clark, one of the endorsers on Melton's note and the attorney of the bank, received from Alexander on the Alexander bond, held as collateral as above stated, the sum of $2,149, which, after being credited thereon, was applied to the Melton note, first to the accrued interest and discount amounting to $423.28, and the balance, $1,725.70, to the principal, leaving a balance thereon of $3,274.30. This last note was taken up or renewed by Alexander on March 29, 1877, at sixty days, with interest at 15 per cent., the discount amounting to $77.75, which was paid in cash. This was again renewed on May 3, 1877, maturing July 5 thereafter, on which day it was again renewed at sixty days for $3,274.70, maturing October 6, at 15 per cent., the discount amounting to $126.-85, paid in cash.

Several payments were then made by Alexander, when finally it was transferred on November 3, 1877, to G. J. Patterson, upon his paying to the bank the balance then due, i. e., $2,400. This payment was made by Patterson, as it appears, out of funds belonging partly to himself and partly to Mrs. S. J. Conner, wife of F. Conner, in the proportion of $828 to $1,572. The note was delivered by the bank to Patterson, for himself and Mrs. Conner, as executrix of her former husband, Richard Springs; but there was no written assignment endorsed or made. Some days after this transfer to Patterson—i. e., on November 10, 1877—Alexander recognized the transfer, and to secure payment of the note to Mrs. Conner and Patterson, executed to them a mortgage of the tract of land and house and lot embraced in the prior mortgage to Melton, mentioned above, in which it was stated that Mrs. Conner and Patterson had purchased the bank note in the proportion of $828 by Patterson and $1,-572 by Mrs. Conner; that Clark had transferred and assigned to Patterson, for himself and Mrs. Conner, the bond and mortgage of Alexander to Melton, held by the bank as collateral, in consideration of which the endorsers had been released, and that it

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was agreed *between the parties that payment of the principal of said bank note now held by Patterson and Mrs. Conner should be postponed until November 3, 1879, with interest at 12 per cent. from the day of the purchase, to be paid annually. This mortgage containing these recitals was executed by Alexander and was signed "S. J. Conner, by Patterson & Gaston, attorneys," and by Giles J. Patterson, all under seal. On the bond and mortgage of Alexander to Melton several endorsements appeared, one from Melton assigning them to W. A. Clark, and others signed by Clark, the first acknowledging that he held them as collateral to the bank note of Melton, one crediting the payments made by Alexander, and a third assigning the papers to Patterson as collateral to the note purchased by Patterson from the bank.

Some time after this transaction, Mrs. Conner died testate, and her husband administered with the will annexed. At the time of her death she was executrix of her former husband, Richard A. Springs. She left surviving her a daughter by her first husband, who some time before her death had intermarried with the plaintiff, Lysander D. Childs. Upon the death of Mrs. Conner, Childs administered with the will annexed on the estate of the said Springs. Some controversy arising between F. Conner and Childs as to the assets of the two estates which they respectively represented, it was finally agreed between them that the papers in the hands of Patterson & Gaston, attorneys for Mrs. Conner in her life-time, should be turned over to Childs; or at least Conner gave to Childs an order on these attorneys for all notes, bonds, and mortgages, and other choses in action, money or other assets belonging either to the estate of R. A. Springs or to that of Mrs. Conner, under which order the note and two mortgages now in suit, with other assets, were delivered to Childs, who soon thereafter instituted the action below, in his name.

In the complaint it is stated that Patterson having refused to unite as plaintiff, was therefore made a defendant. It was also stated that the interest of S. J. Conner in the bond and mortgage sued on had been duly assigned, transferred, and delivered to the plaintiff, Childs, as administrator, and that he was the legal and real owner thereof. It was further stated that the plaintiff and Giles J. Patterson were the owners and hold-

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ers of *the bond and mortgage which had been held by W. A. Clark, as collateral to the Melton note, and which had been assigned by Clark to Patterson, and the plaintiff had demanded judgment against the defendant, that both mortgages be foreclosed, that the premises be sold and the proceeds

be applied to the payment of the note and costs, and in case said proceeds proved insufficient, then that execution issue in favor of the plaintiff and the said Patterson against the said C. H. Alexander for the balance. Patterson failed to answer.

The case was referred to A. G. Brice, special referee, whose report was excepted to by both sides. At the trial, testimony was offered by the plaintiff to prove that the funds of Mrs. Conner used by Patterson in the purchase of the note sued on belonged to the estate of her former husband, Richard A. Springs, and that the purchase was an investment by her as executrix of said estate. This testimony was objected to by the defendant as contradicting the recitals in the mortgage of Alexander to Mrs. Conner and Patterson, which, as we have stated, had been signed by all of the parties.

The defendant relied upon the following defences: 1st. That Lysander D. Childs, as administrator de bonis non of Richard A. Springs, had no legal title to either of the bonds and mortgages mentioned in the pleadings, but that Patterson was the legal owner, holding as trustee of an express trust for the benefit of Mrs. Conner during her life, and after her death for her daughter, Mrs. Childs, her legatee, and that he alone could sue. 2d. That the note sued on, as well as the original note from which it sprang, was usurious, and that C. H. Alexander had been sued for dower in the house and lot purchased from Melton, which suit was then pending; and he demanded (1) that the complaint be dismissed, but failing in this, that then John J. McLure, administrator of Melton, should be made a party; (2) that the amount of the usurious interest in the notes be ascertained and deducted from the recovery; and (3) that the defendant be allowed the right to set off any recovery that may be decreed against him by the Probate Court in the pending dower suit, and for such other and further relief as shall be meet.

Upon hearing the report of the referee,

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with the exceptions *thereto, the Circuit judge held that the action as brought with Childs as plaintiff and Patterson as defendant could be maintained. He further held that the testimony introduced by plaintiff as to the investment by Mrs. Conner of estate funds was competent, and upon the merits he ruled that whether the notes were usurious or not, yet the alleged usurious interest having been paid to the bank, could not now be set up against the assignee of the bank; relying on Driesbach v. National Bank and Stark v. National Bank, 104 U. S., 52 [26 L. Ed. 658]. He also ruled that the pending dower suit could not be interposed; and he ordered and adjudged that the report of the referee, so far as it affected the rights of the plaintiff Childs and the defendant Patterson, be confirmed; that the mortgaged premises be sold by the sheriff, the proceeds to be applied, after payment of costs, to the claims of the plaintiff and the defendant Patterson, according to the amounts found due them respectively, the balance, if any, to be paid to the defendant Alexander. The appeal assigns error to these rulings and holdings, with the additional ground that his honor erred in ordering the land to be sold by the sheriff instead of the clerk.

Did the plaintiff have the right to maintain the action as brought? is the first question At common law actions on contracts could be brought only by the person having the legal title thereto, and as a contract at common law, was regarded as a mere right to go to law, and as that law forbade the sale of a mere right to sue, it followed that no one but the party with whom the contract was made could enforce it by action; and therefore in general, upon all contracts, whether express or implied, whether by parol, or under seal, or of record, the action, if action was necessary, had to be brought in the name of the original payee or obligee, whether the contract has been assigned or not. True, in negotiable paper payable to order or bearer, an apparent exception was made allowing the action to be brought in the name of the endorsee or bearer; this, however, was allowed, not so much as an exception, but rather in accordance with the original rule, because when the note in its terms was made payable to order or bearer, whoever became endorsee or bearer, became at the same time the promisee, and consequently the legal owner. But notwithstanding this

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common law rule which was invariably *enforced in the Courts of Common Pleas, yet the practice in equity was always different, and the rule prevailed there that the assignee, who was regarded as the real party in interest, could sue in his own name. And by special act in certain contracts the action might be brought in the name of the assignee or assignor as the parties might elect, even in the Common Pleas.

Thus stood the law in our state when the code was adopted in which it was provided (with certain exceptions) that every action must be prosecuted in the name of the real party in interest. What was the intention of this provision? It was certainly not the intent that in all the cases where the real and beneficial interest was in one and the legal title in another, that the action must, or even could, be brought in the name of the real party in interest. Because if such was the imperative requirement in every such case, as Mr. Bliss says, great inconvenience would often arise, and representative and express trusts might be practically destroyed. For example, as he further says: "An administrator has less interest in collecting the assets than a creditor or distributee, yet he must bring the action; and there are many

other cases where if the beneficiary, who is the real party in interest, could bring the action in his own name, he might, against the will of the trustee, and contrary to the objects of the trust, be able to control the property and destroy the trust."

So that the code, in our opinion, when it provided and enacted in general terms that "every action must be prosecuted in the name of the real party in interest," except as otherwise provided therein (§ 132), was intended to apply principally to the cases of assignments of contract, or rather to rights of action capable of assignment, and in that way to meet the difficulty which existed at common law, where, as we have seen, the assignee, although after assignment to him he was in truth the real and only party in interest, yet could not sue in his own name. In other words, this section of the code was intended to adopt in all the courts the practice which formally prevailed in the Court of Equity on this subject. The code, however, has not gone to the extent of making things legally assignable which were not so before, but it simply declares that when a transfer or an assignment has been made, which in equity

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has the effect of making *the assignee the real party in interest, that then such assignee must sue. Whether such an assignment has been made or not in a special case is always a question of fact, which may be evidenced by a written endorsement or assignment on the paper, or it may be shown by other competent testimony. It may be made, too, on a separate paper, by a verbal sale, or by manual delivery.

Now apply these principles to the facts of this case with reference to the note of C. H. Alexander, purchased by Patterson, and the mortgage subsequently executed by Alexander to Mrs. Conner and Patterson to secure the same. There was no written assignment of the note by the bank to any one. It appears, however, from the testimony that it was purchased by funds which belonged respectively to Mrs. Conner and Patterson, and that it was delivered to Patterson for himself and Mrs. Conner, thereby making Patterson and Mrs. Conner the real parties in interest, and therefore under the code entitled to sue in their own names; and they were named as the obligee and promisee in the mortgage of Alexander to them. Had the action then been commenced in the lifetime of Mrs. Conner, unless brought in the name of the two, it would have been defective and demurrable, except that if either one refused to unite as plaintiff, the party refusing might have been made a defendant under the code.

But Mrs. Conner died before suit brought; what was then the interest of the parties? Under the old practice and authorities there can be no doubt that upon the death of Mrs. Conner the whole interest survived and became vested in Patterson, who, at common law, could alone have been recognized as entitled to recover, with a responsibility thrown upon him to settle with the representatives of the deceased. Such being the case, the representative character of neither Childs nor F. Conner would give either of them the right to unite in the suit with Patterson; because, supposing that the funds invested by Mrs. Conner in the note and mortgage to have belonged to her personally, or as executrix of Richard A. Springs, her death severed her connection and left Patterson as survivor, the holder of these papers.

Childs, however, does not claim by virtue of his representative character. True, he sues as administrator of Richard Springs,

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*but he claims by assignment to him as such administrator of the interest of Mrs. Conner. Has he shown such an assignment? The evidence on that subject is, that the bank note, with the mortgage, were delivered to him as administrator de bonis non of Richard Springs, by Patterson & Gaston, attorneys of Mrs. Conner, under an order from F. A. Conner, administrator of Mrs. Conner. After this delivery the action was commenced, Childs alleging in his complaint that he is the owner of the interest of Mrs. Conner and of the interest of Richard Springs, the same having been duly assigned and transferred to him as administrator de bonis non; and Patterson in his testimony admits the right of Childs as claimed. This seems to be sufficient evidence of the assignments, but then it is an assignment of only a part of the note and mortgage, i. e., Mrs. Conner's portion.

Under this state of facts, a question arises, what is the effect of a partial assignment of a contract, note, or mortgage, as to the right of action in the parties interested? Can the contract be split in this way so as to make the debtor liable to two or more actions and against his consent? We think not, nor could, under the old practice, the partial assignee, so to speak, have joined in the suit with the assignor, and this principle is still adhered to in some of the states, even where the code has been adopted. Cable v. St. Louis Marine Railway & Dock Co., 21 Mo., 133. But in equity such an assignee was regarded as having an equitable interest, which, under the equity practice, could be enforced in the courts of equity, the assignor and debtor both being made parties, just as, before the code authorized the real party in interest in assignments of an entire contract to sue at law, equity had allowed such assignee to sue in equity. We see no reason, then, why under the code, since all distinction between law and equity as to the mode of procedure has been abolished, a partial assignee may not join with the assignor, in pursuit of his partial interest, as well as to sue alone when the whole contract has been

transferred to him, especially as one of the objects of the code, in establishing but one mode of procedure, was to bring into operation the equity practice as far as practicable in all courts and actions.

This seems to be the law in some of the

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states where the code *has been adopted, notably in Indiana and California (Lapping v. Duffy, 47 Ind., 51; Grain v. Aldrich, 38 Cal., 514; Bliss, Code Pl., § 65), and we can see no legal objection to it, and it is applicable as well to the Alexander-Melton mortgage embraced in the suit, as to the other papers, all of them having been delivered by Patterson to Childs under the same circumstances.

Under this view of the case it is unnecessary to discuss the competency of the testimony excepted to, as whether the funds invested by Mrs. Conner belonged to the estate of her husband or to herself, makes no difference. But even if this testimony was material, there can be no reason growing out of the doctrine of estoppel, or any established rule of evidence, why such testimony should be excluded.

Next, as to the usurious interest. The Circuit judge declined to discuss this question, holding as he did, under the cases referred to, 104 U. S. Reports, that the interest alleged to be usurious having already been paid to the bank, the defence of usury could not now be set up against an assignee of the bank. The cases relied on by the Circuit judge seem to be clear and definite on this point; it is needless therefore to prolong this opinion by a discussion of the question of the fact of usury.

Finally, an abatement is claimed on account of the pending suit for dower before eviction. We need not do more in reference to this than to cite the case of Whitworth v. Stuckey (1 Rich. Eq., 409), where Chancellor Harper, in delivering the opinion of the court in a similar defence before eviction, said: "The law courts will not grant an abatement of price in such case, in a suit for the purchase money. I have no doubt," says he, "that the decision of the law courts was perfectly correct, but with proper deference, I think the dicta of some of the judges that such relief will be afforded in equity are founded on a mistaken view. Relief is to be afforded in no court, because there is no grievance."

The last exception assigns error to the sale of the premises ordered to be made by the sheriff, the appellant contending that the clerk should make the sale. In the General Statutes, chapter entitled "County Sheriff," the following sections are found: "Sec. 691. All judicial sales shall be made by the sheriff, unless otherwise provided by law," &c.

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"Sec. 692. In all sales by said *sheriff under the order of Courts of Common Pleas, or under the order of the Courts of Probate, the fees of said sheriff shall be the same as now fixed by law for sales under executions issuing from Courts of Common Pleas." The phrase in the above section "judicial sales" certainly meant other sales than those by execution, because many of the foregoing sections in this chapter in prescribing the duties of the sheriff, had already provided for sales by execution, and these two sections, if they stood alone, in the absence of any other act providing otherwise, would be construed to mean that all sales made by direct order of the court (and in that sense judicial), would be made by the sheriff.

In the code, however, are found other sections, which certainly leave the question in considerable doubt, if not producing absolute uncertainty. Section 307 of the code provides, "that in all sales under order of the court, where the title is to be made by the clerk of the court, such sales shall be made by the clerk; all other judicial sales shall be made by the sheriff." And "in those counties where the office of master exists, the master shall make all sales ordered by the court in cases granting equitable relief, conformable to the practice of the Circuit Courts or to the practice of the Courts of Equity of this State before said courts were abolished." Now, section 691 of the General Statutes, supra, providing as it does that all judicial sales shall be made by the sheriff, unless otherwise provided by law, evidently intended and supposed that in such sales (judicial) the legislature might make other provisions; but until this was done the sheriff should sell.

Section 307 of the code, supra, has made other provision, but to what extent has it changed the previous act? Section 691 is the difficulty. It says first, that in all sales ordered by the court, where title is to be made by the clerk of the Circuit Court, the clerk shall make the sale. Second, that all other judicial sales shall be made by the sheriff, as now provided by law. And third, that in counties where masters exist, the master shall make all sales ordered by the court, in granting equitable relief. The change made, then, consists in requiring the clerk to sell where the clerk is to make the titles, and the master to sell where a sale is ordered by the court in a case granting equitable relief. In all other judicial sales, the sheriff is to sell as now provided by law,

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*i. e., as provided in section 691, General Statutes, supra. The question of the sale by the master is not involved here, as there was no master in Chester County, but the difficulty arises upon the change above which declares that the clerk shall make the sale where he is to make the titles.

When is the clerk to make titles? We know of no distinct class of cases in which by positive law the clerk is required to ex-

ecute the titles. If there was such a law, and it covered a case of this kind, a sale under foreclosure proceedings, then it would be clear that the order of the judge directing the sheriff to sell would be error, but in the absence of such a law it would seem as if the sheriff was bound to sell under section 691 of the General Statutes, as that section expressly declares that in all judicial sales, unless otherwise provided by law, the sheriff should sell. We suppose it would be competent for a Circuit judge to order titles to be made by the clerk, in any sale made under a Circuit decree, and in such case the clerk should make the sale under section 307 of the code, supra; but in the absence of such order as to titles, and of any law defining when the clerk shall make titles, as matter of law, it would seem that the sheriff is the proper officer to make the sales in counties where the office of master does not exist. The Circuit judge did not direct the clerk to make titles below. The best that we can make, therefore, of the sections of the acts applicable to the question discussed is that there was no legal error in his ordering the sale to be made by the sheriff.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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BAUSKETT v. KEITT.

(April Term, 1884.)

[1. *Trial* ⟸295.]

In considering alleged errors in a charge, the charge must be considered as a whole, and not in detached portions.

[Ed. Note.—Cited in Wallace v. Columbia & G. R. Co., 37 S. C. 343, 16 S. E. 35; Madden v. Port Royal & W. C. Ry. Co., 41 S. C. 452, 19 S. E. 951, 20 S. E. 65.

For other cases, see Trial, Cent. Dig. §§ 703–717; Dec. Dig. ⟸295.]

[2. *Wills* ⟸290.]

Where a will is traced to the possession of testator, but cannot be found after his death, there arises a presumption of destruction by him; this, however, is a presumption of fact, rebuttable by evidence. If the depositories of the deceased pass into the custody of the heirs

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at law, *and his papers are first examined by them, this does not, as matter of law, rebut the presumption, but is a circumstance to be considered by the jury in determining this question of fact.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 663; Dec. Dig. ⟸290.]

[3. *Trial* ⟸236.]

Petitioners to establish an alleged lost will cannot assign error to the judge in charging that the fact that the persons most interested in the destruction of a will were the first and only persons to examine the depositories and papers of the deceased, was a strong circumstance to rebut the presumption of cancellation by testator, but that whether sufficient evidence or not was a matter for the determination of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531–533; Dec. Dig. ⟸236.]

[4. *Trial* ⟸194.]

The Circuit judge could not, without invading the province of the jury, charge "that where there are no corroborating circumstances, the presumption that the loss of the will is due to the act of the testator, rather than to other causes, belongs to the lowest order of proof, and has no other effect than that of obligating the party who denies it to establish his case by some affirmative evidence."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439–441, 446–454, 456–466; Dec. Dig. ⟸194.]

[5. *Evidence* ⟸60.]

The law will presume a destruction of a will by the testator (an innocent act) rather than by the heirs simply because of their opportunity of so doing, as this would be a criminal act.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 81; Dec. Dig. ⟸60.]

[6. *Trial* ⟸296.]

An error in a charge resulting from a misapprehension of the request is no ground for a new trial, the matter requested having been afterwards fully and clearly charged by the judge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713, 715, 716, 718; Dec. Dig. ⟸296.]

[7. *Wills* ⟸331.]

Petitioners alleged that a lost will was witnessed by A, B, and C. A and B testified that it was so witnessed, but C testified that he had never signed such will as a witness. *Held*, that the judge properly refused to charge the jury "that if they should come to the conclusion that the paper propounded is substantially the last will executed by deceased in the presence of A, B, and another witness who was not C, their finding should be for petitioners, unless they find that said will was subsequently revoked or destroyed."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 782–784, 786, 787; Dec. Dig. ⟸331.]

[8. *Wills* ⟸297.]

Declarations of the testator are admissible to prove the destruction by him of his will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 696; Dec. Dig. ⟸297.]

[9. *Wills* ⟸331.]

There was no error in refusing to charge "that if the jury find that a duly executed will of the deceased was in his possession after he was physically unable to destroy it, the presumption that such will, if not found at his death, was destroyed by him, is rebutted."

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 783; Dec. Dig. ⟸331.]

[10. *Trial* ⟸194.]

Where two witnesses testified that an alleged lost will had been executed in the presence of themselves and another witness, all of whom had signed as witnesses, and such other witness denied it, the judge could not charge that the will was sufficiently proved, but he properly left this matter to the jury to be determined by them.

[Ed. Note.—Cited in Kaufman v. Caughman, 49 S. C. 164, 27 S. E. 16, 61 Am. St. Rep. 808.

For other cases, see Trial, Cent. Dig. §§ 413, 436, 439–441, 446–454, 456–466; Dec. Dig. ⟸194.]

[11. *Evidence* ⟸183.]

The contents of a letter from plaintiff to deceased could not be proved in behalf of plaintiff by parol testimony, there being no proof of loss and no notice to the representatives of the deceased to produce it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605–637; Dec. Dig. ⟸183.]

[12. *Witnesses* ⟸321.]

A witness, C, called by plaintiff, testified that deceased had entrusted him with a message to plaintiff, which he had delivered, and what

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that *message was. Plaintiff then offered himself to prove that the message so delivered was of a different tenor, and also another witness to prove C's statement that the message was other than that testified to. *Held*, that plaintiff's object being to discredit his own witness, the testimony offered was incompetent.

[Ed. Note.—Cited in State v. Johnson, 43 S. C. 126, 127, 20 S. E. 988; Pooler v. Smith, 73 S. C. 108, 52 S. E. 967; State v. McKay, 89 S. C. 236, 71 S. E. 858.

For other cases, see Witnesses, Cent. Dig. § 1094; Dec. Dig. ⟸321.]

[13. *Appeal and Error* ⟸273.]

An exception not considered because too general in its terms.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1606, 1620–1623, 1625–1630, 1764; Dec. Dig. ⟸273.]

14. Findings of fact concurred in by Circuit judge and jury, and by Circuit judge and Probate judge approved.

[This case is also cited in Ex parte Jackson, 67 S. C. 60, 45 S. E. 132, without specific application.]

Before Hudson, J., Newberry, November, 1883.

This was a petition in the Probate Court for Newberry County, filed by John Bauskett and Elizabeth Reid, devisees and legatees under an alleged lost will of Thomas B. Wadlington, deceased, praying that said will might be established and admitted to proof in solemn form. Thomas W. Keitt and Joseph L. Keitt, as administrators of said deceased, and they, together with their sister, Harriet A. Keitt, as distributees under the statute were the parties defendant. A copy of the alleged lost will, furnished by the draftsman, was set out in the petition. The case is fully stated in the opinion of this court.

Messrs. Moorman & Simkins, L. F. Youmans, and Johnstone & Cromer, for appellants.

Messrs. Suber & Caldwell, contra.

March 2, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. This was a proceeding, originally commenced in the Court of Probate for Newberry County, for the purpose of setting up an alleged lost will of one Thomas B. Wadlington, deceased, and having the same admitted to probate in solemn form. The petition set out a copy of what was alleged to be such lost will, which purported to have been executed in April, 1873, in the presence of R. V. Gist, Caroline Sondley, and Richard C. Sondley as subscribing witnesses. The judge of probate seemed to be of opinion that such a will was at one time executed, but found that the same had been revoked by the testator, and he therefore declined to admit the paper propounded as the will of Wadlington to probate.

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*From this decree the plaintiffs appealed to the Court of Common Pleas, and at the trial moved for and obtained an order to amend their petition by striking out the name of Caroline Sondley and inserting in lieu thereof the name of John R. Sondley as one of the witnesses to the alleged lost will. The Circuit judge ordered that the following question of fact be referred to a jury for determination, viz.: "Did Thomas B. Wadlington, late of the County of Newberry, die leaving of full force and effect a last will and testament of the same purport and like effect as the will alleged by plaintiffs to be lost, mislaid, or destroyed, and sought by them in these proceedings to be established and admitted to probate?" In response to the question submitted to them, the jury found, "No."

The Circuit judge then rendered his decree, fully concurring in the finding of the jury, saying that the evidence did not, in the first place, establish the due execution of the paper propounded as the will of Wadlington; and, in the second place, that the paper, whether duly executed or not, was traced to the possession of Wadlington, and its not being found after his death raised the presumption that he had revoked it, which the evidence offered for that purpose was not sufficient to rebut. He therefore dismissed the appeal and affirmed the judgment of the Court of Probate. From this judgment the plaintiffs appeal to this court upon various exceptions, which will be considered seriatim.

1. "Because the judge erred in charging and refusing to charge the jury as follows: (1) In refusing to charge that if the will has been traced into the possession of Wadlington, and at his death could not be found by his heirs at law, who alone had the custody of his depositories and examined his papers, the presumption that the testator destroyed the will, with the intention of revoking it, is not a presumption of law, but a presumption of fact, and rebuttable; and in charging the jury directly that the fact that if the will was traced into Wadlington's possession and could not be found at his death by his heirs at law, who alone had the custody of his depositories and examined his papers, was not sufficient to rebut the presumption of revocation by the testator." Upon this request, the Circuit judge instructed the jury as follows: "This alone will not

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be sufficient to rebut the pre*sumption of its revocation by testator. It is but a circumstance to be considered by the jury. If the heirs had custody before death, it would be

sufficient to rebut." In this we think there was no error.

In considering alleged errors in a charge, it is manifestly the duty of this court to consider the charge as a whole, and not in detached portions merely. As is said by Mr. Justice Story, in Maguiac v. Thompson, 7 Peters, 390 [8 L. Ed. 709], affirmed in Spring Co. v. Edgar, 99 U. S., 659 [25 L. Ed. 487]: "In examining the charge for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally follow from the language of other parts of the charge. In short, we are to construe the whole as it must have been understood, both by the court and the jury, at the time when it was delivered." See also remarks of Simpson, C. J., to the same effect in Lynn v. Thomson, 17 S. C., 138. Now, when we examine the whole charge of the Circuit judge in this case, it is quite manifest that, as to the point immediately under consideration, he instructed the jury that where a will is traced to the possession of a testator, and it cannot be found after his death, a presumption arises that he had revoked it by destroying it; that this, however, would be a presumption of fact, and therefore capable of being rebutted by other evidence, and that it would be for the jury to say, from all the evidence, whether such presumption had been rebutted.

It is clear, therefore, that he could not have instructed the jury that the fact that the will could not be found by the heirs at law, who alone had the custody of the alleged testator's depositories and examined his papers, was sufficient to rebut such presumption, but, on the contrary, that he should have instructed them as he did that this was a circumstance to be considered by them in determining whether the presumption was rebutted. Otherwise, he would have been invading the province of the jury and assuming to determine the weight and effect of the evidence. In Durant v. Ashmore, 2

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Rich., 184, the rule is laid down, as *fully sustained by the authorities, that a presumption of revocation arises from the fact that a will, which has been traced to the possession of a testator, cannot be found at his death; but that this is a presumption of fact which may be rebutted by other evidence showing its existence, and of course, therefore, it is a question for the jury, and not for the judge, to determine what evidence will rebut such presumption. See also Betts v. Jackson, 6 Wend., 173.

The second subdivision of exception I. is as follows: "In refusing to charge that the loss, destruction, or suppression of a will does not require direct or positive proof; it may be, and often is, inferred with great certainty from attendant circumstances; and among the circumstances furnishing strong presumption of such being the case is that the depositories of the deceased testator, before they could be searched by any independent person, were accessible to, and investigated by, the only persons interested in the loss, suppression, or destruction of the will, if it existed; and in charging, upon the request so to charge, this is a fact tending to rebut such presumption." The language of the Circuit judge, in response to this request, is not fully set forth in the exception, but was as follows: "This is a fact tending to rebut such presumption. Such a case as is set forth in this request would tend to rebut (and would be a strong circumstance to rebut) the presumption of destruction by the testator. But I cannot say such evidence is sufficient to rebut that presumption; that is a matter for the jury to pass upon." We do not see what more the appellants could ask. If, however, the point of this exception is that the judge failed to notice the first branch of the request that the destruction of a will need not be proved by direct and positive evidence, but may be inferred from attendant circumstances, we think the objection is fully met by the whole tenor of the charge upon this point by which it was clearly left to the jury to say, from all the facts and circumstances developed by the evidence, whether the presumption of revocation arising from the failure to find the will was rebutted.

The third subdivision of this exception is as follows: "In refusing the charge that where there are no corroborating circumstances, the presumption that the loss of the

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will is due to the *act of the testator, rather than to other causes, belongs to the lowest order of proof, and has no other effect than that of obligating the party who denies it to establish his case by some affirmative evidence." Such a charge as this could not have been given without invading the province of the jury, by assuming to determine the strength or the weight of the evidence, which is clearly the prerogative of the jury; and the Circuit judge having left it to the jury to say whether the facts and circumstances adduced in evidence were sufficient to rebut the presumption that the testator had himself revoked his will, arising from the failure to find it at his death, did all that appellants could properly require of him.

In this case there was no allegation or evidence tending to show that the will had been destroyed by accident, but the whole case of the plaintiffs depended upon their being able to show that the will was destroyed by the heirs at law because it was to their interest so to do. This would have been a criminal act on their part, and to establish it there must be evidence satisfactory to the

tribunal (in this case the jury) entrusted with the trial of the issue. Indeed, the very ground upon which the rule is based, that where a will is traced to the possession of the testator, and it cannot be found after his death, the presumption is that the testator himself revoked it, is, that the law will presume that an innocent, rather than a criminal, act has been done. Hence, in such a case, the law will presume that the will was destroyed by the testator, which would be an innocent act, rather than that it was destroyed by the heirs at law, even though they might have an interest so to do, and might, by reason of their close relations to the testator, have the best of opportunities of so doing; because, if they did it, their act would be a criminal one, which the law will not presume, but will require to be established by satisfactory evidence. See Knapp v. Knapp, 10 N. Y., 276.

The fourth subdivision of this exception is as follows: "In refusing to charge that one credible witness is sufficient to prove the contents of a lost, suppressed, or destroyed will, and he need not be a subscribing witness." Inasmuch as there was no controversy whatever as to the contents of the alleged will

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which *the appellants were seeking to set up, it would seem to be of small consequence what the Circuit judge may have said to the jury upon this subject. While it is true that the Circuit judge, in response to this request, did say, "Not if the subscribing witnesses are alive and within the jurisdiction of the court and present testifying," this remark was manifestly made under a misapprehension of the request, and intended to apply to the execution of the will, which was a matter in controversy, and not with reference to proof of its contents, which was not a matter in controversy, and could not possibly have misled the jury, for in his general charge to the jury he distinctly instructed them "that one credible witness would be sufficient to establish, by parol, the contents of a lost or destroyed will; but that in this case there was no contest on that point, the contents of the alleged will having been testified to by competent witnesses, who were not contradicted." We do not think it possible, therefore, that the qualification of the request could have had the effect of misleading the jury, as they were, in effect, told that the contents of the will were established, and that there was no controversy on that point.

The fifth subdivision is as follows: "In refusing to charge that if the jury should come to the conclusion that the paper propounded is substantially the last will and testament executed by Thomas B. Wadlington, in the presence of R. V. Gist and R. C. Sondley, and another witness, who was not John R. Sondley, their finding should be for the petitioners on the issue submitted to them, unless they find that said will was subsequently revoked, obliterated, cancelled, or destroyed." The response to this request was in these words: "The jury cannot conjecture, in face of testimony of plaintiffs to the contrary, that a third unknown person must have witnessed the execution." When it is remembered that a verdict of a jury must always be based upon some testimony adduced in the case, or upon some inference properly deducible from the testimony offered, we see no ground for the error imputed to the Circuit judge.

The only witnesses examined as to the execution of the will were R. V. Gist, R. C. Sondley, and John R. Sondley; the two former of whom both testified positively that

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they, together with *John R. Sondley, were the attesting witnesses, while the latter positively denied that he had ever witnessed a will for Wadlington or any one else, and that the other two witnesses were mistaken in saying that he had. It will be observed that Gist and R. C. Sondley do not say simply that they with another attested the will, and that they believed John R. Sondley was the other witness, but, on the contrary, they say positively that John R. Sondley was the third witness. It will also be observed that John R. Sondley does not speak doubtfully; he does not say that he has no recollection of ever having attested, or that he does not believe that he signed the will as a witness, but says positively that he never did. It is quite clear, therefore, that the testimony of these witnesses not only furnished no evidence whatever that R. V. Gist, R. C. Sondley, and some unknown third person were the subscribing witnesses, but, on the contrary, positively disproved the fact that an unknown third person was one of the witnesses. If, therefore, the jury had been instructed as requested by the plaintiffs, they would have been instructed that they could find a verdict not only without any testimony whatever to support it, but directly in the teeth of the testimony adduced by the plaintiffs themselves. Nor will it do to say that the testimony of Silas Johnstone would have been sufficient to warrant such an instruction to the jury, for, aside from the fact that his testimony was very doubtful and uncertain, he named Gist and two of the Sondleys as witnesses, and as the only two Sondleys that we hear of, besides Richard, are Caroline and John R., and as the plaintiffs concede that Caroline was not a subscribing witness, his testimony comes at last to the same as that of Gist and Richard C. Sondley.

The case of Watkins v. Watkins, 13 Rich., 66, differs very materially from this case. In that case the will was executed in the ordinary's office, while five persons named were present, and the undisputed testimony was that three of the five attested the will, the only difficulty being to designate with certainty which one of the five was the third

witness. None of the five denied signing as a witness, though two of them said they had no recollection of the transaction. The Court said: "It is immaterial that some of them may remember nothing of the transaction

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(Fil*son v. Filson, 3 Strob., 288), although it is material to know who were the subscribing witnesses, that their competency may be judged of properly; but when all the five present at the execution are produced and found competent, it is not very important which three of the five attested." In that case the testimony might well warrant a verdict that the will was executed in the presence of three competent witnesses, because, while it failed to designate with certainty which three of the five subscribed as witnesses, it did show that three of five named persons, all of whom were competent, did sign as witnesses. Indeed, this case seems to be opposed to the doctrine contended for by appellants, for if, as it is said, "it is material to know who were the subscribing witnesses, that their competency may be judged of properly," the request could not properly have been granted, for it involved the idea that the jury might find that the third witness was some unknown person whose competency could not, of course, be judged of properly.

The sixth subdivision is as follows: "In refusing to charge that the declarations of the testator cannot be admitted to prove the destruction of his will." In this there was no error. Durant v. Ashmore, 2 Rich., 184. See, also, remarks of Walworth, Ch., in Betts v. Jackson, 6 Wend., 173. And see Reeves v. Booth, 2 Mill Con. R., 334 [12 Am. Dec. 679].

The seventh subdivision of this exception is in the following language: "In refusing to charge that if the jury find that a duly executed will of Thomas B. Wadlington was in his possession after he was physically unable to destroy it, the presumption that such will, if not found at his death, was destroyed by him, is rebutted." In response to this request, the judge said to the jury: "I cannot say what is, or what is not, sufficient proof. I can only say that it would be a fact to be weighed by the jury." In this there was no error; for, besides the fact that the request called upon the judge to invade the province of the jury and determine the effect of certain evidence upon an issue of fact which they were called upon to try, the request ignored the possibility that the testator might, though physically unable to destroy his will, direct its destruction by some one else.

The second exception is as follows: "In

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charging that where *the will is not produced, and two witnesses swear that they and a third witness, naming him, saw the testator sign an instrument, in form a will, which he then and there stated to be his will, in the presence of themselves and said third witness, and that they and said third witness subscribed as witnesses in the presence of the testator and of each other, and said third witness swears that he did not sign such instrument as a witness, said instrument was not sufficiently proved as a will, even though the jury believed the first two witnesses." On examining the general charge of the Circuit judge, it will be found that he did not instruct the jury as complained of in this exception. On the contrary, his language was that "in the case of a will alleged to have been lost, mislaid, or destroyed, while it is necessary that three persons should have witnessed the same in the presence of the testator and of each other, and while it was the duty of those propounding the will for probate to present and examine all three of the alleged witnesses (if of sound mind and accessible to the court), yet that if one of the alleged witnesses should deny his attestation, the other two would be sufficient to establish his attestation, if the jury should believe those two in preference to the third one denying. But that it is a matter for the jury to determine whether they will believe the testimony of the two, or that of the third one."

It is true that in response to the first request of the plaintiffs, the Circuit judge did use certain language, which, if taken by itself, and not in connection with the context and the whole tenor of the charge (which, as we have seen above, it is altogether inadmissible to do), might afford some warrant for this exception. The plaintiffs' first request to charge was in these words: "That where two credible witnesses swear that they saw testator sign an instrument, in form a will, which he then and there stated to be his will, in presence of themselves and another credible witness, and that they and said other witness subscribed as witnesses, in the presence of the testator and of each other, and said other witness has no recollection of the transaction, said instrument is sufficiently proved as a will, and should be admitted to probate if there is sufficient proof of the contents, and revocation of the instrument has not been proved." In response

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to this request, the *judge said: "If the will were produced and the handwriting of the third were proved, then the proposition would be sound; but not so where the will is not produced, and the third man swears he did not sign it. Should the third man, in the last case, only swear that he has no recollection of signing, the jury may, if they believe the first two witnesses, regard the will sufficiently proved. It would be a question of fact for the jury."

Now when this language is construed with reference to the context, and when it is regarded as in response to the proposition contained in the request, and especially when it is considered in connection with the language

of the general charge, we see no inconsistency and no error. The request was to charge that, in the case supposed, the instrument would be "sufficiently proved as a will." This the judge could not do without invading the province of the jury, for it was for them to say whether the proof was sufficient. And when, as in the case stated in the response to the request, the third witness denied signing, it would be for the jury to say whether they believed the two witnesses or the third. The real proposition which the judge characterized as unsound, was that he should instruct the jury that in the case of a lost will, where two witnesses testify that it was duly executed in their presence, and that of a third who denied signing as a witness, it was "sufficiently proved as a will." This would be, manifestly, an unsound proposition, unless it was qualified, as the judge did qualify it in his general charge, by instructing the jury that in such a case it would be for them to determine whether they would believe the two witnesses who testified to the attestation of the paper propounded as a will by three witnesses, or the third who denied that he had so attested, and that if they believe the two in preference to the third, then the will would be sufficiently proved.

The third exception is as follows: "Because the presiding judge, as to the testimony, erred as follows: (1) In refusing to allow a witness for the petitioners to state the contents of a letter from Bauskett to Wadlington, which Wadlington read to him at the same time of a conversation between them, detailed by the witness." There can be no doubt that the letter itself would furnish the best evidence of its contents, and

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in the absence of *any evidence of its loss, or of any notice to the other side to produce it, parol evidence of its contents was clearly inadmissible to show the contents of the letter.

The second and third subdivisions of this exception, resting upon the same principles, may be considered together. Their language is as follows: (2) "In refusing to allow the petitioner, John Bauskett, to testify as to what the message was which had been delivered to him by one Clamp, as the message entrusted to Clamp by Wadlington, on his death-bed, to be conveyed to Bauskett, Clamp having already testified that a message was so entrusted to him by Wadlington, and that he had delivered it, and having also given his statement of the same; and in refusing to allow Bauskett to testify that the message delivered to him by Clamp was different from that detailed by Clamp on the stand. (3) In refusing to allow another witness offered by the petitioners to testify what Clamp had stated to him was the message so received and delivered by him as being different from the message testified to by Clamp." Inasmuch as Clamp was offered as a witness by the plaintiffs themselves, it is quite clear that it was not competent for them to offer any evidence tending to impeach his credibility, either by testimony as to his general character, or that he had made statements inconsistent with those made by him on the stand. See Perry v. Massey, 1 Bail., 32, as construed in Farr v. Thompson, Cheves, 44; Bank v. Shier, 4 Rich., 240. It is quite clear that the object here was to discredit Clamp, the plaintiffs' own witness, which could not be done.

The fourth subdivision of this exception is as follows: "In refusing to allow the petitioners to testify about transactions and communications with Wadlington during his life." As a matter of fact one of the petitioners, Bauskett, was not prohibited from testifying as to transactions or communications with Wadlington, for although an objection to his so testifying was sustained on his examination in chief, yet when he was examined in reply, the Circuit judge held that the door was opened to such testimony by the course of the cross-examination, and the witness was permitted to testify as to communications between himself and the deceased. As to the other petitioner, Eliz. Reid, she was clearly incompetent to testify to any trans-

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actions or communications *between her and the deceased, under section 400 of the Code of 1882.

The fourth and last exception is as follows: "Because the presiding judge erred: (1) In finding that the evidence did not establish the due execution of the instrument as a will. (2) In finding that, if duly executed, the will was revoked by the testator. (3) In dismissing the appeal from the Probate Court." The last of these subdivisions is, as has often been held, too general in its terms to require any notice at the hands of this court, and the other two subdivisions raise questions of fact. While there may be some room for difference of opinion as to the execution of the will, there certainly is not such manifest error as would warrant this court in disturbing the finding of the court below. But even if there were, the finding on the question of revocation, in which we fully concur, would be quite sufficient to sustain the judgment appealed from. We do not think there was evidence sufficient to rebut the presumption of revocation arising from the failure to find the will, which had been traced to the possession of the alleged testator; certainly none to fix upon the heirs at law, or any one of them, the imputation that they had destroyed the will.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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WERTS v. SPEARMAN.

(April Term, 1884.)

[1. *Equity* ⇐326.]

An administrator, who was also a creditor, filed his bill for the sale of the lands of his intestate in aid of assets. A son of deceased, a defendant to the action, by his answer claimed the land under an unrecorded deed from his father. *Held*, that plaintiff might, at the trial, attack this deed for fraud, although no charges of fraud were preferred in the bill.

[Ed. Note.—Cited in Spoon v. Smith, 36 S. C. 592, 15 S. E. 800.

For other cases, see Equity, Cent. Dig. § 648; Dec. Dig. ⇐326.]

[2. *Fraudulent Conveyances* ⇐139.]

A conveyance in consideration of a pre-existing debt, the vendor retaining possession, and such possession not satisfactorily explained, is fraudulent as to creditors.

[Ed. Note.—Cited in Archer v. Long, 32 S. C. 186, 11 S. E. 86; DuRant v. DuRant, 36 S. C. 58, 14 S. E. 929.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 441; Dec. Dig. ⇐139.]

[3. *Fraudulent Conveyances* ⇐312.]

But there being no actual fraud in the case, the vendee was permitted to establish the indebtedness of the intestate, the consideration in

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part *of the conveyance; and also to receive from the proceeds of the sale of such land the value of other property, which was also a part of the consideration, said property having been sold by intestate and applied to his debts.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 963–965, 967; Dec. Dig. ⇐312.]

[4. *Appeal and Error* ⇐1009.]

Findings of fact by the Circuit judge approved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3974; Dec. Dig. ⇐1009.]

[5. *Evidence* ⇐106.]

Where charges of actual fraud are made against a defendant in a civil action, resting in great part upon circumstances, the defendant may introduce testimony as to his general character.

[Ed. Note.—Cited in Smith v. Lafar, 67 S. C. 495, 46 S. E. 332.

For other cases, see Evidence, Cent. Dig. § 178; Dec. Dig. ⇐106.]

Before Kershaw, J., Newberry, July, 1883.

The case is fully stated in the Circuit decree, which was as follows:

This case was commenced under the old system of pleadings, by a bill in equity, by the plaintiff as administrator of the estate of Graves Spearman, deceased, alleging among other things, the insufficiency of personal assets to pay the debts of the deceased; that he himself held a note against his intestate under seal, which he set forth as an exhibit to the bill, upon which a considerable sum remained due, and that there were other debts; and there was a necessity for the sale of the real estate of the intestate to pay debts: that G. W. L. Spearman was in possession of a tract of land described in the bill, whereof the said intestate was owner at the time of his death; and that he had also possessed himself of personal property of the deceased. The bill prayed that the said G. W. L. Spearman be required to account for the personal property, and that the land be sold and the proceeds applied, so far as needed, to the payment of the debts of deceased. Graves Spearman was the father of G. W. L. Spearman, of Nancy Werts, wife of Jonathan Werts, and of the plaintiff, and the grandfather of the defendants.

No defence was made to the bill, except by G. W. L. Spearman, who answered, denying the possession of the personal property, except a few articles of little value, and admitted that he was in possession of the land, but denied that it was the land of the intestate at his death, but that it was the absolute property of him, the said G. W. L. Spearman. He also admits that the estate of the said intestate was insufficient to pay the debts of his estate.

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*The cause came to trial at November term, 1879, upon the law side of the Court of Common Pleas upon an issue submitted to a jury. There was no written statement of the issue, but his honor, the presiding judge, directed the jury that their verdict should be "either for the defendant, G. W. L. Spearman," or "that Graves Spearman died seized and possessed of the land, and that it is subject to the payment of the debts and distribution among the heirs at law of Graves Spearman." There was much testimony heard at the trial before the jury, and their verdict was "that Graves Spearman died seized and possessed of the 423 acres of land, and that it was liable for his debts, and to distribution among his heirs at law."

A motion for a new trial was thereupon made for the defendant, G. W. L. Spearman, and refused, and an order was signed by the presiding judge, reciting and confirming the verdict, directing that it be referred to the master to take the accounts of the administrator, and to determine and report upon all the issues of law and fact herein undisposed of, and calling in the creditors of Graves Spearman to establish their demands, and enjoining suits against the administrator in the meantime. This order was made at chambers. An appeal was thereupon taken by the defendant, G. W. L. Spearman, to the Supreme Court, upon various grounds. The case was returned to this court for a hearing on the merits, it being considered that the hearing upon which the said order was made could not be had at chambers. 16 S. C., 618.

At the present hearing, much additional testimony was introduced, and the whole case was ably and fully argued by learned counsel on either side. Numerous questions, both of law and fact, were discussed, but only such will be stated here as I consider necessary to sustain this conclusion. On the

10th day of April, 1866, the deceased, Graves Spearman, conveyed, by deed duly executed and delivered to G. W. L. Spearman, the tract of land described in the complaint, the consideration recited being $4,230. This land constituted all of the real estate of Graves Spearman, except twenty-five acres, whereon he resided. He was largely indebted at that time to the plaintiff, on the note set up in the bill, and to others. On the same day, G. W.

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L. Spear*man conveyed, by his deed duly executed and delivered to Graves Spearman, 279 acres of land, the consideration recited being $3,060. It is not denied that the latter conveyance was the consideration in part of the former. These 279 acres of land were made up of two parcels. The first, 212 acres, was conveyed by Graves Spearman to G. W. L. Spearman 28th December, 1859, when Graves was a man of large means and owing few debts, and they of small amount. Of this land, G. W. L. Spearman had been in possession from the date of the conveyance of the same to him. In a list of advancements made by Graves Spearman to G. W. L. Spearman, the value of this land is put down at $2,968. The list bears date December 20, 1849, and embraces a number of negroes given off by Graves Spearman to his children, G. W. L. Spearman, N. C. Werts, and Drucilla Werts. After giving off these slaves, he had upwards of forty remaining, worth at that time, at the value stated in the list of advancements, an average of between $900 and $1,000 each. Some of the witnesses said they were worth that. The advancement list was in the writing of Graves Spearman, and in a book kept by him. G. W. L. Spearman says he bought this land from his father. The deed conveying the same to him recited the consideration to be $2,968. This deed had but one witness; still, if it was made for a valuable consideration, it would be a good conveyance in equity, or if even for a good consideration. Story Eq. Jur., §§ 166, 165; 1 Foubl. Eq., ch. 1, § 7, notes.

This tract (279 acres) of land was subsequently conveyed by Graves Spearman to one Travis Hill, in settlement of a debt which he owed him, amounting to much more than the consideration named in the deed of G. W. L. Spearman conveying the same to him, and more than the consideration named in the deed for the tract of land (423 acres) conveyed by Graves to G. W. L. Spearman.

The other tract of land which, with the 212 acres, composed the tract of 279 acres, was derived by G. W. L. Spearman from one T. J. Taylor by purchase in 1858 (November 1st) for $1,000, the deed conveying 113 40-100 acres. At the time of this purchase there was a mortgage upon this land, held by one Adams (as I understood at the hearing),

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which, to the extent of $500, *was paid by Graves Spearman. In the list of advancements put down to G. W. L. Spearman, he is charged with the payment to B. Adams of $500. I assume that to be the same sum paid by Graves on the Taylor land. If so, as he entered it among the advancements, he intended it as a gift to G. W. L. Spearman, and being in circumstances at that time to make a valid gift, it must be so considered. The portion of the Taylor land so conveyed, with the 212 acres, was sixty-seven acres, making up the 279 acres conveyed by G. W. L. to Graves Spearman as part of the consideration of the deed for the 423 acre tract. To this extent, therefore, there was a valuable consideration passed from G. W. L. to Graves Spearman for the land in question.

G. W. L. Spearman sold the remainder of the Taylor land to Gen. A. C. Garlington, and lent the proceeds, $900, to Graves Spearman, taking his note for it. This, he testifies, constituted the remainder of the consideration for the land; that he gave up the note to his father when the papers were executed between them. There was in evidence a deed from Graves to G. W. L. Spearman and G. H. Werts, dated January 12, 1867, conveying to them twenty-five acres of land (the homestead) and personal property, valued at $132. The consideration of this deed was nominally $2,000. George H. Werts testified that Graves Spearman owed him $1,000; that Graves proposed to him and G. W. L. Spearman to convey to them his home place and his household and kitchen furniture in payment of their notes; that they finally agreed to take it, and credit their respective notes with the amount of $1,000 each. They then united in executing a lease to the home place to Graves for his lifetime, at an annual rent of one dollar, which lease was produced and put in evidence.

G. W. L. Spearman testified that he worked with his father from 1846 to Christmas, 1866, and attended to his business, for which he claimed a sum over $3,800. It was claimed that after deducting the value of the 212 acre tract of land conveyed to him by his father, for the consideration expressed in the deed ($2,968), his father still owed him over $800, and that he held his father's note for that amount. He testified that he paid for the 423 acres of land by his deed for the 279 acres, and by his note against his father for $815, and immediately thereafter men-

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tions his father's *indebtedness to him for services. From this it may be assumed that he meant that the note for $815, given in part payment for the land conveyed to him (423 acres) was given in settlement between him and his father for the difference between the value of the 212 acres and his services. This is not consistent with the fact that in the account for advancements kept by his father in 1859, he is charged with the value of the land, $2,968, and with the further fact that he is charged in the same account with

$500 paid to Adams. I regret to say that there are other inconsistencies.

G. W. L. Spearman, in his testimony at the hearing before me, said: "Father owed me $900. I offered this money to Taylor on the land, and he would not have it, and I let father have it and he gave me his note for it. * * * The day father conveyed the twenty-five acres of land, the $956.30 note was given up to father. I have not seen it since, except that I saw it when looking over the papers after his death. * * * The $900 I let father have I got from Gen. Garlington. * * * The $900 was paid to Travis Hill on father's note, and father gave me his note. The debt to Travis Hill was compromised by land."

It will be noticed that he says he got the money from Garlington. Garlington's deed was dated February, 1867. He says, further, that his father gave him a note for it, and that he gave up the note the day his father conveyed to him the twenty-five acres. The deed bore date in January, 1867, while Geo. H. Werts testified that the arrangement for that purchase was completed in the latter part of February or the first of March, and the credits were dated back to the date of the deed. By that time the sale had been made to Garlington, and G. W. L. Spearman might have had his father's note for the money received by him from Garlington and lent to his father. There is no testimony to the contrary concerning this alleged loan, and Spearman mentions circumstances in connection with the subject which seem to make it probable that the transaction did take place, and which might have been disproved if not true. I think the evidence warrants the conclusion that G. W. L. Spearman did hold the note of Graves at that time to the amount stated by him, and that the

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*same was given up in payment for the twenty-five acres, the home place.

I conclude also that at the time of the conveyance of the 423 acres, G. W. L. Spearman held a note against his father, amounting at that time, with interest, to eleven hundred and seventy dollars ($1,170), which was given up as part of the consideration for that land. I deduce this from the same testimony of G. W. L. Spearman, that he had such a note, uncontradicted by any other witness. He is corroborated also by the statement of Geo. H. Werts, who says that G. W. L. Spearman claimed in the presence of Graves at one time that the latter owed him a thousand dollars before the land was sold to Garlington, and therefore not referring to the note given for that money. True, he says this was in October, 1866, but he may have been mistaken in the time, as he gave no reason for remembering the date.

In April, 1866, Graves Spearman resided at the home place, and continued to reside there until the time of his death, in April, 1867. There was some cleared land upon the 423 acre tract, but no buildings at the time of the transfer. About Christmas, 1866, G. W. L. Spearman went into possession of the land conveyed to him, except fifty acres of it, which remained in the possession of Graves, under a lease from G. W. L. Spearman to him, bearing date April 18, 1866, at an annual rent of one dollar. G. W. L. Spearman improved the land, erected buildings, and cleared fifteen or twenty acres of it, and has continued in the use and possession of it to the present time. The values set upon the lands conveyed by Graves to G. W. L. Spearman, and by the latter to the former, in the deeds respectively, do not appear to have been over or under stated. One witness estimated the land conveyed by the latter to be worth as much as the other.

The declarations of Graves Spearman, made both before and after the transactions, were admitted by the presiding judge at the first trial. As they are in evidence, I shall not exclude them. They are sufficient to cast suspicion upon the transaction, but not conclusive of fraud on the part of G. W. L. Spearman. The statement of the witnesses in regard thereto are not always consistent with other facts. Their evidence in other points is contradicted by G. W. L. Spear-

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man, and they are all interested in *the case, with one exception, and his statement is not conclusive. G. W. L. Spearman proved a most excellent character by a number of witnesses, some of them known to me as of the highest character and intelligence. There was objection made to the introduction of this testimony, and an exception taken when it was admitted. The testimony was admitted upon the principle announced in Dawkins v. Gault, 5 Rich., 153, that "where an actual fraud is charged, perpetrated with a fraudulent intent, and the proof of the charge consists of circumstances, then good character, as in a case of crime, might be resorted to as a circumstance to prove innocence." The question here, in so far as it involves a charge of actual fraud upon the part of G. W. L. Spearman, appeared to me to be of that character, and for that reason, and upon that point only, the evidence was admitted and considered. There are cases elsewhere to the contrary, but I consider the rule as reasonable, and resting upon authority which I am bound to respect. Numerous objections to testimony were made by defendants' attorney, but as they were put in writing and were not discussed at the trial, they will not be further noticed here.

One circumstance upon which great stress was laid, as tending to fix actual fraud upon G. W. L. Spearman, was the mutilation of a book of Graves Spearman by the former, in which certain accounts were kept. It was supposed that it was done to suppress evidence. I am satisfied that the account given

by G. W. L. Spearman of that transaction was correct. By comparison, I am satisfied that the leaves cut out by him are the same produced by him at the hearing, and which he had put together as a blank book for his own use, and contained no entries of Graves Spearman. The other leaves cut or torn from the book I have no doubt were used, as G. W. L. Spearman testified, for writing paper during the war, when that article was obtained with great difficulty.

There are two leading questions of law to be disposed of:

First. It is insisted that the plaintiff had no right to bring an action to avoid his intestate's deed, and many authorities were cited to support the proposition. The ground taken was that a grantor cannot avoid his own deed, and as an administrator succeeds to the intestate's title, he cannot aver against the deed of his intestate. This proposition

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of law is eminently sound, but in this *case the plaintiff was not only an administrator of the grantor, but also a creditor, and sued in both capacities. He had a right to come into equity, because he had no remedy at law, since he could not sue himself. Any other creditor but himself would have been compelled to exhaust his legal remedy before coming into this court, but he having no such remedy, had a right to come into this court directly. A very late case having been decided upon this precise point, and in a case parallel to this, precludes the necessity of any discussion here. In Winsmith v. Winsmith (15 S. C., 611), an action was brought by an administratrix to sell land in aid of assets, and creditors were called in. Held: "That the administratrix, being herself a creditor, could, as creditor, object to the validity of a voluntary bond and mortgage given by her intestate when presented for proof." I conclude, therefore, that plaintiff had the right to contest the deed of Graves Spearman. The action was such as an administrator could rightfully maintain, being an ordinary bill to sell lands in aid of personal assets, and for an account of personal property in possession of a distributee and heir. The defendant at the trial set up the deed, and the plaintiff undertook to show that it was void as against creditors. Under the authorities cited I think he could do this.

The next question is, Was the deed of Graves Spearman to G. W. L. Spearman, conveying 423 acres of land on the 10th April, 1866, void as against creditors? I conclude that it was. It was made at a time when the grantor was in embarrassed circumstances, resulting in the insolvency of his estate. It was made, in part, in consideration of a pre-existing debt due by the grantor to the grantee. The grantor remained in possession of a portion of the land under a lease made for a nominal consideration. The deed of conveyance was not placed upon record. The grantor conveyed away all of his property, mostly to his children, even his homestead and household furniture, retaining possession under a lease for a merely nominal consideration, none of these conveyances being recorded. As I understand the law in South Carolina to be, a conveyance of land made under such circumstances cannot stand as

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against the claims of existing credi*tors, and being void as to one class, is void also as to all other creditors.

The cases upon this subject have been so often and so fully discussed here and elsewhere, that I do not purpose to do more than refer to the authorities. The English and American cases are collated and discussed by Ch. Kent (2 Com., 515, et seq.) with the ability for which that great jurist was so highly distinguished, and also in the American edition of Smith's Leading Cases (vol. 1, p. 1), under Frazier's Case. The notes of the editors state the law in this state succinctly and correctly.

[Here the judge cited and quoted largely from Smith v. Henry, 1 Hill, 16; Maples v. Maples, Rice Eq., 310; Anderson v. Fuller, McMull. Eq., 27 (36 Am. Dec. 290).]

From these authorities, it is properly said that in South Carolina the rule is established "that where a pre-existing debt is the consideration of a conveyance, or a part of the consideration, retention of possession and use, without a new agreement to that effect, on adequate consideration, is a fraud in law." 1 Sm. Lead. Cas., 63. The cases establishing this doctrine were subscribed to by all the judges of the Court of Errors who heard the case of Cox v. McBee, 1 Speers, 204. "If there be a new contract of hiring on sufficient consideration, it will rebut the presumption of fraud; * * * but retention of possession after an absolute sale for a price paid is not conclusively fraudulent, but only prima facie evidence of fraud, and capable of explanation." Sm. Lead. Cas., supra, and cases therein cited. No case since Anderson v. Fuller has changed the rule as applicable to cases where an antecedent debt constituted part of the consideration. This case falls distinctly within the inhibition of the rule as stated, and the other circumstances attending the transaction materially strengthen the legal presumption that the conveyance in question was fraudulent, and consequently void as against creditors.

Having reached this conclusion, the question arises, Is G. W. L. Spearman to be allowed the value of the actual considerations paid by him? As I have not found actual fraud against him, and as the land transferred to Graves was applied to the satisfaction of a debt due by him for more than

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double the value of the *land, I think, upon the principles adopted in Anderson v. Fuller, that G. W. L. Spearman should be repaid the value of that land. He will be allowed nothing for his improvements, but

will not be made to account for rents, or use and occupation. As to the note of Graves cancelled in the trade for that land, it will be reinstated as a debt against the estate of Graves Spearman, according to the character of the note, to the amount of eleven hundred and seventy dollars ($1,170), but without interest. This amount is the difference between the values of the two tracts of land exchanged between Graves and G. W. L. Spearman, and must have been the amount due on the note at that time. A reference will be necessary to determine whether it was a sealed note or otherwise.

The question regarding the personal property having been withdrawn from my consideration by consent of counsel, this decree may here be closed.

It is ordered and decreed, that it be referred to the master to take testimony and report whether the note of Graves Spearman, which constituted part of the consideration for the conveyance of the 423-acre tract of land to G. W. L. Spearman, was a sealed note or otherwise, and that the same be established as a debt against the estate of Graves Spearman to the amount of eleven hundred and seventy dollars ($1,170), according to the class of claims to which it shall be determined to belong; that the tract of land described in the complaint, containing four hundred and twenty-three acres, as set out in the deed from Graves Spearman to G. W. L. Spearman, dated April 10, 1866, be sold by the master, as of the estate of Graves Spearman, on the first Monday in November next, or some other convenient sales-day thereafter, to the highest bidder for cash; that he pay from the proceeds of sale, first, the costs of these proceedings and the costs of sale; next, that he pay to G. W. L. Spearman the sum of three thousand and sixty dollars, being the value of the land transferred by him to Graves Spearman in exchange for the aforesaid tract of 423 acres; next, that he pay the debts established, or that may be established, in this cause against the estate of Graves Spearman, according to their legal rights and priorities; and, lastly should anything remain, that he

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pay the same to the *heirs at law of Graves Spearman, according to their several rights and interests therein.

The plaintiff, G. H. Werts, and the creditors of the said Graves Spearman, appealed from this decree on the following grounds:

I. Because his honor erred in not finding that the evidence established a clear case of actual fraud on creditors in the deed from Graves Spearman to G. W. L. Spearman for the 423 acres of land, and that it was so intended both by the alienor and alienee.

II. Because his honor erred in allowing G. W. L. Spearman, out of the proceeds of the sale ordered in the decree, the sum of $3,060, being the consideration expressed in the deed for the 279 acres from him to Graves Spearman, at all, and much more so in giving him a preference over creditors whose claims have been established in this case.

III. Because his honor erred in directing that the note alleged to have been cancelled in the transaction be reinstated as a debt against the estate of Graves Spearman.

IV. Because the verdict of the jury was fully sustained by the evidence and by the opinion of the judge who heard the case when it was tried before the jury.

V. Because his honor erred in allowing evidence to be introduced to prove the general character of defendant.

VI. Because his honor erred in finding as a fact that G. W. L. Spearman did not mutilate the book in which Graves Spearman kept an account of his transactions and particulars with his children, when it was proved by four reliable witnesses, two of whom are in no way interested in this case, that they saw him do it.

VII. Because his honor erred in finding as a fact that the deed for the 423 acres from Graves Spearman to G. W. L. Spearman was duly executed and delivered.

VIII. Because his honor erred in finding as a fact that it is not denied that the conveyance of the 279 acres was the consideration in part of the 423 acres, when the contrary is true.

IX. Because his honor erred in holding that the $500 paid by G. Spearman for G. W.

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L. Spearman to Adams on his mort*gage on the Taylor tract was a gift, simply because it was found entered at the bottom of a list of property given by G. Spearman to G. W. L. Spearman, when he found that the land $2,968, which was also entered at bottom of said list, was not a gift but a purchase.

X. Because his honor erred in finding as a fact that G. W. L. Spearman sold the remainder of the Taylor land to A. C. Garlington, and loaned the proceeds ($900) to G. Spearman, which constituted the remainder of the consideration for the land, when the evidence shows that this could not have been so, for Garlington only gave $596.25 for said land, and paid for it and took a deed near a year after the alleged transfer of the 423 acres to G. W. L. Spearman.

XI. Because his honor erred in disbelieving the six witnesses sworn on the part of the plaintiff, when they testify to what they actually saw and heard, and when there was no attempt to impeach their character for truthfulness, and when they were sustained by papers produced and the circumstances developed in the case.

XII. Because his honor erred in finding that G. W. L. Spearman had another note besides the $956.30 note, and that he is uncontradicted in this by any other witness, when the declarations of himself and G. Spearman, proved by some four witnesses,

show that the said G. Spearman only owed him about $1,000 on settlement.

XIII. Because his honor erred in not charging G. W. L. Spearman with rents on the 423 acres of land in controversy.

The defendant, G. W. L. Spearman, appealed on the following grounds:

I. Because his honor, the presiding judge, erred in not finding as a matter of fact that the said G. W. L. Spearman purchased the tract of 423 acres, here in dispute, from his father, Graves Spearman, for a valuable and sufficient consideration.

II. Because his honor, the presiding judge, erred in not finding as a matter of fact that the said G. W. L. Spearman purchased the said tract of land in good faith, without knowledge of any intention on the part of

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the said Graves Spearman to de*fraud, hinder, or delay his creditors, and without reason to suspect any such intention.

III. Because his honor erred in not finding as matter of fact that the said G. W. L. Spearman let the fifty acres of land to Graves Spearman, after the acquisition of the 423 acres, as a mere gratuity, and that its reservation for the use of Graves Spearman was not any part of the consideration of the transfer of the 423 acres from Graves to G. W. L. Spearman.

IV. Because his honor erred in not excluding all declarations of Graves Spearman made after the execution of his deed to G. W. L. Spearman as incompetent to impeach or explain that deed.

V. Because his honor erred in not finding as a conclusion of law, that the said G. W. L. Spearman, by such said purchase and the conveyance of the said land herein, acquired a valid and sufficient title to the said land, and that the said land is not liable to the claim of creditors of the said Graves Spearman.

VI. Because his honor erred in not dismissing the bill, and requiring the plaintiff to pay the costs of the action.

VII. Because his honor erred in not dismissing the bill, inasmuch as it alleged that Graves Spearman died seized and possessed of the 423 acres of land, whereas it was established beyond dispute that he, in 1866, conveyed the same to the defendant, G. W. L. Spearman, who was in possession at the death of Graves Spearman.

VIII. Because his honor erred in not dismissing the bill, inasmuch as it does not allege any conveyance which it claims ought to be set aside, nor embrace any charge of fraud against creditors or others, which ought or could operate as a reason for setting aside the conveyance attempted on the trial to be set aside, and which his honor by his decree undertakes to set aside.

Others, defendants, appealed upon substantially the same grounds as the creditors.

Messrs. L. J. Jones and Geo. S. Mower, for plaintiff and creditors.

Messrs. Y. J. Pope and Suber & Caldwell, contra.

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*March 9, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Graves Spearman, late of Newberry County, died in 1869 intestate. George H. Werts (respondent), a son-in-law of the deceased, administered on the estate, and in February, 1870, he instituted the proceeding below, in which he alleged that he was a creditor of the estate; that the personal property in his hands as administrator was insufficient to pay the debts; that the defendant, G. W. L. Spearman, a son of the deceased, was in possession of a portion of the personalty, and that the deceased died seized and possessed of a certain tract of land of 423 acres, more or less, and prayed an accounting from G. W. L. Spearman as to the personalty alleged to be in his hands, and the sale of the aforesaid land in aid of the personalty, and that creditors be called in. No defence was interposed by any of the parties except G. W. L. Spearman, who answered, denying his accountability for any personal property, and also asserting title in himself of the tract of land in question.

The case came to trial at the November term of Common Pleas for Newberry County in 1879, when an issue as to the title to the land was submitted to a jury. The plaintiff introduced a deed to Graves Spearman, the intestate, from the then Commissioner in Equity for said county, dated in 1828. He also proved that the estate was indebted to him in a large amount by seal note, dated March 22, 1863. The defendant relied upon an unrecorded deed from Graves Spearman to himself, dated April 10, 1866, the consideration being $4,230, which according to the evidence, was paid by the said G. W. L. Spearman to Graves in the conveyance by the former to the latter of a certain other tract of land containing 279 acres, valued at $3,060, the balance being paid by a note held by G. W. L. Spearman on his father, which was delivered up and cancelled. The 279-acre tract it appeared was made up out of a tract of land of 212 acres previously obtained by G. W. L. Spearman from his father and a portion of a tract which he, G. W. L., had bought from one Taylor.

There was some evidence that the 212-acre tract had been given to the said G. W. L. by his father as an advancement several

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*years back. It further appeared that the said G. W. L. occupied the land, but did not live upon it; that he cultivated it sometimes with his own hands and sometimes with his father's and his own together. It was further in evidence that some days after the

purchase, i. e., April 18, 1866, he had leased fifty acres of the land to his father for life at a consideration of one dollar per annum, with the privilege of getting all necessary timber, fuel, &c., from any of his lands. At the time the 212-acre tract was transferred by Graves to his son, he, Graves, was a man of considerable estate. At the time of the last transaction, however, in 1866, he was much embarrassed, and it was admitted that at his death his personal assets were insufficient to pay his debts. It further appeared that Graves in his life-time, after he had obtained the 279-acre tract from his son in the transfer of the lands mentioned, had conveyed said tract to one Francis Hill in settlement of a large debt, amounting to much more than the consideration mentioned in the deed conveying said land to him.

The jury found that Graves Spearman died seized and possessed of the 423-acre tract, and that it was liable for his debts and distribution among his heirs at law. A motion was then made for a new trial on the minutes of the judge, which, after argument, was refused, and upon appeal taken to this court the case was remanded to the Circuit Court for a new trial. 16 S. C., 618. The cause came on again for a second trial before his honor, Judge Kershaw, at the July term of the court, 1883. Upon this trial the testimony offered at the former trial was heard by consent, including certain declarations of Graves Spearman, made both before and after the land transaction above, with other and additional evidence.

The two leading questions of law discussed and decided in the decree of his honor, Judge Kershaw, are: First. Whether the plaintiff, being administrator of the intestate, could contest the intestate's deed of the 423 acres to the defendant. Second. Whether said deed was void as to creditors. As to the first question his honor ruled that the plaintiff being a creditor as well as administrator, and having no remedy at law, could maintain the action, contesting said deed, citing Winsmith v. Winsmith, 15 S. C., 611. As to the second,

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finding as matter of fact that the deed *from the father to the son was executed when the father was in embarrassed circumstances, resulting in the insolvency of the estate; that it was made in part in consideration of a pre-existing debt; that the grantor remained in possession of a portion of the land under a lease for a nominal consideration; that the deed was never recorded; and that the grantor remained in possession of all his property conveyed to his other children under leases from them—he adjudged the said deed to be void as against creditors, but without "actual fraud" in G. W. L.; and inasmuch as the land transferred by G. W. L. to his father was applied by the father to the satisfaction of a large debt due by him to Hill, he further adjudged and decreed that the said G. W. L. should be refunded the value of said land, without improvements, and not to account for rents and profits; and also that the said G. W. L. should be allowed to set up against the estate the note which he had delivered up in the land trade according to its rank, and to the amount of $1,170. And he ordered the land to be sold, the proceeds after the payment of the costs to be applied, first, to the payment to G. W. L. Spearman of the sum of $3,060, the value of the land transferred by him to his father in exchange for the 423-acre tract; next, to the payment of the debts established, or that may be established, against the estate according to their legal rank; and, lastly, should anything remain, to be paid to the heirs at law, according to their rights.

The appeal of the defendant does not question the ruling of the Circuit judge as to the right of the plaintiff to contest the deed of his intestate as a general proposition. That question, therefore, is not before us. The eighth exception, however, denies his right to do so in this action, as the bill was not framed for that purpose, there being no charge of fraud therein nor any demand that said deed should be vacated and set aside. Should the bill have been dismissed on this ground, is the question raised in this exception. In Lowry v. Pinson (2 Bail., 324 [23 Am. Dec. 140]) the plaintiff was allowed without question to attack and defeat for fraud the deed of defendant interposed at the trial, and yet there was no allegation of fraud in the declaration nor claim that defendant's deed should be declared void. The action was the ordinary action for trespass to try titles, the

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plaintiff claiming as *purchaser at sheriff's sale, and the defendant under a prior deed from the judgment debtor. So, too, in Thomas & Ashby v. Jeter & Abney, 1 Hill, 380; Smith v. Culbertson, 9 Rich., 106, and in many other cases.

In fact, the practice in the law courts of contesting deeds in this way for fraud is of old standing, and has been frequently pursued in the past. The action below, it is true, was not in form an action to try titles, yet it assumed that form at the trial, by the defendant asserting title in himself to the land in dispute. The plaintiff, as administrator and creditor, claimed that it was necessary to sell the real estate of his intestate in aid of the personalty to pay debts, and he alleged that the intestate died seized and possessed of the land in question. The defendant appeared and claimed the land himself, by virtue of a deed from the deceased, thus raising the question of title, and therefore putting the validity of his deed in issue himself. Under these circumstances, and by analogy to the cases above referred to, ought not the plaintiff to have been allowed to assail the deed at the trial, when for the first time it had perhaps been presented or known to exist;

especially in a case like this, where the plaintiff, because of the fact that he was the administrator of his deceased debtor, had no means of reducing his debt to judgment, and of exhausting the estate by execution and return of nulla bona? Unless this could be done, in cases like the present, then the principle that there can be no legal right without a remedy to enforce it should be exploded.

Besides, in Ragsdale v. Holmes (1 S. C., 96) it was held that creditors of an estate could seek the application of the assets to their claims, by means of a creditors' bill, before reducing them to judgment and without exhausting their legal remedies. That necessity, it was said in that case, existed inter vivos, "for the reason that the estate of the living debtor does not become assets for the payment of debts until the exhaustion of the legal remedies is complete, whereas the estate of a deceased debtor, or so much thereof as may be required for the payment of his debts, becomes assets from his decease."

The next question involves the correctness of the Circuit decree as to the validity of de-

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fendant's deed. The Circuit judge, *though finding no "actual fraud" in the defendant, yet declared this deed void for legal fraud under the cases of Smith v. Henry, 1 Hill, 16, and Maples v. Maples, Rice Eq. 310, and the other cases referred to in the decree, on the ground that where property is transferred by a debtor to his creditors in payment of a pre-existing debt, either in whole or in part, the debtor still retaining possession, the transaction is per se fraudulent. True, he says that the other circumstances attending the transaction strengthened the legal presumption, and upon these two principles he adjudged the deed fraudulent.

We think he gave rather too much weight to Smith v. Henry, especially in the light of subsequent cases, which, though not distinctly overruling that case, have modified and explained the principle, which seems to have been applied there by the authority of Chancellor Harper himself, who pronounced the opinion in Smith v. Henry. In Jones & Briggs v. Blake and wife (2 Hill Eq., 636) it was held, Chancellor Harper delivering the opinion, that where the debtor retained possession by virtue of a contract of hiring, made after the sale and independent thereof, this relieved the transaction of the per se fraudulent feature, as laid down in Smith v. Henry. The same doctrine was held in Pringle v. Rhame, 10 Rich., 75 [67 Am. Dec. 569], which was also a case of hiring, and in the recent case of Pregnall & Brother v. Miller & Kelly, 21 S. C., 385 [53 Am. Rep. 684]. Considering the principle upon which these two cases were based, this court held that it could not be confined in its application to a case of hiring alone, but that it extended to all cases where possession was retained, leaving such possession an open question in every case, with the burden, however, of explaining it satisfactorily upon the party attempting to sustain the deed, and in the absence of such satisfactory explanation, to have the effect as held in Smith v. Henry.

Now, in this case we have found no testimony explaining the possession retained here. The conveyance was made upon the consideration of a pre-existing debt, in part at least. The possession of a portion of the land was retained upon a nominal consideration, and this was to continue for the life of the grantor. With these facts unexplained, we think the decree of his honor may be sustained even in accordance with Pringle v.

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Rhame and *Pregnall & Brother v. Miller & Kelly, supra. The Circuit judge distinctly found no actual fraud on the part of G. W. L., and on that account he adjudged that the defendant should be refunded the value of the 279 acres transferred to his father in the exchange of lands, and also that he should be allowed to set up against the estate his note which was delivered up and cancelled in that trade also. McMeekin v. Edmonds, 1 Hill Eq., 294 [26 Am. Dec. 203], sustains this.

Under the rules which control this court as to the findings of fact in equity causes, we cannot interfere with such findings below, as we are unable to say that the manifest weight of the testimony is against these findings.

Lastly, the plaintiff excepted to the admission of testimony as to character of the defendant, G. W. L. No doubt, as a general rule in civil cases, such testimony is incompetent, but there are cases even on the civil side where such evidence has been received, under a principle which makes it competent in similar cases. Mr. Greenleaf, than whom there is no higher authority on evidence, says: "In civil cases, such evidence [speaking of general character] is not admitted, unless the nature of the action involves the general character of the party, or goes directly to affect it;" referring to several cases in the notes. Green. Evid., § 54. And further, he said: "Generally in actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it." And Judge O'Neall, in Dawkins v. Gault (5 Rich., 153), though the case did not turn on it, recognizes this principle, and referring to Greenleaf, and also to Smets v. Plunket (1 Strob., 372), said: "Where an actual fraud is charged, perpetrated with a fraudulent intent, and the proof of the charge consists of circumstances, then good character, as in a case of crime, might be resorted to." The Circuit judge says the "case below was of that character;" charges of actual fraud were made against the defendant, and in a great part resting on circumstances; "and upon that point only the

evidence was admitted and considered." We do not think this was error.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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*RAILROAD COMMISSIONERS v. RAILROAD COMPANY.

(April Term, 1884.)

[1. *Appeal and Error* ⇐169.]

This court can make no original decision upon a point not ruled upon below.

[Ed. Note.—Cited in Dargan v. West, 27 S. C. 157, 3 S. E. 68; State v. Turner, 36 S. C. 541, 15 S. E. 602.

For other cases, see Appeal and Error, Cent. Dig. § 1034; Dec. Dig. ⇐169.]

[2. *Courts* ⇐39.]

Whether the statutes gave to the Railroad Commissioners the right to regulate charges to points outside of this state, is a question of jurisdiction which may be raised at any time.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 152–156; Dec. Dig. ⇐39.]

[3. *Carriers* ⇐12.]

The general railroad law of this state was intended to confer upon the Railroad Commissioners the right to regulate freight upon all railroads where any part thereof was within this state, and to all stations on those roads, including stations outside of the state.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7–11, 15–20; Dec. Dig. ⇐12.]

[4. *Commerce* ⇐8.]

The power to regulate commerce among the states is given exclusively to Congress; the transportation of freight, or of the subject of commerce, is a constituent part of commerce itself; the transportation of passengers or merchandise through a state, or from one state to another, is commerce among the states, and exclusively within the control of Congress; but, as a general rule, each state may control, as a matter of domestic concern, all the railroads and other things, proper subjects of public control, which are located entirely within the borders of the state, although such regulating control may affect incidentally general inter-state commerce, with which the subject may connect.

[Ed. Note.—Cited in Hall v. South Carolina R. Co., 25 S. C. 567, 568; Lowe v. Seaboard Air Line Ry., 63 S. C. 250, 41 S. E. 297, 90 Am. St. Rep. 678.

For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⇐8.]

[5. *Commerce* ⇐33.]

Transportation of merchandise through a state, or from one state to another, although the carriage may be continuous, is inter-state commerce, and beyond the control of the state, even where Congress has taken no action upon the subject.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. ⇐33.]

[6. *Commerce* ⇐61.]

Any regulation of freights for the transportation from Columbia in this state to points in the State of North Carolina, by the statutes of this state, is beyond the power of the state, because of its being an invasion of the power exclusively vested in Congress by the constitution of the United States.

[Ed. Note.—Cited in Sternberger v. Cape Fear & Y. V. R. R. Co., 29 S. C. 513, 7 S. E. 836, 2 L. R. A. 105.

For other cases, see Commerce, Cent. Dig. § 82; Dec. Dig ⇐61.]

Before Kershaw, J., Richland, May, 1884.

The decision of the Circuit judge was as follows:

This is an appeal from the decision of the Railroad Commissioners under the recent amendments of the general railroad law, heard May 24, 1884. There are serious questions as to the jurisdiction of the judge to whom is committed the hearing of these appeals which suggest themselves, but as no objection has been made to the hearing upon that ground, I will proceed to determine the matters submitted upon their merits. This decision is required to be filed within ten

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days after the hearing; and as the *cases referred to and the statutes to be considered are so numerous that they could scarcely all of them be carefully read in the time at my disposal, but little more than a bare decision can be expected, without the support of that mature consideration which questions of such magnitude and importance ought to receive.

This first appeal is from the decision of the Commissioners against a charge made by appellants in their rates of freight on merchandise shipped by their road from Columbia, South Carolina, to various points in North Carolina on the Chester & Lenoir Railroad, being one of the roads consolidated with and controlled by the appellants' company. Several grounds are urged by the appellants against the authority of the Commissioners to require them to amend their rates in conformity with the decision of the Commissioners. I shall notice, first, the objection that this decision is an invasion of the domain of inter-state commerce, a subject exclusively within the control of Congress, under the constitution of the United States, article 1, § 8.

As this is a question affecting the constitution of the United States, if we can find that it has been settled by the decisions of the federal courts, they would be of controlling authority and binding upon the courts of this state. It has been established by decisions in those courts that "the transportation of merchandise from a place in one state to a place in another is commerce among the states," and "to fix or limit the charges for such transportation is to regulate commerce," and "a statute fixing or limiting such charges for transportation from places in one state to places in another state is a regulation of commerce among the states," and "the power to regulate such commerce is vested by the constitution in Congress," and "this power of Congress is exclusive, at least in all cases where the subjects over which the power is exercised are in their nature material, or admit of one uniform system or plan of regulation." This is an extract from the summary of what is laid down as settled in the federal courts, by McCrary, J., in one of the most recent cases

on the subject, Kæiser v. Illinois Central R. R. Co., 18 Fed. Rep., 153. To sustain this summary, he cites Crandall v. Nevada, 6 Wall., 35 [18 L. Ed. 745]; Passenger Cases, 7 How., 283 [12 L. Ed. 702]; Gibbons v. Ogden, 9 Wheat., 1 [6 L. Ed. 23]; Case of State Freight Tax, 15 Wall., 232 [21 L. Ed. 146];

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Welton v. Missouri, *91 U. S., 279 [23 L. Ed. 347]; Hall v. De Cuir, 95 U. S., 497 [24 L. Ed. 547]; Railroad Co. v. Husen, 95 U. S. 469 [24 L. Ed. 527]; Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S., 9 [24 L. Ed. 708], &c.

In Hall v. DeCuir, Chief Justice Waite says: "There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several states." In Railroad Co. v. Husen, Mr. Justice Strong, delivering the opinion of the court, says: "Whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is inter-state than it can that which is with foreign nations. Power over one is given by the constitution of the United States to Congress, in the same words in which it is given over the other, and in both cases it is necessarily exclusive." In the same opinion it is said: "Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it or burden laid upon it by legislative authority is regulation." In the case of the State Freight Tax, it was held that "the transportation of freights, or the subject of commerce, is a constituent part of commerce itself. * * * That transportation of passengers or merchandise through a state, or from one state to another, is commerce among the states, and exclusively within the regulating control of Congress."

If these propositions of law be correct, it follows that any regulation of freights for the transportation of merchandise from Columbia in this state to points in the State of North Carolina by the statutes of this state, would be beyond the power of the state, because of its being an invasion of the powers exclusively vested in Congress by the Constitution of the United States, and hence would not be binding upon the appellants in this case. As these decisions have been pronounced by the highest judicial authority of the United States, in courts of the last resort, and affect a question of the limits imposed upon state legislation by the constitution of the United States, they are binding upon me.

But does the statute under which the Commissioners are acting here undertake to regulate or limit the rates of freight beyond the limits of the state? I think it does not. It is entitled "An act to provide a general railroad law for the management and regulation of railroads in this state," &c. [Here the

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learned judge *quotes the language of the General Statutes, as found in sections 1440, 1441, 1442, 1443, and 1446.] I can find nothing in the sections quoted (which are those affecting the subject now under consideration) which necessarily requires to be construed as an attempt on the part of the state to do more than establish regulations of commerce by railroads within the limits of this state, which it has the clear and unquestioned right to do. I therefore hold that the act does not authorize the Commissioners to regulate freights upon merchandise committed to railroads for transportation from a point in this state to a point beyond the limits of the state.

The argument of the learned attorney general to the contrary of this is based to a large extent upon the similarity of these provisions to those in the act of Illinois on the same subject, and the construction of that act by the courts of that state. But it is quite as fair to assume that the legislature of this state was moved to employ the language they did by a knowledge of the cases in the United States Court, which held that they had no power to legislate upon this subject so as to affect commerce beyond the limits of this state.

The case of Peik v. Chicago & N. W. Ry. Co., 94 U. S., 164 [24 L. Ed. 97], also relied upon by the attorney general, is a very peculiar case, and can hardly be authority upon the general subject, because of the very unusual circumstances there existing. The decision is placed distinctly upon the peculiar contractual effect of the consolidated charters, and so far as the feature of inter-state commerce is concerned, it is considered by Chief Justice Waite that the regulation in question was one confined to "state commerce, or such inter-state commerce as directly affects the people." He says: "Until Congress acts in reference to the relation of this company to inter-state commerce, it is certainly within the power of Wisconsin to regulate its fares, &c., so far as they are of domestic concern."

In relation to this case, I will add a few remarks from the decision of Judge Hill, in the Circuit Court, Southern District of Mississippi, in the case of the Illinois Central Railroad Company v. John M. Stone and others, Commissioners [20 Fed. 468]. Speaking of Peik v. Chicago, he says: "The last

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case, at first view, would seem to *sustain the position assumed by counsel. But it cannot fairly be supposed that the court intended to declare that inter-state commerce might be regulated by the states until Congress chose to regulate it, for the same court has often said that inaction by Congress in this respect is no warrant for state interference. * * * It was a peculiar case. A corporation of Illinois was, by the consent of that state, merged into a corporation of the State of Wisconsin, and in express terms

was thereafter to be governed by the laws of Wisconsin, and the constitution of Wisconsin authorized the legislation complained of, and the corporation had become a domestic corporation of Wisconsin, although its line of road extended into the State of Illinois."

The "Granger cases" are also relied on by the counsel for the Commissioners, but they do not appear to have been considered as settling the doctrines which they are cited to sustain. In a very instructive case in the Circuit Court for the Middle District of Tennessee, those cases have been commented upon by Judge Hammond at some length and with much force. He concludes thus: "The decisions amount, we think, only to this, where a warehouseman or common carrier is engaged in the storage of goods or their carriage within a state, and exclusively within it, the rates of charges for such business are subject to legislative control by the state, and the fact that such legislation may indirectly and remotely affect commerce between the states, does not invalidate it." That case was heard before Judges Baxter, Hammond, and Key, and decides inter alia that the power of the states to regulate railroad rates by such direct action, is limited to domestic transportation, "which means that carried on exclusively within the boundaries of the state."

Possibly a state may bind corporations engaged in inter-state commerce to schedules of rates agreed upon by them, but this is binding only by force of the contract of the carrier so bound. Louisville & N. R. R. Co. v. Railroad Commissioners of Tennessee, 19 Fed. Rep., 679.

That such a restriction upon the states in regard to commerce among the states is reasonable and necessary, is further made apparent by considering that if the one state has a right to prescribe the rate of freight

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at one end of the line, the other would *have the same right, on its side, to prescribe another and a different rate for the same transportation, and conflicts most absurd and disastrous to commerce might ensue in consequence. This feature is referred to and pointed out in many of the cases as vindicating the necessity of the restriction, and that it must be, in its nature, exclusive of state legislation.

Another argument insisted on by the appellant is that the charter of this railroad is a contract, and that by the terms of the charter the railroad is allowed to carry freights at a rate not exceeding fifty cents per hundred pounds, and twenty cents per cubic foot, which rates are not exceeded in the charges sought now to be reduced by the Commissioners. Nor do they exceed the rates allowed by the charter of the Kings Mountain Railroad Company. This company was protected as to the 41st section of the act of 1841, subjecting all chartered companies to legislative control, by the 32d section of its charter, which expressly declares that it shall in no wise be subject to its provisions (11 Stat., 408). The act to produce conformity in the charters granted to the Charlotte & South Carolina Railroad Company by the States of North and South Carolina declares that the charter theretofore granted to said company "shall continue of force, except in so far as it may be repugnant to the provisions of this act" (11 Stat., 542, § 33). By section 30 of the same act it is declared that "the said company shall be entitled only to such powers and privileges as shall be granted to it by the legislature incorporating it, * * * and shall be subject to all the restrictions and liabilities which may be imposed on it by either of the legislatures by the act of incorporation, so that its powers and disabilities may be similar in each of the states, unless the provisions of this section be repugnant to the clause of the former charter exempting the company from the operations of the act of 1841." I do not discover any such repugnancy in the act. But it may be that some such repugnancy may have arisen under this (the 30th) section in consequence of the provisions of the act of North Carolina in regard to this company. That act is not before me, nor at present accessible.

It is insisted, however, by the counsel for the railroad that the effect of section 33 is to

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continue in force the chartered exemp*tion from the act of 1841, section 41. By the act consolidating the Charlotte & South Carolina Railroad Company with the Columbia & Augusta Railroad Company, creating the Charlotte, Columbia & Augusta Railroad Company, it is declared that said company shall possess all the rights, powers, privileges, immunities, and franchises conferred upon said companies by the several acts heretofore passed and now of force incorporating said companies, and amending the charters thereof. 14 Stat., 232.

It is further insisted that these immunities have never been waived by the company or withdrawn by their acceptance of any amendment or modification of the charter, and therefore it is claimed that the legislature can make no law interfering with rates of freight charged by said company so long as they are not in excess of the limit fixed in the charter. I do not agree with this proposition. If the company had been authorized to transport passengers and property, and to receive compensation therefor without any restrictions as to amount, the company would have been confined in their charges to reasonable rates, and unless restrained by the charter, the legislature would have had power to declare what were reasonable rates.

In this charter there was a provision which qualified the general power conferred to receive compensation and establish rates

of freights and fares, and declared that these should not exceed the limit prescribed. In other words, instead of a general grant of the right to make such charges without limit, and afterwards by another act declaring what should be a reasonable rate, the reasonable rate is fixed by the charter. If a general grant in the charter of the right to make these charges without any specified limit, leaves the state at liberty to interfere and say what shall be the rate, how can the state powers over the subject be less where the grant of the power is not unlimited, but qualified and limited? If the latter is to be construed a contract limiting the power of the state, why not the former? Yet it is well established that the legislature may establish reasonable limits to such charges when there is a general grant of the power, and upon like principles I am of the opinion that when at the time a maximum is fixed by the charter, which is then deemed reasonable, but which by the change of circumstances becomes un-

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reasonable *subsequently, the state may prescribe another and different maximum in order to conform to the progress of commerce and the public necessities. The object of the proviso in the charter in relation to charges for freight and passengers was not to control or limit the power of the legislature, but to limit the company. The principle is that "a state may limit the amount of charges by railroad companies for fare or freights, unless restrained by some contract in the charter," and I find no such contract here. The authorities on this subject are all collected in the case of Ruggles v. Illinois, 108 U. S., 531 [2 Sup. Ct. 832, 27 L. Ed. 812], to which I refer.

There are other objections made by the company to the exercise of this power of control by the state of the railroads as violating the state constitution in several particulars. These the limited time at my disposal will not allow me to discuss severally, and I must content myself by saying that in my opinion they are probably answered by what has already been said, so far as the present question is concerned. If they have not, they would not affect the result of this appeal.

It is therefore ordered and adjudged that the finding by the Railroad Commissioners in the matter of the items of charges by the said railroad company for the transportation of fertilizers from Columbia, S. C., to the stations on the Chester & Lenoir Railroad, bearing date the 10th day of April, 1884, from which this appeal was taken, be reversed, and the said appeal sustained.

From this decision the Railroad Commissioners appealed, upon the grounds stated in the opinion of this court.

The Attorney General, for appellants, contended that the Railroad Commissioners were required by law to supervise freight charges on railroads to points without the state and to require the railroad companies to make their charges conform to the law, citing the several statutes of this state since 1878, and also the case of People v. Wabash, St. Louis & Pacific R. R. Co., 104 Ill., 476, construing similar legislation in Illinois. He further contended that such legislation was not in conflict with the constitution of the United States, citing 6 Cr., 87; 12 Wheat., 270; 99 U. S., 718; 94 Id., 114, 155, 175, 179,

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180; 95 Id., 497; *104 Ill., 476. In support of the position that respondent is not protected by its charter from this legislation, the attorney general cited the statutes of incorporation and amendments. Gen. Stat., §§ 1361, 1416; 11 Stat., 168, § 41; 95 U. S., 318; 108 Id., 531.

Mr. J. H. Rion, contra, cited, inter alia, 105 U. S., 464; 95 Id., 469, 487; 94 Id., 163; 18 Fed. Rep., 12, 154; 20 Id., 470; 19 Id., 680; 45 Iowa, 338; 6 Am. and Eng. R. R. Cas., 305; Rorer Inter-State Laws, 311–313; Pom. Inter-State Com., 382, 383, 387, 391; U. S. Rev. Stat., § 5258, and the preamble to the act contained in that section, as originally passed.

April 28, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. In obedience to the provisions of the general railroad law of the state from section 1413 to 1561, General Statutes, the president of "The Charlotte, Columbia & Augusta Railroad Company" submitted to the Railroad Commissioners a freight tariff, in which was set down rates on the transportation of fertilizers between Columbia, South Carolina, and Crowder's Creek, and other stations in the State of North Carolina, on the Chester & Lenoir Railroad, which was operated by the defendant corporation. The Commissioners objected to the freights for transporting the fertilizers aforesaid, and, after giving opportunity as required for the defendant corporation to be heard, rendered the following decision: "That the items of charges in the said schedule hereinbefore set forth are in violation of the law (General Statutes, § 1442) forbidding any railroad company to charge or collect for the transportation of freight over its railroad, the branches thereof, and any road or roads which said company has the right, license, or permission to use, operate, or control, wholly, or in part, within this state, a greater amount than shall at the same time be charged or collected by it for the transportation of a like quantity of freight of the same class transported over any portion of said road of equal distance, and are in excess of the rates fixed and approved by the said Railroad Commissioners on January 18,

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1884, a copy of which *is herewith filed as exhibit 'B,' and that notice of the said pro-

posed changes in the schedule so adopted and approved was not given thirty days before the day it was to go into effect, such proposed changes not having been agreed to by the said Railroad Commissioners, as required by the General Statutes, section 1451, a."

From this decision the defendant corporation appealed to Judge Kershaw, "resident judge" of the Fifth Circuit, who, after hearing argument, held that the general railroad act of this state does not authorize the Railroad Commissioners to regulate freights upon merchandise committed to railroads for transportation from a point in this state to a point beyond the limits of the state. And also that if it did so, "such attempted regulation would be beyond the power of the state, because of its being an invasion of the power exclusively vested in Congress by the constitution of the United States," and dismissed the appeal.

From this judgment the Commissioners appeal to this court upon the following exceptions:

I. "Because his honor held 'That any regulation of freights for the transportation of merchandise from Columbia, in this state, to points in the State of North Carolina, by the statute of this state, would be beyond the power of the state, because of its being an invasion of the power exclusively vested in Congress by the constitution of the United States, and hence would not be binding upon the appellants (the C., C. & A. R. R. Company) in this case.' Whereas, it is respectfully submitted, his honor should have held that the general railroad act (under the provisions of which the finding of the Railroad Commissioners appealed from was made) operates upon every company in this state engaged in the transportation of property by railroad, and extends and applies to every railroad which said company has a right, license, or permission to use, operate, or control. That therefore the regulation of such company is a matter of domestic concern. It is employed in state as well as inter-state commerce, and until Congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people

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within its own jurisdiction, *even though in so doing those without may be incidentally affected. (Chicago R. R. Co. v. Iowa, 94 U. S., 163 [24 L. Ed. 94]).

II. "Because his honor having found that the Chester & Lenoir Railroad is one of the roads consolidated under an act of the State of South Carolina with and controlled by the appellant, a corporation of said state, should have held that 'thus the State of South Carolina is permitted to legislate for the consolidated company in this state precisely the same as it would for its own original companies if no consolidation had taken place,' and that therefore the law of South Carolina regulating the charges of the C., C. & A. Railroad for transportation undertaken by it to points upon the Chester & Lenoir Railroad applies to state commerce or such inter-state commerce as directly affects the people of South Carolina; until Congress acts in reference to the relations of this company to inter-state commerce, it is certainly within the powers of South Carolina to regulate its fares, &c., so far as they are of domestic concern. With the people of South Carolina this company has domestic relations. Incidentally these may reach beyond the state, but certainly until Congress undertakes to legislate for those who are without the state, South Carolina may provide for those within, even though it may indirectly affect those without. (Peik v. Chicago Railroad Co., 94 U. S., 177 [24 L. Ed. 97.])

III. "Because, it is respectfully submitted, his honor erred in following the decisions of some of the Circuit Courts of the United States, inconsistent with the decisions of the Supreme Court of the United States in relation to the question involved in the appeal of the right of the state to regulate its railroad companies.

IV. "Because his honor held that the 'general railroad act does not authorize the Railroad Commissioners to regulate freights upon merchandise committed to railroads for transportation from a point in this state to a point beyond the limits of the state.' Whereas, it is respectfully submitted, this point was not made in the grounds of appeal from the finding of the Railroad Commissioners, and his honor erred in deciding it; because sections 1451 a and 1451 b of the General Statutes expressly require all railroad companies in this state to submit to the Railroad

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Commis*sioners for their scrutiny and revision copies of the schedules of all through rates and joint rates with other roads as soon as adopted; and the said Railroad Commissioners are required to examine the same and determine whether they are in any particular a violation of any of the provisions of the law intended to prevent discrimination, and to secure to all persons just and reasonable rates of charges for transportation of passengers or freight of any description; and it is from the findings of the said Commissioners under these sections that the appeal heard by his honor is taken; but his honor, in quoting all the sections of the general railroad act which he considers affect the subject under consideration, omits to allude to these sections. And his honor also omits to quote section 1445, General Statutes, which declares that 'each and all of the provisions of the act shall apply to all property, and the receiving, delivering, loading, unloading, storage, or carriage of the same on one actually or substantially continuous carriage, or as part of such continuous carriage, * * * and the compensation thereof, whether such property be carried wholly on one railroad or partly on several railroads;

and whether such services are performed or compensation paid by or to one person alone, or in connection with another or other persons.

V. "Because, it is respectfully submitted, his honor erred in not deciding as requested to do by the respondents, that the state has the right to regulate the freights to be charged by all companies in this state, chartered by this state or consolidated under the laws of this state with companies chartered by other states, notwithstanding any exemption from legislative control, which might be claimed by such companies under the original charters; such consolidation having worked a dissolution of the original charters, and such exemption from legislative control having ceased when amendments to the original charters were made and accepted. Shields v. Ohio, 95 U. S., 319 [24 L. Ed. 357]; Hoge v. R. R. Co., 99 U. S., 348 [25 L. Ed. 303]."

As to the fifth exception for not deciding as to the general right of the state to supervise and regulate freights on railroads within the state, we cannot make an original decision. We are limited to the correction of

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errors, and when there has been no *ruling below there can be no question of error before us. Besides, we may say that the judge did substantially decide the point made, and from that decision there was no appeal. The judge held as follows: "It is further insisted that these immunities (exemption from legislation under the 41st section of the act of 1841) have never been waived by the company or withdrawn by their acceptance of any amendment or modification of the charter, and therefore it is claimed that the legislature can make no law interfering with rates of freight charged by said company so long as they are not in excess of the limit fixed in the charter. I do not agree with this proposition. If the company had been authorized to transport passengers and property, and to receive compensation therefor without any restriction as to amount, the company would have been confined in their charges to reasonable rates, and unless restricted by the charter the legislature would have had power to declare what were reasonable rates. * * * The object of the proviso in the charter in relation to charges for freight and passengers was not to control or limit the power of the legislature, but to limit the company. The principle is that a state may limit the amount of charges by railroad companies for fare or freights, unless restrained by some contract in the charter, and I find no such contract here. The authorities are all collected in the case of Ruggles v. Illinois, 108 U. S., 531 [2 Sup. Ct. 832, 27 L. Ed. 812]," &c.

The fourth exception complains that the judge decided that the railroad law "does not authorize the Commissioners to regulate freights upon merchandise committed to railroads for transportation from a point in this state to a point beyond the limits of the state, where the point was not made in the grounds of appeal from the finding of the Railroad Commissioners, and therefore it was error." Whether the general railroad law gave the Railroad Commissioners the right which they exercised, was a question of jurisdiction which could be raised at any time whether made or not by the parties. See Waller v. Cresswell, 4 S. C., 353.

Did the Circuit judge err in holding that the law under which the Commissioners acted does not undertake to regulate the rates of freight beyond the limits of the state, and that in attempting to do so the Commissioners acted beyond the authority conferred

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*upon them? The question involves the construction of the railroad law of the state, and especially as to the powers and duties imposed upon the Commissioners. The railroad law is composed of many sections which have lately been much amended, and it could hardly be expected that so many complex provisions made at different times upon a subject so difficult should be entirely consistent with each other in every particular. But taking all the different parts together, and considering them as a whole with reference to the manifest object and intent, we cannot doubt that the jurisdiction exercised was given and intended to be given to the Railroad Commissioners.

It is of course assumed in the outset that the general assembly of the state legislates only for the territory embraced within the boundaries of the state, and that generally its acts have not the force of law beyond those boundaries. It is true, as stated, that the railroad law is properly entitled "an act to provide a general railroad law for the management and regulation of railroads in this state." It is also true that several of the sections speak expressly of railroads in this state; but it must be observed that neither the title of the act nor any of the sections limit the provisions of the law to railroads exclusively within this state—having both termini and doing all its business within this state. To give the law this construction would exclude entirely from its operation all railroads which happen to have a terminus, or operate another road which has a terminus, beyond the limits of the state. This would defeat the very object of the act and make discriminations instead of preventing them, and we are sure was not the intention of the legislature. It is not to be doubted that the legislature intended justice and equity, and that the remedies sought to be enforced by the law were as much applicable to railroads running through the state and across its border as to those located exclusively within the state. We do not

see that a railroad chartered by the state, and running for a distance on the soil of the state, is any the less a "railroad in the state," because it may have a terminus in another state.

The correctness of this view is demonstrated by the provisions of the last important amendment to the law, that of 1883 (18 Stat., 487), which, among other things, enacts "that

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it shall be *unlawful for any such person, &c., to charge, collect, or receive at any point upon its railroad a higher rate of toll," &c.; and then provides "that the provisions of this section and the two preceding sections shall extend and apply to any railroad, the branches, and any road or roads which any such person or persons so engaged as aforesaid, has the right, license, or permission to use, operate, or control, wholly, or in part, within this state." These two provisions, taken together, constitute an express authority and direction that the requirements of the law "should extend and apply" to railroads "in part within this state" and at any point on such road, which necessarily includes stations without as well as those within the state. See the opinion of the Supreme Court of Illinois in the case of The People of the State of Illinois v. The Wabash, St. Louis & Pacific Ry. Co., 104 Ill., 476.

It is suggested, however, that while it may be true that the provisions of the law do apply, and were intended to apply, to a railroad within this state which happens to have a terminus beyond its limits, yet it was intended to apply only to that portion of the business of the road, which might be done between stations on the road located in the state. There is no such limit or qualification in the provisions of the act. Some of the states under similar circumstances (for example, Georgia) have inserted such limitation, but our act has none. The provisions are sweeping and general—"all through rates and joint rates with other roads," &c. It seems to us that the general embraces every particular—that the whole includes all its parts. We cannot assume that the legislature made general provisions without limitation or qualification, and appointed Commissioners to enforce them, with the unexpressed reservation that the Commissioners themselves should make a distinction in the duties imposed—enforcing one class and omitting to enforce another, only for the reason that in their judgment the latter were unconstitutional and void.

The object of the law manifestly was to secure a uniform system of rates to be charged by companies doing business in the state for all transportation undertaken by them, and this object would certainly not be promoted if the relief proposed did not extend

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to *any part of the transportation, not even that within the state, of all property destined for delivery beyond the limits of the state. We do not think that the words "within this state," as used in the railroad act, can by any fair construction be held to limit the provisions of the act against discriminations to charges for transportation wholly within the state, or that the Commissioners could have shown a warrant in the law for refusing to enforce its provisions as to articles transported from the state and delivered beyond its limits.

Assuming, then, that the Railroad Commissioners did not transcend their jurisdiction; that some of the provisions of the railroad law do apply to transportation undertaken and conducted by companies doing business in South Carolina, even when the place of delivery may be beyond the limits of the state, then the question arises whether it was beyond the power of the state to insert those provisions in the law. Judge Kershaw held that any regulation of freights for the transportation of merchandise from Columbia, in this state, to points in the State of North Carolina by the statutes of this state, would be beyond the power of the state, because of their being an invasion of the power to regulate commerce among the states, which is vested exclusively in Congress by the constitution of the United States. Was this error?

The question is one of importance, and in some aspects not free from difficulty arising not from the provisions of the constitution itself, which is short and plain, but principally from a seeming conflict in the decided cases as to what is a regulation of commerce between the states, and connected therewith as to the matters upon which a state may act, although inter-state commerce may be thereby incidentally affected. Section 8, art. I., of the constitution of the United States declares that "Congress shall have power to regulate commerce with foreign nations and among the states." In considering the proper interpretation of this provision, we may, for the sake of brevity, assume several points to be settled beyond controversy. We may take as settled that the power to regulate commerce among the states is given exclusively to Congress. In The City of New York v. Miln, 11 Peters, 102 [9 L. Ed. 648], Mr. Jus-

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tice Story said: "The power given to *Congress to regulate commerce with foreign nations and among the states has been exclusive from the nature and objects of the power and the necessary implications growing out of its exercise. Full power to regulate a particular subject implies the whole power and leaves no residuum; and the grant of the whole to one is incompatible with a grant to another of a part," &c.

In Groves v. Slaughter, 15 Peters, 449 [10 L. Ed. 800], Mr. Justice Baldwin said: "That the power of Congress to regulate commerce among the states is exclusive of any interfer-

ence by the states, has been, in my opinion, conclusively settled by the solemn opinions of this court in Gibbons v. Ogden, 9 Wheat., 186 [6 L. Ed. 23], and in Brown v. Maryland, 12 Wheat., 438 [6 L. Ed. 678]. If these decisions are not to be taken as the established construction of this clause of the constitution, I know of none which are not yet open to doubt; nor can there be any adjudication of this court, which must be considered as authoritative upon any question, if these are not to be so on this," &c. These positive judicial declarations from the highest court in the United States must suffice, without attempting to cite the multitude of cases upon the exact point.

It may be taken as settled that "the transportation of freight or of the subject of commerce is a constituent part of commerce itself; and that the transportation of passengers or merchandise through a state, or from one state to another, is commerce among the states, and exclusively within the control of Congress." (See the case of the State Freight Tax, 15 Wall., 281 [21 L. Ed. 146].) "Whenever the subjects in regard to which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of Congress."

It may, as we think, also be taken as settled that, as a general rule, each state may control, as a matter of "domestic concern," all the railroads and other things—proper subjects of public control—which are located entirely within the borders of the state, although such regulating control may affect incidentally general inter-state commerce, with which the subject may connect. This proposition is well illustrated by the somewhat famous case of Munn v. Illinois, 94 U. S., 135 [24 L. Ed. 77]. In that case an immense grain elevator or warehouse was erected to

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facilitate the storing *and shipment of grain at the city of Chicago between the railroad and the lake, and although located within the State of Illinois, it stood in the very gateway of commerce, affecting eight or ten states. The State of Illinois passed a law to regulate public warehouses, inspection charges, &c., and the Supreme Court of the United States sustained the constitutionality of the law.

In delivering the judgment of the court, Chief Justice Waite said: "It was very properly said in the case of the 'State Tax on Railway Gross Receipts' (15 Wall., 293 [21 L. Ed. 164]) that it is not everything that affects commerce that amounts to a regulation of it within the meaning of the constitution. The warehouses of these plaintiffs in error are situated, and their business carried on exclusively, within the limits of the State of Illinois. They are used as instruments by those engaged in state as well as those engaged in inter-state commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transported from one railroad station to another. Incidentally they may become connected with inter-state commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly until Congress acts in reference to their inter-state relations, the state may exercise all the powers of government on them, even though in so doing it may indirectly operate upon commerce outside of its immediate jurisdiction," &c.

It seems, however, that there are some exceptions to this rule—cases in which it has been held that a state may not make such regulations, even where the subject is exclusively within the limits of the state and in that sense might be considered a matter of "domestic concern." The case of Hall v. DeCuir (95 U. S., 497 [24 L. Ed. 547]) is one of them. In that case the State of Louisiana passed a law, requiring those engaged in the transportation of passengers to give all persons travelling in that state equal rights and privileges, without distinction of race or color; and the Supreme Court held that the act was unconstitutional, as an attempted regulation of inter-state commerce. Chief Justice Waite, after referring to what had been held in Munn v. Illinois, supra, said: "The line which separates the powers of the states from this exclusive power of Congress

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is not always distinctly marked, and *oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances, it would be a useless task to undertake to fix an arbitrary rule by which the line may in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved. But we think it may safely be said that state legislation, which seeks to impose a direct burden upon inter-state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within," &c. And see the judgment of Chief Justice Marshall, in the famous case of Gibbons v. Ogden (9 Wheat., 1 [6 L. Ed. 23]), as to the constitutionality of a law of New York granting to Livingston & Fulton the exclusive navigation of all the waters within the jurisdiction of that state.

But in the view that the doctrine of Munn v. Illinois is general and extends to railroads; that a state may exercise regulating control

within her borders, although such action may incidentally affect commerce beyond, it is insisted that the converse of that proposition should hold good, viz., that the state may not exercise such regulating control where it reaches beyond the state line, and in the sense contemplated cannot be fairly said to be "a matter of domestic concern," and its effect upon commerce is not merely incidental, but direct. Seeing that the most difficult application of a rule, resting upon what may be a matter of "domestic concern," must be in reference to through transportation on railroads which cross the borders of one state into another, the embarrassment arising from the carriage being continuous, part in one state and part in another, and therefore part domestic and part foreign—we have looked carefully through the cases to see whether the courts have held that in such case a state may control the freights on that part of the transportation which lies beyond the state line as an incident or integral part of that which is within, and may be said to be "domestic." We have found

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*several cases which hold, more or less distinctly, that there is not such identity in the different parts of a continuous carriage from one state into another as to make them necessarily subject to the same control in regard to the question as to what is and what is not a regulation of commerce in the sense of the constitution. We will select only the following cases:

Case of the State Freight Tax, 15 Wall., 277 [21 L. Ed. 146]. In this case, in delivering the judgment of the court, Mr. Justice Strong said: "The state may tax its internal commerce, but if an act to tax inter-state or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state. Nor is a rule prescribed for carriage of goods through, out of, or into a state any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal. Doubtless a state may regulate its internal commerce as it pleases. If a state chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another state, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the state." This case has often been cited with approval by the Supreme Court of the United States, without an intimation of dissent from its rulings.[1] Very recently several of the Circuit Courts of the United States have applied its principles and doctrines to cases precisely similar to the one before us. It may be true that these cases have not yet reached the Supreme Court of the United States and been finally decided there, but we think they are commended to notice as the last judicial utterances upon the subject, and for the learning and ability displayed.

In Pacific Coast Steamship Co. v. Board of Railroad Commissioners, 18 Fed. Rep. 10 (November, 1883), Judge Field held that "the State Board of Railroad Commissioners has no power to regulate or interfere with the transport of persons or merchandise by a steamship company, between ports within the state, if they be in transit to or from

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other states, or when in navigating *the ocean the vessel goes beyond a marine league from the shore. This power has been conferred upon Congress and is exclusive," &c.

In Kæiser v. Illinois Cent. R. R. Co. (Circuit Court, Iowa), Fed. Rep. (November, 1883), Judge McCrary held that "this power of Congress is exclusive. It follows that the act of the General Assembly of Iowa providing for a tariff of maximum charges for the transportation of freight and passengers by railroads, in so far as it relates to through shipments over inter-state lines, is unconstitutional." (See numerous authorities quoted.)

In Illinois Cent. R. R. Co. v. Stone et al., Fed. Rep. (July 8, 1884), Judge Hill held that "a state legislative act to fix and regulate the charges of transportation of any road, save such as is strictly and entirely within the borders of that state, is a law to regulate commerce and against the constitution of the United States." This case, as stated by the Circuit judge, explains that of Peik v. Chicago & N. W. Ry. Co., 94 U. S. 175 [24 L. Ed. 97].

In Louisville & N. R. Co. v. Railroad Commissioners of Tennessee, Fed. Rep. (February 29, 1884), the court held, among other things, that "the power of the states to regulate railroad rates by direct action is limited to domestic transportation, which means that carried on exclusively within the boundaries of a state, and transportation can be domestic only when it begins and ends within those boundaries; and this definition cannot, for the purpose of enlarging state authority, be held to include so much of a transportation on a continuous shipment between two or more states as will cover the distance travelled within the limits of any one of those states; for this construction would utterly destroy the exclusive power of Congress over the inter-state transportation, abrogate the constitutional provision, and enable the states to restrict, obstruct, or impair that freedom of commerce between the states which it was the object of the provision to permanently secure. It can only include the transportation carried on upon roads lying wholly within the state, or else it may be to shipments beginning and ending in the state, without reference to the character of the road in that regard. This is the utmost reach of the state power," &c.

There is one case which seems to be in

[1] See opinion of Supreme Court of the United States, filed April 13, 1885, Gloucester Ferry Company v. Pennsylvania, 114 U. S., 196 [5 Sup. Ct. 826, 29 L. Ed. 158].—Reporter.

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conflict with this array *of authority. It is one of those generally known as "the Granger Cases," Peik v. Chicago & N. W. Ry. Co., 94 U. S., 178 [24 L. Ed. 97]. As the Circuit judge states, this seems to be "a very peculiar case." As we understand it, the Northwestern Railway Company, a corporation of the State of Illinois, was consolidated with certain roads in the State of Wisconsin, upon certain stipulations that the Wisconsin law should govern the consolidated company; that is, making the Illinois company, so far as it could be done, a company of the State of Wisconsin. This state (Wisconsin) passed a law to regulate rates on her railroads. The creditors of the Illinois company challenged the right of the State of Wisconsin to regulate fares in Illinois, and it was held that as they had chosen to come in under the Wisconsin law they "must take the consequences." This was clearly the main question in the case. It is true that, among others, the point was made, that the Wisconsin act, so far as it related to the Illinois portion of the consolidated road, was an effort to regulate commerce among the states, but the point seems not to have been fully argued.

In delivering the judgment of the court, Chief Justice Waite said: "As to the effect of the statute as a regulation of internal commerce, the law is confined to state commerce, or such inter-state commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to inter-state commerce, it is certainly within the power of Wisconsin to regulate its fares, &c., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the state, but certainly until Congress undertakes to legislate for those who are without the state, Wisconsin may provide for those within, even though it may incidentally affect those without," &c.

It seems that for the purposes of government, the Illinois road was considered as pushed back into the State of Wisconsin, and stood precisely as if it were within the physical boundaries of that state, and in this light, fares on the Illinois road were matter of "domestic concern" to Wisconsin. This would seem to be indicated by the phrase "domestic concern." When that expression was first used in the case of Munn v. Illinois, supra, in reference to the grain elevator at Chicago,

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it was plainly to convey the idea *of being within, as contradistinguished from that of being without the state. To use the expression in any wider sense, as affording the test of state jurisdiction, would, it seems to us, throw open the whole subject, and leave it to the legislature to decide in each case as to what is, and what is not, sufficient to constitute a matter of "domestic concern" to the state. But if we are mistaken in our understanding of this case, we cannot think that it overthrows the weight of authority which holds "that transportation of passengers or merchandise through a state, or from one state to another, is inter-state commerce."

We think we are not allowed to give controlling influence to the fact that Congress has not exercised the jurisdiction conferred upon it. In several of the cases allusion is made to the fact that "Congress has not acted," and that induced the inquiry whether there was any law upon the subject; but we find none. In a certain class of cases, local in character, such as harbors, bays, &c., state legislation is permitted until Congress acts, and nothing more. As we have shown, the jurisdiction is exclusive, and that would seem to be inconsistent with the view that nonaction on the part of Congress confers it on the states. As was said in the case of Mobile v. Kimball, 102 U. S., 691 [26 L. Ed. 238]: "Commerce with foreign countries and among the states, strictly considered, consists of intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined, there can be only one system of rules applicable alike to the whole country, and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible. Language affirming the exclusiveness of the great power over commerce, as thus defined, may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce," &c. (It appears that efforts are now being made in Congress to pass a law upon the subject.)

We are fully aware of all the presumptions in favor of the constitutionality of an act of the legislature, and we feel sensibly the great and delicate responsibility imposed upon us;

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but reluctant *as we may be, we are constrained by our sense of duty to concur with Judge Kershaw in holding "that any regulation of freights for the transportation from Columbia in this state to points in the State of North Carolina, by the statutes of this state, is beyond the power of the state, because of its being an invasion of the power exclusively vested in Congress by the constitution of the United States."

The judgment of this court is that the judgment below be affirmed.[2]

[2] This ends the cases of April Term, 1884. The last eleven of these cases were heard at the adjourned April Term, in November.

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DARBY v. STRIBLING. MURPHY v. SAME. WILEY v. SAME.

(November Term, 1884.)

[*Guardian and Ward* ⇐33.]

A guardian holding a note belonging to the estates of his wards given for the purchase money of a negro slave consented in 1872 to take judgment against the makers of the note, then perfectly solvent, for one-third of the amount due, because of an agreement then prevailing among the lawyers at that bar, induced by the rulings of their presiding judge. In 1871 the Supreme Court had twice decided that such debts were collectible. *Held*, that the guardian was liable to account to his wards for the full amount of the note.

[Ed. Note.—Cited in Darby v. Stribling, 24 S. C. 423.

For other cases, see Guardian and Ward, Cent. Dig. § 147; Dec. Dig. ⇐33.]

Before Wallace, J., Abbeville, February, 1883.

In this case the Hon. I. D. Witherspoon, judge of the Sixth Circuit, sat in the place of Mr. Justice McGowan, disqualified.

The opinion states the case. The master gave the following reasons for his findings:

In the case before us the guardian very wisely did not collect this note in Confederate money. Immediately, and for several years after the war, there was great uncertainty whether negro debts could be collected at all. Indeed, Judge Orr, as I have said, had held that they could not be. He dismissed many

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cases be*cause the parties would not accept judgment for one-third of the amount. This, I take it, gave rise to the rule adopted by this bar in such cases. As Mr. Lee says in his testimony, this was considered the best that could be done in the cases, and was generally acted upon here. It is true that judgment was not taken in this case till more than a year after the decision in Calhoun v. Calhoun, wherein it was held that negro debts were collectible. But the case was in the hands of the guardian's attorney, and I have no doubt he acted upon his advice. Mr. Lee, who knew Mr. Willard well, says that he was a cautious man, in money matters. The manner in which he administered the estates that came into his hands negatives the idea of any mala fides on his part, for he has paid out more than he received. So that upon a review of the whole case I do not think that his estate should be held liable for the whole amount of the note.

Mr. Samuel C. Cason, for appellant.

Mr. W. H. Parker, contra.

January 19, 1885. The opinion of the court was delivered by

Mr. Justice WITHERSPOON. Each of the above entitled actions involves the same questions and were heard together. On June 9, 1857, James C. Willard was appointed guardian of the plaintiffs, E. J. Darby, M. A. Murphy, and N. J. Wiley, respectively, whose maiden name was Magrath. Willard, the guardian, died August 21, 1876, without settling with his said wards. Thomas Thomson became the administrator of Willard, and he died in 1881 without a settlement with said plaintiffs. John V. Stribling, the defendant, is the administrator de bonis non of James C. Willard, the deceased guardian of said plaintiffs. These actions were instituted in September, 1882, for the purpose of requiring the defendant, as administrator de bonis non, to account for the estate of the plaintiffs, E. J. Darby, M. A. Murphy, and N. J. Wiley, that came into the hands of their deceased guardian, James C. Willard.

It appears that the estate of the said plain-

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tiffs in the hands of *their said guardian consisted of $900, the proceeds of the sale of a negro woman, sold on credit under order of court in 1860. Thomas Leroy was the purchaser of said negro and executed his note for the purchase money, with James P. Leroy and J. H. Britt as sureties. On November 16, 1872, the deceased guardian obtained judgment in the Common Pleas for Abbeville County against the sureties on said note for $306.84, the note having been reduced to a little more than one third of the amount thereof, according to a custom then prevailing in said county, with the approval of the then presiding judge and the members of the Abbeville bar, with reference to the collection of such notes. The defendant alleges in his answer that before receiving the amount on the judgment aforesaid, the deceased guardian had paid out for the respective plaintiffs more than he received for them on said judgment, and prays that plaintiffs' complaint be dismissed with costs.

It was referred to the master for Abbeville County to state the accounts of the deceased guardian and report thereon. The master reports that the deceased guardian paid out for plaintiffs more than he received for them respectively upon the judgment aforesaid. The master concludes that the estate of the deceased guardian is not responsible for the whole amount of the note, as the guardian took judgment on the note in accordance with a rule then generally acted upon at the Abbeville bar. The master therefore recommends that plaintiff's complaint in each of the above actions be dismissed with costs.

Upon hearing the testimony, the master's report, and plaintiffs' exceptions thereto, Judge Wallace sustained plaintiffs' exceptions and adjudged that the estate of the deceased guardian was liable to the respective plaintiffs for the whole amount of the note upon which the judgment was obtained, it appearing from the testimony that the note was amply secured, and that it was sealed with the consent of, or certainly without objection from, the guardian. The findings of law and fact by the master were overruled

by the Circuit judge, and the report recommitted to the master to state the accounts of the deceased guardian in accordance with the Circuit decree. The defendant appeals from the decree of the Circuit Court; and

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the only question involved in *the appeal is as to the liability of the estate of the deceased guardian for the whole amount of the note upon which the judgment was obtained.

This court will always protect a guardian or other trustee acting in good faith and with proper diligence and care for the interests of the ward, or other cestui que trust. The law, however, requires a guardian to exercise the same diligence and care for the benefit of his ward, that a prudent man would do in the management of his own affairs, and the court will not allow a guardian to escape responsibility from mere tender consideration of his misfortune.

The amount of the judgment taken by the guardian represents but a fraction more than one-third of the amount of the note, without reference to the accrued interest for some seventeen years. There can be no doubt that at the time the judgment was taken the note was amply secured. Whilst there was doubt and uncertainty for several years after the war about the collection of notes of this character, yet all such doubts were solved and removed by the decision of this court, filed April 3, 1871, in the case of Calhoun v. Calhoun, 2 S. C., 291, as well as by the decision in Brewster v. Williams, 2 S. C., 455, filed July 6, 1871. The judgment obtained November 16, 1872, and acquiesced in by the deceased guardian, is in direct conflict with these decisions, one of which was filed seventeen months prior to said judgment. Under these circumstances the act of the deceased guardian cannot be considered prudent, nor can we conclude that the guardian has exercised proper care and diligence in protecting the rights and interests of his wards.

It is the judgment of this court that the judgment of the Circuit Court be affirmed in each of the above entitled cases.

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*WHALEY v. KEITT.

(November Term, 1884.)

[1. *Appeal and Error* ⟸1018.]

A finding of fact by a referee, concurred in by the Circuit Judge, based upon direct testimony involving the accuracy and credibility of witnesses, affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4006; Dec. Dig. ⟸1018.]

[2. *Landlord and Tenant* ⟸322.]

Under a contract between G. and A., under which A. was to superintend a plantation of G., and was to receive the "net cotton after all expenses were paid," G. furnishing all the supplies, the provision crops were not applicable to the payment of the expenses.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1353, 1354, 1357; Dec. Dig. ⟸322.]

[3. *Limitation of Actions* ⟸41.]

The cotton made upon the plantation not being sufficient to pay the expenses, and A. having paid a note for supplies out of the proceeds of the cotton crop, and then brought action against G. to recover such payment (G. being the principal on such note, and A. the surety), G.'s defence was not in the nature of a counterclaim, nor was the statute of limitations applicable thereto.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 214, 215; Dec. Dig. ⟸41.]

Before Witherspoon, J., Orangeburg, October, 1883.

This case is fully stated in the Circuit decree, which was as follows:

It appears that Jacob G. Keitt placed his son, John A. Keitt, in charge of his Whetstone plantation, in the county aforesaid, for the year 1867, including stock, &c. There is no written evidence as to the terms upon which the farming operations were to be conducted. It appears that for supplies furnished the plantation that year, John A. Keitt and Jacob G. Keitt gave E. H. Rodgers & Co., of Charleston, a note for $2,237.13. John A. Keitt signed the note first without seal, and Jacob G. Keitt signed with a seal. In January, 1868, forty-eight bales of cotton, the entire cotton crop of the Whetstone plantation for that year, was shipped to the payees, E. H. Rodgers & Co., and the proceeds, $1,994.24, credited on the note aforesaid, leaving due thereon, October 1, 1868, the sum of $530.35, which was paid in full by the father, Jacob G. Keitt.

John A. Keitt died intestate in August, 1867, during the year of the farming operations on the Whetstone plantation, and the defendant, Peter M. Houser, administered on his estate, and brought suit against E. H. Rodgers & Co. for the cotton money, and recovered a verdict for $3,087.13, including costs. In the meantime, Twitty and other

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creditors of John A. Keitt insti*tuted proceedings in the Probate Court for Orangeburg County to marshal the assets of the estate of John A. Keitt. Rodgers & Co., who had been compelled to refund the cotton money, under call for creditors, proved the note aforesaid as a specialty debt of the estate of John A. Keitt for the whole amount, less the $530.38 paid by Jacob G. Keitt, and received their pro rata of $1,331.66 from the estate of John A. Keitt. In November, 1879, Jacob G. Keitt died intestate, and the plaintiff, Lawrence M. Whaley, became his administrator, and was sued by Houser as administrator of John A. Keitt, to recover back the $1,331.66 paid by the estate of John A. Keitt as surety of Jacob G. Keitt on the note aforesaid. Whaley, as administrator, instituted proceedings to marshal the assets of the estate of Jacob G. Keitt. In this contest between the creditors of the two estates the special master reported in favor of the claim of the estate of John A. Keitt against the

estate of Jacob G. Keitt for the $1,331.66 and interest, on the ground that Jacob G. Keitt was the principal and John A. Keitt was surety on the E. H. Rodgers & Co. note, as aforesaid. Whaley, as administrator of Jacob G. Keitt, appealed, and the Supreme Court affirmed the finding of the special master, that Jacob G. Keitt was the principal and John A. Keitt was surety on the Rodgers & Co. note.

The Supreme Court, in this cause (April term, 1882), say that the agreement between the parties (father and son, as to farming operations for 1867 on Whetstone plantation), although it lies at the very foundation of this controversy, has not been ascertained in this case, and as this is a contest between the creditors of the two estates, it is necessary to determine what was the business agreement between father and son. The court further say, if John A. Keitt actually cleared nothing by the farming operations, his administrator, as against Jacob G. Keitt, would have no right to retain any portion of the cotton money, and, having recovered it from Rodgers & Co., the administrator of Jacob G. Keitt would be entitled to the benefit of that recovery, and to set off such claim for the cotton money against the claim of Houser, administrator, for the money paid by his intestate, as surety for his father. These questions, the court say, can only be determined by ascertaining the exact agreement between the father and son as to the

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*farming operations for 1867. The court say that this agreement should be examined as an original question, without being affected in any manner by the verdict in the case against Rodgers & Co.

The above entitled case was remanded by the Supreme Court (April term, 1882) to the Circuit Court, to ascertain what were the terms of the agreement between Jacob G. Keitt and his son, John A. Keitt, as to the farming operations on the Whetstone plantation in the year 1867, and to apply the result according to the principles therein announced. On May 28, 1883, the case was referred by Judge Wallace to C. B. Glover, special master, to take the testimony respecting the terms of the agreement between Jacob G. Keitt and John A. Keitt, as to the farming operations on the Whetstone plantation in the year 1867, and to report the same and his conclusions of fact to this court at its next sitting for adjudication, with liberty to either party to object to the admissibility of testimony on the coming in of the report.

On September 25, 1883, the special master filed his report, in which he finds the agreement as to the farming operations on the Whetstone plantation in 1867 to be as follows: "That Jacob G. Keitt was to find all the supplies necessary to run the plantation. That the plantation was to be superintended by John A. Keitt. That after the laborers had received one-third of the crops for their services, then John A. Keitt was to have the net cotton, after all the expenses were paid." The special master concludes as matter of fact: I. That the Whetstone plantation was planted in the year 1867 by Jacob G. Keitt, who placed his son, John A. Keitt, in charge of the same as superintendent. II. That John A. Keitt was to receive for his services the net cotton remaining after all the expenses of the place were paid. III. That the expenses of the plantation exceeded the whole income derived from the crops, as it appears that when the proceeds from the cotton crop were applied to the Rodgers & Co. note (given for supplies), there remained a balance on that note unpaid, which balance was paid by Jacob G. Keitt. IV. That John A. Keitt died in August, 1867, and as there was no net cotton, after the expenses of the plantation were paid, there was nothing as a matter of fact to go to the estate of John A. Keitt.

The defendant, Peter M. Houser, adminis-

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trator of John A. *Keitt, excepts to the report of the special master. In the view taken of this case it will be only necessary to consider the first exception in substance as follows: Because the special master erred in finding that the expenses exceeded the whole income derived from the crops raised on the Whetstone plantation in 1867, but should have found that the value of the crops exceeded the amount of expenses, and should have found the amount of such excess.

The referee finds that Jacob G. Keitt planted the land; that he placed his son, John A. Keitt, in charge as superintendent, who was to receive for his services the net cotton after all the expenses of the place were paid. As I understand it, the master finds that according to the terms of the agreement between father and son the measure of the son's compensation for services as superintendent depended upon whether or not there would be any net cotton crop, after paying all the expenses of the place cultivated.

It is very difficult now to ascertain accurately the terms of an oral agreement entered into in 1867, when both parties to the agreement are now deceased. Whilst at first view it might appear to be an unreasonable proposition for any one to agree to accept as compensation for such services the net cotton after paying all the expenses of the plantation, yet such terms may be made to appear more consistent and reasonable when the facts of the case, the circumstances and situation of the parties are considered.

It appears from the testimony that Jacob G. Keitt owned the land, furnished the stock, wagons, tools, seed, and supplies, including fertilizers. A highly intelligent witness, Dr. Wannamaker, testifies that he understood from Jacob G. Keitt that John A. Keitt was

to receive two-thirds of the net proceeds of cotton crop, and that he, Jacob G. Keitt, was to receive all the provision crop save what the negroes got, and cotton seed. The witness, Spigener, testifies that Jacob G. Keitt told him he had not given the plantation to his son, but wanted to see what he could do for himself; that if he made anything clear on the crop, it is his. Robinson, the foreman on the place, testifies that Jacob G. Keitt had control of business and gave directions; that

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he went to the *place once or twice a week, after the crop was set, and sometimes every morning; that when Jacob G. Keitt didn't go to the place, he, Robinson, went to him for directions. Robinson and other laborers on the place testify that they heard John A. Keitt say, that after expenses of place were paid, he was to have the balance of the cotton. The written contract for hire of the laborers was made in the name of John A. Keitt, and witnessed by his father, Jacob G. Keitt. The laborers were to receive one-third of the crop. Some of the laborers testify that they were hired by Jacob G. Keitt.

It appears that the son, John A. Keitt, lived with his father, Jacob G. Keitt, some two miles distant from the Whetstone plantation, and had very limited means. The crop consisted of eighty or eighty-five acres of cotton, seventy-five or eighty acres of corn, and some peas, potatoes, &c., and was cultivated with five mules belonging to Jacob G. Keitt. As the father furnished the land, stock, tools, supplies, and fertilizers, it does not appear improbable that the son in limited means, who lived with his father, would agree to accept for his services as superintendent of the plantation, under the direction of the father, the net cotton, after paying the plantation expenses, including the labor. It is not material, however, to consider the reasonableness of the agreement. As matter of fact, the issue to be determined is, What were the terms of the agreement?

After a careful review of the testimony, I am constrained to concur in the finding of the special master that John A. Keitt agreed to superintend the Whetstone plantation for his father in 1867, and was to receive as compensation for his services the net cotton remaining after all the expenses of the plantation were paid; that the son died in August, 1867, before the crop was made; that the expenses of the plantation exceeded the net cotton, and, as matter of fact, there was nothing due the estate of John A. Keitt under said agreement.

The special master also finds, and states as matter of fact, that the expenses of the plantation exceeded the whole income derived from the crops. Having concluded and found as matter of fact that, under the agreement, the son was to receive as compensation for his services the net cotton re-

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maining after all the *expenses were paid, it was neither material nor necessary for the special master to estimate or state the value of the crop, other than the cotton crop. All of the expenses of the plantation in making a crop, is a very comprehensive term. As the son died during the year, the expenses of the crop were necessarily increased beyond the calculation of the parties. It is in evidence that the father hired extra hands to pick cotton, gathered the grain crop, and prepared the cotton crop for market, after the death of the son.

It would seem that the expenses incident to the death of the son would have to be included, under the agreement, before the net cotton compensating the services of the son could be ascertained. Even if the value of the whole crops should have been estimated and stated by the master, as contended for by defendants, I am inclined to concur with the master in the conclusion that the expenses would exceed the whole income derived from the crop, inasmuch as the proceeds of the cotton failed to pay the debt of Rodgers & Co. for supplies by $530.35, without regard to the other expenses incident to the death of John A. Keitt during the year.

As already stated, it is difficult to arrive at a satisfactory conclusion as to the precise terms of an agreement entered into more than sixteen years ago, when both of the parties to the agreement are dead, yet I must conclude that there is enough in the testimony to sustain and support the findings of fact by the special master.

It is therefore ordered and adjudged, that the exceptions of Peter M. Houser, administrator of John A. Keitt, to the report of C. B. Glover, special master herein, be overruled; the findings of fact by said special master be confirmed, and that the claim of Peter M. Houser, administrator, presented against the estate of Jacob G. Keitt, be disallowed.

Defendant appealed upon seventeen exceptions, but the points thereby raised are sufficiently indicated in the opinion of this court.

Messrs. Jas. F. Izlar, Samuel Dibble, and Glover & Glover, for appellant.

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*Mr. J. D. Pope, contra.

February 21, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. This litigation has been protracted for a number of years. It has a history in its different and changing phases somewhat involved, but for the purposes of the question now before us, it will not be necessary to reproduce it here, as it will be found fully stated in the last opinion in the cause pronounced by this court. See MSS. Dec., No. 1306, [Whaley v. Houser] 18 S. C., 602. It there appears that after disposing of other questions, mainly as to who was the principal and who the surety on

a certain note, the contention assumed the form of a struggle between the creditors of John A. Keitt, deceased, and those of Jacob G. Keitt, deceased, as to which estate (both parties being dead) was entitled to the proceeds of the cotton crop made on the Whetstone plantation of Jacob G. Keitt in the year 1867.

Jacob G. Keitt was the father of John A., and even after the war the owner of considerable property, consisting of lands, stock, &c. John A., the son, had little, and being unmarried, lived with his father. It seems that the father, Jacob G., placed the son, John A., on his Whetstone plantation, about two miles from the family homestead, to superintend making a crop in the year 1867, but there was no written contract between them. John A. died in August of that year, and Jacob G. some time afterwards. It happened (explained in former opinion) that the proceeds of the cotton made on Whetstone fell into the hands of Peter M. Houser, administrator of John A., and that estate paid $1,331.66 to E. H. Rodgers & Co. on a note which had been given for supplies for Whetstone, signed by both John A. and Jacob G. Keitt.

It was afterwards decided that Jacob G. was responsible for the Rodgers debt as principal, and Houser, administrator of John A., sued Whaley, administrator of Jacob G., to recover the said $1,331.66 as so much money paid by the estate of the surety for that of the principal. That made it necessary to know whether the proceeds of the cotton crop originally belonged to the father or the son; for if they really belonged to the father, the administrator of the son was suing for

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money which never belonged to *his intestate, and which, of course, he could not ex equo et bono recover. And that could only be known by ascertaining what was the agreement between the father and the son as to the farming operations in 1867. This was the only question left undecided by the former judgment of this court.

This, and this alone, was referred back. The opinion states as follows: "As the court has decided that Jacob G. Keitt, the father, was the principal in the note for supplies, we think that, acting in the light of that decision, the controversy between the creditors of the father and the son, should be finally decided by the exact terms of the agreement which existed between them as to the farming operations on the Whetstone place in the year 1867. If, according to the agreement, John A., who died during the year, was to receive the whole crop of cotton before the expenses were paid and without regard to them, then his creditors are entitled to the money paid by his estate as surety for his father; but if, on the other hand, he was to receive under the agreement only the 'net cotton,' that which 'was over' after paying expenses, and those expenses, including the note for supplies, were greater than the value of the whole crop, then John A. actually made nothing during the year, and the administrator should recover nothing for the money paid. This question of fact was not specifically ascertained by the referee, or passed upon by the Circuit judge, and therefore upon this point the case must go back to the Circuit Court. The judgment of this court is, that the judgment of the Circuit Court be set aside and the case remanded, to ascertain what were the terms of the agreement between Jacob G. Keitt and his son, John A., as to the farming operations on the Whetstone plantation in the year 1867, and to apply the result according to the principles herein announced."

Accordingly, the question sent back was referred to Charles B. Glover, Esq., as special referee, who took the testimony and reported that the terms of the agreement between Jacob G. and John A. Keitt were as follows: "Jacob G. Keitt was to find all the supplies necessary to run the plantation; the plantation was to be superintended by John A. Keitt; after the laborers had received one-third of the crop for their services, then John A. Keitt was to have the 'net

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cotton' after all the expenses were *paid." He finds as conclusions of fact: "1. That the Whetstone plantation was planted in the year 1867 by Jacob G. Keitt, who placed his son, John A., in charge of the same as superintendent. 2. That John A. Keitt was to receive for his services the 'net cotton' remaining after all the expenses of the place were paid. 3. That the expenses of the plantation exceeded the whole income derived from the crops, as it appears that when the proceeds from the cotton crop were applied to the Rodgers note (given for supplies) there remained a balance on that note unpaid, which balance was paid by Jacob G. Keitt. 4. That John A. Keitt died in August, 1867, and as there was no 'net cotton,' after the expenses of the plantation were paid, there was nothing, as a matter of fact, to go to the estate of John A. Keitt," &c.

To this report Peter M. Houser, administrator of John A. Keitt, filed exceptions, and after argument thereon, Judge Witherspoon affirmed the report, overruled the exceptions, and disallowed the claim presented by the administrator of John A. Keitt against the estate of Jacob G. Keitt. From this decree Houser, the administrator of John A. Keitt, appeals upon numerous grounds, which are in the brief and need not be set out here.

Several of the exceptions, in one form or another, complain that it was error to find that the terms of the agreement as to farming was that Jacob G. Keitt placed his son, John A., as superintendent on the Whetstone plantation, who was to receive for his services the "net cotton" after all expenses were

paid: and that the expenses of the plantation exceeded the whole income from the crops. Being a chancery case, this court has appellate jurisdiction and may review the evidence; but the question referred was one purely of fact, as to which the special referee took the testimony and made a clear and distinct finding. The Circuit judge concurred with the referee, and in such cases, especially where the finding is based upon direct testimony involving the accuracy or credibility of witnesses, the rule has been uniform that this court will not disturb the finding, unless it is without any testimony to support it. See cases collected in Reporter's Note, 12 S. C., 612. We have read the testimony in this case carefully, and cannot say there is no evidence to support the finding, which must therefore stand as established.

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Doubtless all human tri*bunals are imperfect and may err, but from the nature of things it is necessary that there should be an end of controversy.

It was urged that the finding was erroneous because of the inherent unreasonableness of the agreement found. As the Circuit judge correctly states, the question was what was the agreement, not whether it was reasonable or unreasonable. But if it had been otherwise, we fail to see the unreasonableness of an agreement, by which Jacob G. Keitt undertook to furnish land, stock, provisions, &c., paying all expenses, and to give to his son as superintendent all the "net cotton" that might be made; that is, taking upon himself all risks of misfortune and loss, and giving to his son substantially whatever clear profit, if any, might be made. On the contrary, it seems to us that such a contract with a stipulation that the son should have all the cotton, without regard to expenses, while certainly very kind, could hardly be regarded a business transaction.

Another class of exceptions complain that it was error not to include the value of the provision crops in discharging the current expenses. That was not an open question, but was absolutely concluded by the agreement, which, as found, embraced only the cotton. The land belonged to Jacob G. Keitt, and of course the provision crops belonged to him, unless they were included in the agreement in whole or in part. We are not informed why John A. had no interest in the provision crops, but it may have been for the reason that they were not made for market, but to replace those of like kind which had been consumed in making the crop.

Other exceptions complain that the "judge failed to decide that the claim of the plaintiff (Whaley), by way of set-off to the claim of P. M. Houser, administrator, was barred by lapse of time before the claim of Houser, administrator, accrued, although the counsel of Houser, administrator, duly urged the said objection to the plaintiff's claim under the statute of limitations." We are not quite sure that we understand the view intended to be urged by this exception, but we suppose the proposition to be, that this is really the case of a plaintiff pleading the statute of limitations against a counter-claim set up by the defendant. If we are right in this, there are several reasons why that doctrine cannot be made to apply to this case. The de-

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fence interposed by the ad*ministrator of Jacob G. Keitt is not in the nature of a counterclaim against the estate of his son, John A. Keitt, for agricultural advances in 1867. Such a claim could not stand for a moment, for the simple reason that he never made any such advances to his son. It now appears that he and not his son, John A., farmed Whetstone in 1867, and of course all the supplies furnished were for himself.

But while the estate of Jacob G. never had any claim against that of John A. for advances, it now appears from the agreement between them that the cotton made on the place that year belonged to Jacob G. for the purpose of assisting him in discharging the expenses. It follows that the money now sued for (being part of the proceeds of that cotton) was properly payable to the said expenses, and having been paid to Rodgers & Co. towards the satisfaction of a note for supplies at Whetstone in 1867 (on which Jacob G. was principal and John A. Keitt surety), was properly paid, and the administrator of John A. Keitt is not entitled to recover it from the estate of Jacob G. Keitt. The claim must fail, for the conclusive reason that the money never belonged to the estate of John A. Keitt, and being properly paid for the relief of the estate of Jacob G. Keitt, to which it belonged, it cannot be said that it was paid out of the estate of John A. as surety for Jacob G. Keitt.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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22 S. C. 257

LATIMER v. LATIMER.

(November Term, 1884.)

[1. *Judgment* ⇐415.]

A judgment, regular in form and rendered by a court of competent jurisdiction, is in its nature final and conclusive; but one man cannot be bound by the unauthorized act of another, and, therefore, a judgment recovered by an attorney without the authority or knowledge of the plaintiff may, upon the proof of such fact, be set aside as void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 781; Dec. Dig. ⇐415.]

[2. *Judgment* ⇐951.]

But in an action by the party in whose name the judgment was obtained, against the same defendant for the same recovery, the presumption is in favor of the first attorney's authority, and the plaintiff must prove with satis-

factory clearness that she did not authorize or have knowledge of the former action.

[Ed. Note.—Cited in Sanders v. Price, 56 S. C. 4, 33 S. E. 731; McCullough v. Hicks, 63 S. C. 547, 41 S. E. 761.

For other cases, see Judgment, Cent. Dig. § 1809; Dec. Dig. ⟸951.]

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[3. *Appeal and Error* ⟸1012.]

*The burden of proof being with plaintiff, this court concurred with the Circuit judge, that plaintiff had not clearly and satisfactorily proved the allegations of her complaint, such finding of fact not being manifestly against the weight of the evidence.

[Ed. Note.—Cited in Lipscomb v. Seegers, 22 S. C. 410.

For other cases, see Appeal and Error, Cent. Dig. § 3990; Dec. Dig. ⟸1012.]

[This case is also cited in Suber v. Chandler, 28 S. C. 385, 6 S. E. 155, without specific application.]

Before Hudson, J., Abbeville, February, 1883.

The opinion states the case. The Circuit decree, omitting its statement, was as follows:

The question upon which the case hinges is whether the plaintiff had knowledge of the action in the Probate Court, and whether that suit was with her consent and by her authority instituted. The defendant contends that she is bound thereby, whether she had knowledge thereof and sanctioned the same or not; that the remedy is over against the attorney E. B. Gary, Esq., and W. C. Latimer, her son.

To sustain this position, he cites as a leading case, Denton v. Noyes, 6 Johns., 297, opinion by Chancellor Kent. I have read the case carefully, and am far more impressed by the dissenting opinion of Judge Van Ness, in which is manifested a stronger view of common sense and a sense of justice than is displayed in the opinion of the court. The doctrine of this court is overthrown by subsequent decisions of the courts of the states of the Union, and by the Supreme Court of the United States, and Judge Van Ness's dissenting opinion is now the law in the United States. Shelton v. Tiffin, 6 How., 163 [12 L. Ed. 387]; Freem. Judg., § 499, and cases there cited. These cases adopt the doctrine of Lord Mansfield, laid down in Robson v. Eaton, 1 T. R., 62, and it is on this latter case that the plaintiff relies. The law of this last case I adopt as my guide in the present.

Therefore, if Mrs. Amanda M. Latimer is sustained by the proof, she must have judgment. But the burden is on her to prove clearly and satisfactorily that the action for dower was begun, prosecuted, and concluded wholly without her knowledge, consent or sanction. Has she done this? Betwixt her and her son, W. C. Latimer, there is on this point an issue of veracity, which is painful. All parties are unknown to me, and I have the additional embarrassment of not having seen them and heard them testify, the testimony having been taken by the master and

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sent *up to this court without comment or finding of fact by him, such being the direction in a previous order of this court.

The defendant is nephew of the plaintiff by marriage; the party charged with the fraudulent institution of the suit and receipt of money is her son and is cousin to the defendant, J. S. Latimer. The attorney, Eugene B. Gary, Esq., is well known throughout this and other counties, and is of unimpeachable character. She once resided in Abbeville, but at the time of the alleged fraud resided no further distant than at Johnston's in Edgefield. W. C. Latimer resided in Allendale. That J. S. Latimer confided in the genuineness of the suit, and that the learned attorney thought he was acting for Mrs. Latimer and by her authority, there can be not a shadow of a doubt. Shortly before the institution of that suit, Mrs. Latimer was in correspondence with J. S. Latimer about the recovery of this dower, and one, at least, of her letters might be construed into a threat to seek all the law would allow her. If her son was acting without his mother's knowledge, it was certainly a bold and daring step, as the chances were very decided that she and her other son, who was with her, would find it out. The chances were decidedly in favor of a discovery by her.

It would be very tedious to review all the testimony in this decree. I deem it only necessary to say that I have examined it carefully, and counsel have ably discussed it before me, and my conclusion is, that the plaintiff has not clearly and satisfactorily proved the allegations of her complaint. The direct and positive testimony of W. C. Latimer, and the many circumstances corroborating it, are of such weight as that the proof on the part of the plaintiff does not clearly outweigh them.

It is therefore ordered, adjudged, and decreed, that the recovery in the Court of Probate is a bar to this suit, and that hence the complaint be dismissed, each party to pay his and her own costs respectively; the tenant, Southerland, not to be mulcted in any costs.

Messrs. B. W. Bettis, jr., and S. C. Cason, for appellant.

Messrs. Wells & Orr, contra.

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*February 21, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action brought by the plaintiff as the widow of Micajah B. Latimer, deceased, for dower in a tract of land now owned by the defendant. The land had been aliened by the deceased husband in his life time, but the plaintiff had

not relinquished her dower. The pleadings are not in the brief, but the Circuit judge says: "The plaintiff alleges that, on July 26, 1880, the plaintiff's son, W. C. Latimer, representing himself as her agent, employed Eugene B. Gary, Esq., an attorney at law of the Abbeville bar, to institute in the name of the plaintiff an action in the Court of Probate of said county against the defendant, James S. Latimer, to recover dower in this land; the result of which action was a judgment for $716.95, the assessment in lieu of dower. This sum of money, with the costs of action, was paid by the defendant, James S. Latimer, to the sheriff of Abbeville, who had levied upon the said land under the execution issued upon the judgment aforesaid. The sheriff paid the same to E. B. Gary, Esq., attorney as aforesaid, who paid the same to W. C. Latimer. All these proceedings, she alleges, were had without her consent, authority, or knowledge, and she prays the court to set the same aside as being a fraud upon her rights, and to award to her dower in the land, as if no such proceedings had been had. In his answer, the defendant, J. S. Latimer, admits the intermarriage of the plaintiff with M. B. Latimer, his assignor, during coverture, his alienation thereof without a renunciation of dower therein by plaintiff, and that she did have this estate in the said tract of land. But he insists that the proceedings in the Court of Probate, set forth in the plaintiff's complaint, were instituted in her name, with her knowledge, and by her authority; and this recovery he pleads in bar of the plaintiff's demand."

It was referred to the master to take the testimony, which, consisting for the most part of written correspondence, and answers to interrogatives filed, is all in the brief, and need not be stated. The cause was heard by Judge Hudson. The defendant insisted on two defences: First, that the proceedings in the Probate Court, being entirely formal, and instituted in the name of the plaintiff by a regular practising attorney, were, as a mat-

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ter of law, binding *upon the plaintiff, whether she authorized or had knowledge of the same or not; and second, that, as matter of fact, the proceedings in the Probate Court were instituted in the name and with the knowledge, approbation, and consent of the plaintiff, and, therefore, were binding upon her.

The judge held with the plaintiff on the question of the plea in bar, that the plaintiff was not bound by the probate proceedings unless she authorized the same, or, having knowledge thereof, acquiesced therein. But upon the question of fact, he held with the defendant, that the plaintiff, having made the allegation that the proceedings were without her authority, consent, or knowledge, was bound to prove the same clearly and satisfactorily; and upon a review of the testimony, he decided that she had failed to do so, concluding as follows: "It would be very tedious to review all the testimony in this decree. I deem it only necessary to say that I have examined it carefully, and counsel have ably discussed it before me, and my conclusion is that the plaintiff has not clearly and satisfactorily proved the allegations of her complaint. The direct and positive testimony of W. C. Latimer, and the many circumstances corroborating it, are of such weight as that the proof on the part of the plaintiff does not clearly outweigh them. It is therefore ordered, adjudged, and decreed, that the recovery in the Court of Probate is a bar to this suit, and that the complaint be dismissed," &c.

From this decree the plaintiff appeals: "I. Because his honor erred in holding that the suit in the Probate Court, set forth in the pleadings, is a bar to the present action, for the reason that the plaintiff had failed to show 'clearly' and 'satisfactorily' that she did not authorize the said suit in the Probate Court. II. Because his honor erred in not finding that the said suit in the Probate Court was unauthorized by the plaintiff, and that she was entitled to recover in this action. III. Because his honor seemed to have been governed, not by the preponderance of the testimony, but by the fact as stated by him, that the testimony on the part of the plaintiff did not clearly outweigh that for the defendant."

The decree was for the defendant, but to meet the possible view, that the ground on which it was rested might not be sustained, he asked the court to consider the other de-

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fence of former *recovery, which was overruled below. It is certainly the general rule, that a judgment, regular in form and rendered by a court of competent jurisdiction, is in its nature final and conclusive; but to this rule there are well established exceptions. Is it one of these, where an attorney, regularly admitted to practice and in good standing at the bar, is deceived into bringing an action without authority of the plaintiff? It is certainly correct in principle to maintain that one man cannot be bound by the act of another without authority to do so. But it seems to have been considered that there was something peculiar and exceptional in the case of an attorney, regularly licensed to do such business, when he in the name of another puts into operation the machinery of a court, and thereby obtains its judgment enforceable at law; for the old rule upon the subject was that "when an attorney takes on himself to appear, the court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him." The mere fact of the appearance of the attorney was deemed enough for the opposite party and the court. This may have been for the reason that war-

rants of attorney were then required to be filed.

But it is not the law or practice with us to require such warrants. They have never been in use in our courts. "The general integrity of gentlemen of the profession furnishes a security against their taking upon themselves to defend or prosecute a cause without authority of the party; and when we add to this the difficulty of concealing such a practice, and the accountability in the event of detection, I cannot perceive why they were ever thought necessary otherwise than as a protection to the counsel himself." Hellman v. McWhennie, 3 Rich., 364; Allen v. Green, 1 Bail., 448. We think, however, it is a good rule for attorneys to take warrants of attorney in important cases, and especially when the business is transacted with one claiming to be agent, although the authority of the attorney will be presumed, in the absence of any proof to the contrary. "A record which has such appearance will bind the party until it is proved that the attorney acted without authority." Hill v. Mendenhall, 21 Wall., 453 [22 L. Ed. 616]. The cases are not in entire accord upon the subject, but we concur with the Circuit judge

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that the weight of authority main*tains the view, that a judgment recovered by an attorney without the authority or knowledge of the plaintiff may, upon the proof of such fact, be set aside as void. Robson v. Eaton, 1 T. R., 62; Bailey v. Boyce, 5 Rich. Eq., 188; Shelton v. Tiffin, 6 How., 163 [12 L. Ed. 387]; Freem. Judg., § 499, and authorities.

Then as to the exceptions of the plaintiff, that the judge erred in finding that the plaintiff had failed to show "clearly and satisfactorily" that she did not authorize the suit in the Probate Court. This was a question of fact, and the practice of the court is well established, that the finding of the court below will not be disturbed unless it is manifestly against the weight of the evidence. It is urged, however, that in considering that question the judge committed error in putting the onus probandi on the plaintiff, thereby requiring her to prove a negative, and in finding that her testimony did not "clearly" out-weigh that for the defendant.

There is a general rule of evidence that a party will not be required to prove a negative; but that is not inconsistent with another rule of logic and universal recognition, that he who affirms must prove, and therefore the plaintiff who alleges must make out his case. "The obligation of proving every fact lies upon the party who substantially asserts the affirmation of the issue." 1 Greenl. Evid., § 74. Here the plaintiff alleges that she did not authorize or have knowledge of the probate proceedings. That was the affirmative issue she made, and although expressed in negative form, she was bound to prove it before she could have a recovery. "To the general rule that the burden of proof is on the party holding the affirmative, there are some exceptions in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions will be found to include those cases in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, the establishment of the negative is an essential element in his case; as for example, in an action for having prosecuted the plaintiff maliciously, or without probable cause," &c. 1 Greenl. Evid., 78.

There was a presumption that the attorney was employed by the plaintiff to sue in the Probate Court, and in such a case, especially the above principle applies. Wherever the

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law pre*sumes in favor of the affirmative, it lies on the party who denies the fact to prove it, although it may be a negative. For instance, on a note the law presumes consideration, and if the defendant denies that there is consideration, he must prove it. 2 Wait Prac., 109; 1 Stark. Evid.; Williams v. East India Co., 3 East, 192; Monk v. Butler, 1 Roll., 83. In the last case cited, being a suit for tithes, the defendant pleaded that the plaintiff had not read the 39 articles, and the court put the defendant to prove it though a negative, "for in this case the law will presume that the parson had read the articles, and when the law presumes the affirmative, then the negative has to be proved." We do not think it was error in the judge to require the plaintiff to prove with satisfactory "clearness" the allegation upon which her whole case rested.

In the view that it was incumbent on the plaintiff to make out her case, we have looked carefully through the testimony, and cannot say that the finding of the judge was manifestly against the weight of the evidence. There is direct conflict between the testimony of the plaintiff and her son William, and it cannot be necessary to advert to all the details of that painful discrepancy. It will be enough to say in general terms, that, as it impresses us, most, or at least several, of the facts and circumstances of the case tend to corroborate the testimony of William, that his mother at least knew of the proceeding in the Probate Court and allowed it to proceed. Mother and son had recently lived together at Johnston, in Edgefield, and had talked over the matter of the dower. She says that William there asked her for permission to have the action brought for her, which she refused. The correspondence with the defendant was opened by her, saying in her last letter of May 17, 1880: "I thought you would be anxious for the matter to be settled. It is certainly my right that

it should be, and my circumstances demand it. * * * I claim all that the law allows me. * * * It is the only means I have to look to: * * * my circumstances require an immediate settlement," &c.

There seems to have been no answer, and at this stage her son William, who had then removed to Allendale, Barnwell County, took up the business and wrote to Mr. Gary, em-

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ploying him to *institute suit "for his mother." Nothing more was heard from Mrs. Latimer pending the suit or until April, 1881 (after the suit was ended and a silence for nearly a year), when she renewed the correspondence with the defendant about her dower. Considering her pressing needs, as declared by herself, it is difficult to understand this long silence, except upon the supposition that she knew of the proceedings and was waiting the event in silence, until she heard that her son, who was conducting the litigation for her, had appropriated the whole proceeds of the action.

This view is entirely consistent with the remarkable chasm in the correspondence, and explains what otherwise would have been on the part of the son an unparalleled act not only of audacity but of folly. Indeed, it was urged that the testimony of William was discredited by his letters, showing conscious guilt and apprehensions of arrest and disgrace. But upon a careful reading of his letters it will be found that his cries for mercy were all for taking and appropriating the contents of his mother's letter. Neither in his letter nor in his testimony does he any where intimate that he was not authorized to have the action brought for his mother or express apprehensions of danger or disgrace for anything except the appropriation of the money enclosed in the letter to his mother.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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22 S. C. 265

COVAR v. SALLAT.

(November Term, 1884.)

[1. *Appeal and Error* ⇐724.]

An exception alleging error in overruling the exceptions to a referee's report, and an exception in general terms containing no distinct legal proposition, not considered because in conflict with the requirements of Rule V.

[Ed. Note.—Cited in Levi v. Blackwell, 35 S. C. 544, 15 S. E. 243; State v. Seabrook, 42 S. C. 78, 20 S. E. 58.

For other cases, see Appeal and Error, Cent. Dig. § 2907; Dec. Dig. ⇐724.]

[2. *Appeal and Error* ⇐1022.]

Findings of fact by referee, concurred in by the Circuit judge, not disturbed, especially as the judgment was not based thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⇐1022.]

[3. *Costs* ⇐13.]

Costs in equity causes are at the discretion of the Circuit judge, and his ruling will rarely be disturbed.

[Ed. Note.—Cited in Cooke v. Poole, 26 S. C. 324, 2 S. E. 609; Dendy v. Waite, 36 S. C. 575, 15 S. E. 712.

For other cases, see Costs, Cent. Dig. § 21; Dec. Dig. ⇐13.]

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[4. *Appeal and Error* ⇐832.]

*Petition for rehearing granted, certain exceptions, misplaced and not properly entitled, having been overlooked.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3215; Dec. Dig. ⇐832.]

[5. *Appeal and Error* ⇐819.]

Where an appeal was suspended so that appellant might move on Circuit for a new trial upon one of the issues involved, the result of which was to be certified to this court, until such certificate is furnished the appeal cannot be heard on its merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3200; Dec. Dig. ⇐819.]

Before Aldrich, J., Aiken, September, 1883.

The opinion sufficiently states the case. The decree of the Circuit judge was as follows:

The complaint was filed for the foreclosure of a mortgage, and referred to Mr. James Aldrich to hear and determine the issues of law and fact. Proceedings were had in the Ordinary's Court to sell the lots described in the pleadings for partition and to pay outstanding debts. On March 2, 1868, the land was sold and the defendant became the purchaser of the lots, made the cash payment, and gave his bond and mortgage to secure the same. The lots sold for $355. There was a credit on the bond which reduced it to $285.20, and the referee finds that the defendant paid $432 of debts. In June, 1872, a suit was commenced in Edgefield, in the name of Turner, ex-judge of probate, to foreclose this identical mortgage.

The referee finds as facts: 1. That the bond and mortgage are satisfied. 2. That there was another case pending between the same parties, for the same cause of action, in Edgefield County. His conclusions of law are: 1. That the bond and mortgage are satisfied, and plaintiff has no cause of action. 2. That the action in Edgefield is a bar to this action.

It is not my purpose, nor is it necessary, to travel over the wide range of argument indulged in by the counsel who represent the plaintiffs. The findings of fact by the referee, like the verdict of a jury, will generally control the court, unless the same be unsupported by the evidence, or against the weight of the evidence. In this case, the referee is a leading member of the bar, highly trusted and esteemed for his learning and probity. He had the witnesses before him, and is the best judge of the confidence to be placed in their statements. After a careful examination of all the evidence, he has come to the

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deliberate con*clusion that the bond has been paid and the mortgage satisfied. He is also satisfied that there is an action pending in Edgefield, which is a bar to this action. The plaintiffs cannot complain of this finding, for they introduced the testimony which led the referee to this conclusion.

Great stress is laid on the fact that the officer, Durisoe, to whom this bond and mortgage was given, was out of office, and had no right to make the settlement, the records and papers of his office by law being required to be transferred to his successor. But it is worthy of consideration that this transaction took place soon after the corrupt government of 1868 went into operation; that there was great doubt in the minds of officeholders what was the best course to pursue in regard to the bonds and mortgages in their custody, and which they held for the benefit of widows, orphans, and other persons entitled to the proceeds of sales made by them in the discharge of their official duties. Turner, the successor of Durisoe, was a man of very unsavory character, and, it may be, he held the valuable securities in his possession until he would be protected, by an order of court, in paying them over. Be that as it may, however, he made the sale, the defendant gave to him the bond and mortgage, and it was very natural for him to make the settlement with the man who held the custody of the securities.

There is another consideration which doubtless had its weight with the referee. This sale was made in 1868. The action to foreclose was not brought for several years after. The parties for whose benefit the action is brought stood by, saw this purchaser improve the property, sell off a portion of it to innocent purchasers for value, and, so far as the court can see, never uttered a word or made the first assertion of property. I do not see or appreciate the superior equity claimed for them. The object of this court is to do exact justice. The defendant, according to the findings, has paid out a considerable sum of money, more than he contracted to pay for the lots, has made a settlement with the man who had his papers, who promised to send them to him, and now it is argued, you must lose the property as well as the money.

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*The exceptions are overruled and the report of the referee confirmed. Let the complaint be dismissed with costs.

[For subsequent opinion, see 24 S. E. 136, 137.]

Messrs. Bonham & Devore, P. A. Emanuel, for appellant.

No counsel contra.

February 27, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This action was brought originally by Lycurgus Charlton, as judge of probate for Edgefield County, to foreclose the mortgage mentioned in the complaint, and for judgment upon the residue of the bond, secured by said mortgage. This bond and mortgage had been executed by the defendant, Sallat, in 1868, to W. F. Durisoe, the then ordinary for Edgefield, in the purchase of certain lots of land situate in Hamburg, sold by the said ordinary as the property of one Gray, deceased.

Before the trial Charlton was succeeded by L. P. Covar, as probate judge, and the defendants, Laurence and Williams, having purchased portions of the land, the complaint was amended by substituting Covar as plaintiff, and making Laurence and Williams defendants with Sallat. These defendants all answered, Sallat separately, and the other two together. The defence set up was the same in both answers, i. e., that the bond had been paid, and that the plaintiff, Covar, judge of probate, was not the lawful owner and holder of the bond and mortgage, and therefore could not maintain the action. Laurence and Williams also claimed that Sallat was the owner of a separate tract of land from them, of value sufficient to pay the bond, if not already paid, which should first be exhausted.

The case was tried by James Aldrich, Esq., to whom, as referee, the issues of law and fact had been referred by order of the court. At the close of the testimony on both sides, the referee allowed the answers to be amended, so as to conform to the evidence submitted by the plaintiff, as follows: "That the plaintiff cannot maintain this action, because an action is pending upon the same cause of action set forth in the complaint in the Court of Common Pleas for Edgefield

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county, between the prede*cessor of the plaintiff, as probate judge, and the defendant." It may be stated here, that at the time the land was sold to Sallat in 1868, Hamburg was in Edgefield County; since then Aiken has been laid off, embracing Hamburg, hence the action below was brought in Aiken County.

The referee, after full hearing, found and reported as matters of fact: "1. That the bond and mortgage are satisfied. 2. That there was another case pending between the same parties, and for the same cause of action in Edgefield County." And as conclusions of law: "1. That the bond and mortgage being satisfied, the plaintiff has no cause of action. 2. That the action in Edgefield is a bar to this action." Wherefore he ordered and adjudged that the complaint be dismissed, and that the plaintiff pay the costs. To this report the plaintiff filed exceptions and gave notice of an appeal, with further notice that he would at the next term of the Court of Common Pleas for

Aiken, move to set aside the report, or have the same modified, and for such relief as may be proper.

In the mean time Covar having ceased to be probate judge, his honor, Judge A. P. Aldrich, before whom the report and exceptions came on for hearing on the 16th September, 1882, passed an order that "W. F. Roath, his successor, be made a party to this action as plaintiff; and that the said Roath, as probate judge, be empowered to act as plaintiff, and that the action stand revived, and is hereby continued." This order was preceded by a statement, that as Covar became entitled to the control of said bond and mortgage, as successor to Durisoe, so Roath, as the successor of Covar, had become entitled to the custody and ownership thereof; and in order that the appeal of Covar should be heard, and otherwise that justice should be done, therefore the order was passed.

On the hearing, Judge Aldrich overruled the exceptions, confirmed the report of the referee, and dismissed the complaint with costs. The plaintiff has appealed upon the grounds following: "1. That his honor erred in overruling the exceptions to the report of the referee, James Aldrich, Esq. 2. That his honor erred in his conclusions of fact, wherein he says that the parties for whose benefit

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the action is brought, have been guilty *of laches in permitting the mortgagor to improve and sell off the same without asserting their rights. The defendant, according to the findings, has paid out a considerable sum of money, more than he contracted to pay for the lots, has made a settlement with the man who had his papers, who promised to send them to him, and now it is argued, you must lose the property as well as the money. 3. That his honor has erred in discharging the complaint, with costs, inasmuch as the plaintiff has honestly striven to do his duty; and to be deprived of the funds with which to perform it, and subjecting him to costs, under the circumstances will deter any officer from performing his duties. 4. That the plaintiff appeals from his honor's decree in this case, inasmuch as it is void, for W. F. Roath was substituted as plaintiff in the place of Covar, and such a judgment is void for uncertainty, for Covar is dead as to this action, and no judgment could be rendered against him. 5. The plaintiff excepts to each and every conclusion of law and fact herein, because contrary to law and the evidence."

Rule V., of this court, concludes as follows: "Exception to decree. An exception for the purpose of an appeal must contain a statement of the proposition of the law or fact which it is desired to review, and a mere reference to an exception taken to the report of the master or a referee, or to the decree of a judge of probate, will not be sufficient, and an exception so taken will not be considered." Exceptions in the words, that the verdict or decree is contrary to the law and the evidence, or that his honor erred throughout his whole charge, thereby causing the jury to bring in a verdict contrary to the law and the evidence, are too general and indefinite, charging no specific error, and will not be considered. State v. Branham, 13 S. C., 389; Norton v. Livingston, 14 Id., 177. All exceptions should distinctly state the error complained of. Blake v. DeLiesseline, 4 McCord, 496; Shand's Manual, 53.

The first exception of appellant is in direct conflict with the latter part of rule V., above—in fact of the entire rule—as it contains no proposition of law or fact for review, and it merely refers to exceptions taken to the master's report in gross, eight

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*in number.[1] Exception 5 is also in violation of the above rule, in that it contains no distinct legal proposition, which appellant seeks to have reviewed. At the same time it is obnoxious to the rulings in the cases referred to, supra, because too general and indefinite, and charging no specific error.

Exception 2 imputes error to some of the findings of fact of his honor. We cannot say that this exception is well taken under the rule well established here in such matters, that the findings of fact by the Circuit Judge, especially when he has concurred with the referee, will not be disturbed unless such finding is patently unsustained. Besides, it is manifest from reading the decree, that the findings of fact referred to had but little influence in producing the judgment. That was founded upon other considerations, and these facts seemed to have been alluded to by the judge as merely supplemental.

Exception 3 is in reference to the costs. Under the fee bill costs in equity causes is a matter for the judge pronouncing the decree, and this court rarely disturbs his order in that respect. Code, § 323.

We do not know that we fully understand the 4th exception. It claims that the decree is void for uncertainty, giving as a reason that Roath having been substituted for Covar as plaintiff, and Covar being "dead as to this action," no judgment can be entered up against him. We do not see the uncertainty complained of by the appellant in the decree. It is certainly quite plain in its conclusion, where the judge announces the result of his findings of law and fact by overruling the exceptions, confirming the report, and dismissing the complaint with costs. The defendant has not complained of any uncertainty as to the party from whom he is to get his costs. The decree is in his favor, and if he is willing to abide it in the shape in which it has been left, why should the plaintiff seek to protect him?

We have declined, with some reluctance, to consider the questions sought to be raised

[1] See order for rehearing at the foot of this opinion, next page.

in exceptions 1 and 5 under our rule and the cases referred to above, but the strict observance of the requirements of that rule, and of the principles laid down in the decisions above by the profession, would contri-

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bute greatly *not only to the satisfactory discharge of its duties by this court, but to the interests of litigants, in having their rights fully and thoroughly considered and adjudicated. And inasmuch as most of the questions attempted to be raised by reference to the exceptions to the referee's report are questions of fact, which, under the rule governing this court as to such questions, we could hardly disturb, we have thought that this would be a good case in which to call to the attention of the profession the necessity of observing said rule V. of this court.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

The appellant filed a petition for rehearing upon the ground that the exceptions to the referee's report had been added in detail to his first exception by special permission of this court.

April 28, 1885. The following order was passed

PER CURIAM. We have examined the petition for a rehearing in this case, and finding that it is true, as alleged, that the court did overlook some of the exceptions which the appellant had been allowed to add, by way of amendment to those originally filed, we think a prima facie case for a rehearing has been made.

It is proper, however, to explain how it happened that the oversight occurred. At November term, 1883, when the case was first called for argument, the appellant desired the court to suspend the appeal, so far as it related to the question of payment of the bond sued upon, and proceed to hear and determine the appeal so far as it related to the question whether the present action was barred by a former pending suit. This the court declined to do, but did grant an order, on January 26, 1883, continuing the case and suspending the appeal, with leave to the appellant to apply to the Circuit Court for a new trial of the question of payment of the bond on the ground of after-discovered evidence. The case was then continued from term to term until December 11, 1884.

In the meantime, however, the counsel for appellant had obtained leave to amend the exceptions originally filed so as to conform to the requirements of rule V. of this court,

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but the *counsel failed to put the order granting such leave in writing, and there being no record of the same, and the amended exceptions having been appended to the argument of appellant's counsel, without any reference to such amendment being noted at that portion of the brief, where they would most naturally be expected to be found, such amendments were overlooked when the court came to consider the case after the argument.

We desire also to add that when the case was argued at the last term the court lost sight of the fact that, nearly two years before, an order had been passed suspending the appeal and granting leave to the appellant to apply to the Circuit Court for a new trial of the issue of payment, on the ground of after-discovered evidence, and requiring that the result of such application should be certified to this court; and the counsel did not bring to the attention of the court the fact that such an order had been granted, as should have been done, inasmuch as if this fact had been brought to the attention of the court, it is manifest, from the ruling of the court when the original application to suspend the appeal as to one point in the case was made, the appeal could not then have been heard. The order of January 26, 1883, hereinbefore referred to, having expressly required that the result of the application to the Circuit Court should be certified to this court, and no such certificate having yet been filed in this court, the case is not yet in a condition to be heard on its merits It is true that a certified copy of Judge Kershaw's order granting a new trial of the issue of payment has been filed in this court, but whether such new trial has been had and if so what was the result this court is not yet informed, either by certificate from the Circuit Court, as required by the order of January 26, 1883, or otherwise.

It is therefore ordered that the petition for rehearing be set down for argument on the first day assigned for the hearing of cases from the Second Circuit at the next term of this court.

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22 S. C. *274

*ANDREWS v. LOEB.

(November Term, 1884.)

[1. *Wills* ⇐547.]

In 1826 a lot of land was devised to L., the wife, for life, and upon her decease to be sold and the proceeds divided between A. and S., the children, their heirs and assigns, but in the event of either A. or S. dying, leaving no issue living at the time of L.'s death, the whole of said property was to go to the survivor, his or her heirs or assigns for ever; and executors were appointed. It was also declared that the "estate bequeathed to S. is for her and the heirs of her body, to them and their assigns for ever." A. conveyed his interest to S., and afterwards L. died and also A., unmarried. *Held*, that S. had a good title in fee simple to this land.

[Ed. Note.—Cited in Robinson v. Ostendorff, 38 S. C. 74, 16 S. E. 371; Vaughan v. Bridges, 61 S. C. 162, 39 S. E. 347.

For other cases, see Wills, Cent. Dig. § 1179; Dec. Dig. ⇐547.]

[2. *Wills* ⇐610.]

What S. took under this will was personalty, and words which, as to land, would create a

fee-conditional, create an absolute estate in personalty.

[Ed. Note.—Cited in Woods v. Reeves, 23 S. C. 387; Walker v. Killian, 62 S. C. 487, 40 S. E. 887; Mattison v. Stone, 90 S. C. 149, 72 S. E. 991.

For other cases, see Wills, Cent. Dig. §§ 1379-1385; Dec. Dig. ⟸610.]

[3. *Wills* ⟸866.]

There being no disposition by will of the fee, it descended to testator's heirs at law, who were his widow and these, their children. S. was therefore now the sole heir, and the words "heirs of her body" in this will have no relation to the fee thus descended, but only to her interest in the proceeds of the sale.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2200–2203; Dec. Dig. ⟸866.]

[This case is also cited in Vaughan v. Bridges, 61 S. C. 162, 39 S. E. 347, as to facts.]

Before Fraser, J., Charleston, November, 1884.

This was a controversy without action between Sarah Ann Andrews and Lee Loeb. The opinion fully states the case.

Mr. J. N. Nathans, for appellant.

Messrs. Lord & Hyde, contra.

March 2, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This is a controversy without action, and it involves but a single question, i. e., whether the plaintiff can convey to the defendant a fee simple title to one-half of certain premises, situate in Charleston, which defendant had contracted to purchase from said plaintiff. It is admitted that as to the other half the plaintiff can make good title.

The lot in question formerly belonged to one Moses Andrews, the father of the plaintiff, who, by his will, dated in 1826, gave and devised said lot to his wife, Louisa Andrews, for life, "and upon her decease the same to

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be sold and the proceeds thereof to *be equally divided between my two children, Augustus O. Andrews and Sarah Ann Andrews, share and share alike, their heirs and assigns, but in the event of either of my children dying, leaving no issue living at the time of the decease of my said wife, Louisa, the whole of said property to go to the survivor, his or her heirs or assigns forever," appointing his wife Louisa and one David Kittleband, executrix and executor. At the bottom of the will, and noted in the attestation clause, the following language was inserted: "It is understood that the property and estate hereby bequeathed to my daughter is to her and the heirs of her body, to them and their assigns forever." In November, 1847, Augustus O. Andrews conveyed his interest to his sister, the plaintiff, and he died in 1880. The widow, Mrs. Louisa Andrews, died in 1879. The plaintiff has never married.

Upon these facts his honor, Judge Fraser, to whom the controversy was submitted, decreed that the plaintiff could convey the land in fee simple to the defendant; he therefore ordered and adjudged that upon a proper deed conveying the interest in question by the plaintiff being tendered, that defendant do carry out his contract of purchase according to the terms agreed upon. This decree was based upon the following reasoning as expressed in the decree: "The will under which the plaintiff claims gives positive directions that the land shall be sold and the proceeds divided. What she took under the will, therefore, was personalty, and the words added to the will which would have given only a fee conditional in land, gave her an absolute estate in personalty, i. e., in the proceeds of the land. The subsequent election to take the land instead of the money, operates to give her a good title in fee to the land. This election cannot in my view operate to transfer to the land, with a view of limiting the estate, words which, as to personalty, create an absolute estate. It was in effect a purchase of an absolute estate with the proceeds which were absolutely hers. It is therefore adjudged that the plaintiff can convey to the defendant in fee simple the one-half of said premises devised to her in the will of her father."

We adopt the reasoning of the Circuit judge and concur in his conclusion. This conclusion might also be sustained upon another ground if necessary. At the death of

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Moses Andrews, *inasmuch as he devised only a life estate to his widow, without disposing of the fee in terms to any one, the fee descended to his heirs. These were his widow and his two children, who inherited one-third each. That is, the fee descended to them in that proportion, awaiting a sale as directed by the will, upon the termination of the life estate. The widow died in 1879, upon which event the fee vested in the two children. Augustus died in 1880, leaving his sister, the plaintiff as his heir, who then became vested with the entire fee, or rather with the fee in the entire premises, to which fee the words in the will, "heirs of her body," have no relation, as those words apply only to her interest in the proceeds after sale, which, as the Circuit judge has held, was personalty. There has been no sale under the will, and, consequently, the fee has not been divested from the heir.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

22 S. C. 276

STEELE v. EXUM.

(November Term, 1884.)

[1. *Venue* ⟸26.]

Where none of the parties to an action reside in this state, the county designated in the complaint is the proper county for the trial.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸26.]

[2. *Venue* ⟸46.]

Where the defendants, residing in this state but not in the county where the action is brought, in their answer to a complaint for services rendered, deny on this ground the jurisdiction of the court, the Circuit judge may, on plaintiffs' motion, change the place of trial to the proper county under the authority of section 147, subdivision 1, of the code.

[Ed. Note.—Cited in Ware v. Henderson, 25 S. C. 387; Geiser Mfg. Co. v. Sanders, 26 S. C. 71, 72, 1 S. E. 159; Bell v. Fludd, 28 S. C. 316, 5 S. E. 810; Ex parte Ware Furniture Co., 49 S. C. 30, 27 S. E. 9; Nixon & Danforth v. Piedmont Mut. Ins. Co., 74 S. C. 440, 54 S. E. 657; Silcox & Co. v. Jones, 80 S. C. 488, 61 S. E. 948; All v. Williams, 87 S. C. 102, 68 S. E. 1041, Ann. Cas. 1912B, 837.

For other cases, see Venue, Cent. Dig. § 68; Dec. Dig. ⟸46.]

Before Wallace, J., Williamsburg, March, 1884.

The opinion fully states the case.

Mr. T. M. Mordecai, for appellant.

Mr. H. J. Haynsworth, contra.

March 2, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The action below was brought in Williamsburg County,

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by the administrators of the estate of *S. W. Maurice, for services. The defendant, Bardin, was served in Charleston County, where he resided at the time of said service and also at the commencement of this suit, and since. Exum, who resided in Orangeburg County, was never served. Bardin answered denying the jurisdiction of the court at Williamsburg, on the ground that both of the defendants resided outside of Williamsburg County, the county designated in the complaint as the place of trial. At the call of the case on the docket, his honor, Judge Wallace, on motion of plaintiffs' attorney, passed an order changing the place of trial from the County of Williamsburg to the County of Charleston, and directing all subsequent proceedings in the action to be had in the county last mentioned. The defendant, Bardin, appealed, on the ground that the court at Williamsburg had no jurisdiction over the persons of the defendants, as neither of them resided in Williamsburg County.

The code, sections 144, 145, and 146 (1882), divides actions into four classes with reference to the place of trial—the first depending upon the location of the subject-matter of the action, the second upon the cause of action, the third upon the county in which one or more of the defendants resides, and the fourth upon the fact that none of the parties reside in the state; in which last class the plaintiff has the right to designate in his complaint the county for trial, subject to the power of the court to change the place, as provided in a subsequent section. In each of these classes of cases, then, actions therein may be said to have a proper county as the place of trial, to be determined by the conditions mentioned in the sections above; and where a mistake is made by the plaintiff in suing in a county not the "proper" one, his action becomes subject to the subsequent section 147, which will be considered hereafter. It must be observed here, however, in reference to the last class mentioned above, i. e., where none of the parties reside in the state, inasmuch as in such case the plaintiff has the right to designate the county, there can be no mistake, and therefore there can be no improper county, so to speak, as the law fixes no county except the one designated by the plaintiff.

Next to the sections referred to above fol-

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lows section 147, in *which it is provided that "the court may change the place of trial in the following cases: 1. Where the county designated for that purpose in the complaint is not the proper county. 2. Where there is reason to believe an impartial trial cannot be had. 3. Where the convenience of witnesses and the ends of justice would be promoted by the change." This section is an independent and separate section, the last in the chapter, and, as we understand it, controls the preceding sections so far as it is applicable thereto. For the reasons given, however, above, the first subdivision in this section (i. e., where a change of place may be made because the county designated in the complaint is not the proper county) can have no application to the fourth class of actions mentioned, i. e., where none of the parties reside in the state, because, as we have seen, when the plaintiff designates in such a case the county, it is the proper county, and therefore there can be no such thing in such case as an improper county, which is the only contingency upon which the court could change the place of trial under this subdivision. The other two subdivisions apply to all four of the classes, and this with the other two apply to the three first classes.

The case under consideration belongs to the third class, where the defendants reside in different counties from that in which the action is brought. It is apparent, therefore, that the action was not brought in the proper county, and it is equally apparent, for this reason, that it is a case where the court has been invested with power to change the place to the proper county by section 147, subdivision 1.

It is said, however, that this cannot be done here, because the court at Williamsburg had no jurisdiction of the person of the defendant. It may be true, no doubt it is, that so far as the trial of the cause upon its merits is concerned, that court had no jurisdiction, as under the code, supra, the defendants residing in other counties, the trial could not be had in Williamsburg, but did it not nevertheless have jurisdiction as to changing the place of trial? If not, what is the meaning of section 147, wherein this power is expressly given to the courts in just such cases? If the exercise of this power can be denied and defeated on the ground that the court had no

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general jurisdiction of the case as *a whole, then the first subdivision of section 147 had as well be expunged.

If it was necessary for the court to get jurisdiction of the whole case before it could entertain such a motion, then the court could hear it upon its merits, and there would be no necessity for such motion, but it is only because the court cannot have such complete jurisdiction that the power in question has been conferred; and it would be strange that when the occasion arises for the exercise of this power to change the place of trial expressly provided for, because the court has no jurisdiction to try the case itself, that this underlying want of jurisdiction would divest the power. This cannot be the true construction of these sections. There may be full jurisdiction or a limited jurisdiction in courts, determined by the law which confers it. In cases of the kind before the court, we think that section 147 has conferred upon the courts of this state jurisdiction to the extent of changing the place of trial in cases falling under the sections referred to.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

22 S. C. 279

PELZER, RODGERS & CO. v. STEADMAN.

(November Term, 1884.)

[1. *Trial* ⇐136.]

The construction of a written paper is a question of law for the court, and not a question of fact.

[Ed. Note.—Cited in Cheatham v. Morrison, 37 S. C. 193, 15 S. E. 924; Senterfeit v. Sealey, 71 S. C. 271, 51 S. E. 142.

For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323–327; Dec. Dig. ⇐136.]

[2. *Principal and Surety* ⇐59.]

A surety is a favorite of the law with certain established rights which must be observed by the creditor, but a written contract cannot be construed in one way as against the principal debtor, and in another as against the surety.

[Ed. Note.—Cited in Ex parte Powell, 74 S. C. 197, 54 S. E. 236; Exchange Bank v. McMillan, 76 S. C. 568, 569, 57 S. E. 630.

For other cases, see Principal and Surety, Cent. Dig. § 103; Dec. Dig. ⇐59.]

[3. *Principal and Surety* ⇐66.]

Therefore, where a husband contracted for an advance of $2,000, which he agreed to repay on a day named, and also to ship to this creditor all cotton controlled by him during the year, to be sold on commissions, and the wife mortgaged her separate property to secure the performance of this agreement, the creditor, in the absence of directions from the principal debtor, might apply the proceeds of cotton so shipped (which proceeds exceeded $2,000), first to the credit of other indebtedness of the principal debtor, and then for a balance remaining due on the account for advances, the creditor could foreclose the mortgage given by the wife as surety.

[Ed. Note.—Cited in Rouss v. King, 69 S. C. 173, 174, 48 S. E. 220.

For other cases, see Principal and Surety, Cent. Dig. §§ 108–110, 112; Dec. Dig. ⇐66.]

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[4. *Payment* ⇐39.]

*Where a creditor has three accounts for three different periods of time open upon his books against the same person, for one of which he holds the mortgage of a surety, he may apply to either of these three accounts unappropriated payments made by the principal debtor.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 111; Dec. Dig. ⇐39.]

[5. *Payment* ⇐24.]

Where a sealed note is taken for the aggregate amount of three several accounts, the law, in the absence of testimony, will imply satisfaction, but such implication may be rebutted by testimony, as in this case.

[Ed. Note.—Cited in Ex parte Middleton, 42 S. C. 181, 20 S. E. 34.

For other cases, see Payment, Cent. Dig. § 28; Dec. Dig. ⇐24.]

[6. *Pleading* ⇐349.]

A plea of usury being admitted, judgment should be rendered for the principal of the debt, without interest or costs.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1067–1069; Dec. Dig. ⇐349.]

[This case is also cited in Exchange Bank v. McDill, 56 S. C. 565, 35 S. E. 260, and distinguished therefrom.]

Before Witherspoon, J., Barnwell, March, 1884.

This was an action to recover a debt and to foreclose the following mortgage, which was executed February 1, 1881:

To all persons whom these persons may concern, I, Alice A. Steadman, of the county and state aforesaid, greeting:

Whereas Pelzer, Rodgers & Co., of the city of Charleston, in said state, have agreed to made advances to my husband, G. E. Steadman, doing business at Blackville, in said county, during the current year, to the amount of two thousand dollars upon the condition that the security hereinafter given should be provided for the payment of the amount that shall be so advanced, with interest from the date of the advances at the rate of seven per cent. per annum, and also commissions thereon at the rate of five per cent., as compensation to said Pelzer, Rodgers & Co. for their services in making said advances; the whole to be due and payable on the first day of November next. And whereas I am willing to assist the said G. E.

Steadman in procuring said advances for the furtherance of his business by a pledge of my separate property.

Now, know ye, that I, the said A. A. Steadman, in consideration of the advances agreed to be made by the said Pelzer, Rodgers & Co. to the said G. E. Steadman, as aforesaid, and for the better securing the amount that shall be so advanced, with interest and commissions as aforesaid, and in further consideration of the sum of five dollars to me in hand paid at and before the sealing and delivery of these presents by the said Pelzer, Rodgers & Co. (the receipt whereof is hereby acknowledged), have granted, bargained, sold and released, and by these presents do grant, bargain, sell, and release to the said Pelzer, Rodgers & Co. [then follows description of the premises mortgaged, with habendum and warranty clauses]. Provided always nevertheless, and it is the true intent and meaning of the parties to these presents, that if the said G. E. Steadman shall

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well and truly *pay, or cause to be paid, unto the said Pelzer, Rodgers & Co. the said sum of two thousand dollars, to be advanced to him as aforesaid, with interest and commissions thereon as aforesaid, on the first day of November next, and shall further fulfil and perform his engagement with said firm (part of the consideration for said advances) to ship them as factors for sale on commission all the cotton he may control in his business during the current year, then this deed of bargain and sale shall cease, determine, and be utterly null and void; otherwise to remain in full force and virtue.

Other matters necessary to a full understanding of the case are stated in the opinion of this court. The Circuit decree, omitting so much as is restated in the opinion, was as follows:

There can be no doubt that the amount of advances to be made and to be secured by the mortgage is limited by the contract to $2,000 and interest during the year. It is equally clear that the time for payment is definitely fixed on the 1st November, 1881, after which advances could not be made upon the security of the mortgage. It was conceded upon argument that G. E. Steadman had shipped plaintiffs all of the cotton controlled by him during the year 1881. This condition of the mortgage having been fully complied with, plaintiffs can only look further to the mortgage as a security for the advances and interest provided for. Plaintiffs yield to defendants' plea of usury, the penalty for which by statute is a forfeiture of all interest and payment of costs.

There are three parties to the contract. The plaintiffs who agree to make the advances, the defendant, G. E. Steadman, the principal debtor, to whom the advances were made, and the defendant, Alice A. Steadman, who gives plaintiffs a mortgage of her separate property to secure payment of advances to be made to the principal debtor, etc. Payment, therefore, by the principal debtor discharges the collateral liability of the surety. The cases of Witte v. Wolfe, Williams & Co. v. Vance & Moseley, and Hunter v. Wardlaw & Edwards [6 S. C. 74], cited by counsel, were cases between creditor and principal debtor, and the rights and liabilities of sureties or guarantors were not involved. Two objects appear to have been contemplated by the parties in this case, and both were to be secured by the mortgage. I. Advances to the principal debtor to a lim-

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ited amount, and payable at a definite *time. II. The shipment of cotton by the principal debtor to the plaintiffs, as factors for sale on commission.

It being admitted that the cotton has been shipped to plaintiffs, the liability of the surety for the shipment of cotton must be held to be discharged. It remains to be determined whether or not the liability of the surety for advances to the principal debtor has been discharged by payments made by the principal debtor up to November 1st, 1881. It does not appear that the surety, at the time that she executed the mortgage, knew of the antecedent liability of her husband. It may be that, with this knowledge, she would have refused to pledge her separate property. It may be that plaintiffs then relied upon the cotton secured to be shipped as sufficient to pay the secured advances, any past balance, as well as any additional credit that they might extend to the principal debtor. If such was the expectation it has not been realized in consequence of the short crop of 1881, and not from any fault of the surety. If the contract was intended to secure balances due or balances to become due by the principal debtor, it should have been so expressed, as in the case of Witte v. Wolfe, 16 S. C., 256.

Whilst the mortgage does not refer to the means to be employed by the principal debtor in paying for the advances, and whilst the two engagements in the mortgage appear to be distinct in terms, yet the mortgage that secures the advances also provides the means by which the principal debtor can pay for the advances. It is fair and reasonable to suppose that this fact was an inducement for the surety to pledge her separate property, especially when considered in connection with the further fact that the surety had taken the precaution to impose a limit both as to amount and the time for payment of the advances.

I must therefore conclude, under all the circumstances, that it was the intention of the parties that the advances should be made by plaintiffs to the principal debtor from February 1, 1881, to November 1, 1881, and that the payments made by the principal debtor during that period were to be applied

first to the advances to the extent of $2,000 and interest secured by the mortgage.

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*It appears that plaintiffs advanced to G. E. Steadman, from 1st February to 1st November, 1881.....	$4,006 69
That G. E. Steadman is credited with payments made during same period	2,728 55
	$1,278 14

In this view of the case it is not necessary to consider the effect of the note for $3,432.-55, executed by defendant, G. E. Steadman, June 30, 1882, to plaintiffs or the credit endorsed thereon as to the liability of the surety. Nor is it material to consider the right of application of partial payments which cannot apply in this case. The factor's lien cannot prevail in this case to the prejudice of the surety, it being held that, under the contract, the shipments were first applicable to payments of advances and interest.

It does not appear from the accounts or the testimony that a greater rate of interest than seven per cent. per annum has been charged or embraced in the note executed by the defendant, G. E. Steadman, to plaintiffs. This note embraces indebtedness prior to the execution of the mortgage by the surety. It was intended to represent the balance of the liability by G. E. Steadman to plaintiffs. After deducting the $1,714.63 credited on the note there remains a balance of $1,-826.70, with interest from the 14th April, 1882, due by the defendant, G. E. Steadman, to plaintiffs.

As Matter of Fact. I. I find that G. E. Steadman has paid plaintiffs the amount of advances and interest and shipped plaintiffs the cotton secured by the mortgage of the defendant, Alice A. Steadman. II. That the defendant, G. E. Steadman, is individually indebted to plaintiffs in the sum of $1,826.70 with interest from April 14th, 1882.

As Matter of Law. I. I find that the defendant, Alice A. Steadman, is not liable to plaintiffs upon the mortgage executed February 1, 1882, and delivered to plaintiffs, and as the conditions of said mortgage have been fulfilled, said mortgage, by its terms, is void and of no effect, and should be delivered to the said Alice A. Steadman to be cancelled.

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II. That plaintiffs' com*plaint should be dismissed as to the defendant, Alice A. Steadman, with costs. III. That plaintiffs are entitled to judgment against the defendant, G. E. Steadman, individually, for the sum of $1,826.70 with interest from the 14th April, 1882.

It is therefore ordered, adjudged, and decreed that the plaintiffs' complaint be dismissed with costs as to the defendant, Alice A. Steadman, and that plaintiffs do, within thirty days from the filing and notice of this decree, deliver to the defendant, Alice A. Steadman, the mortgage referred to in the complaint, to be cancelled by the clerk of the court, who is hereby authorized and directed to mark said mortgage satisfied. It is further ordered, adjudged, and decreed that plaintiffs have judgment with leave to issue execution against the defendant, G. E. Steadman, for the sum of eighteen hundred and twenty-six dollars and seventy cents with interest thereon from the 14th April, 1882, with costs as to said G. E. Steadman.

The exceptions raise only the points stated and considered in the opinion of this court.

Messrs. John J. Maher and Henderson Bros., for appellant.

Messrs. H. M. Thompson and L. T. Izlar, contra.

March 2, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In February, 1881, Pelzer, Rodgers & Co., factors in Charleston, agreed verbally to make advances to G. E. Steadman during that year, in money or supplies, to the amount of $2,000, with interest from the dates of the advances at seven per cent. per annum, and also commissions at five per cent. Steadman was a merchant at Blackville, S. C., dealing in cotton; and it was stipulated in the agreement, as a part of the consideration thereof, that Steadman should send to the factors, for sale on commission, all the cotton he might control in his business during the current year. This agreement was made upon the understanding that Mrs. Alice A. Steadman, the wife of G. E. Steadman, to secure the performance of his portion of the agreement, should execute a mortgage of her separate estate to the factors. Accordingly, in Feb-

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ruary, 1881, Mrs. Stead*man executed to the plaintiffs the mortgage mentioned in the complaint, covering certain real estate in Barnwell County, in which mortgage, after reciting the agreement between the plaintiffs and Steadman, and expressing her willingness to assist him, she duly conveyed the property to the plaintiffs, with condition that the deed should be void if Steadman should pay, or cause to be paid, to plaintiffs, said sum of $2,000, on November 1, 1881, and should further fulfil his said engagement to ship to said factors, for sale on commission, all the cotton he might control in his business during the current year.

At the date of this mortgage it appears that Steadman was indebted to the plaintiffs in the sum of $946.95, balance on the accounts of the previous year; but whether Mrs. Steadman knew of this, is not stated. The plaintiffs advanced to Steadman, during the year $2,758.31, subject to a credit of $475.37; so that at the close of the business year, July 1, 1881, the accounts stood $946.-95+$2,758.31=$3,705.26—$475.37=$3,229.89, to which interest was added to November 1,

1881, at which date total amount was $3,432.35, for which Steadman gave his note under seal, payable on November 1, 1881. This note embraced the $946.95 of the previous year, also advances under the agreement, $2,000, and additional advances $758.31, and interest from July 1, to November 1, 1881, less the credit of $475.37. On the note appeared a credit $1,714.65, dated April 14, 1882, which was a balance in favor of Steadman on transactions between July 1, 1881, and December, 1881.

Under these circumstances the action below was brought against G. E. Steadman and Alice, his wife, to recover against him individually the amount due for advances, and to foreclose the mortgage given by her. The defendant, Alice, answered, claiming that her husband had shipped to the plaintiffs all of the cotton under his control during the year, to an amount considerably in excess of the two thousand dollars, interest and commissions agreed upon, and therefore the mortgage was discharged. She further alleged that the agreement was usurious, as more than seven per cent. had been stipulated for on the advances. The defendant, Geo. E. Steadman, adopted the answer of

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his wife. *The case was heard by Judge Witherspoon upon testimony reported by the master.

It was conceded that Steadman had complied with his contract to ship all the cotton under his control, and that the proceeds of this cotton amounted to considerably more than the $2,000, secured by the mortgage. Nor was there any difference between the parties as to the amount remaining unpaid of the $2,000 secured by the mortgage, if the proceeds of the cotton should be applied first to the portions of the account, other than that. The vital question in the case, therefore, to Mrs. Steadman was how should this cotton money be applied; if to the mortgage, then her defence was sufficient and successful, but if to the entire account, then there was a balance due by her. There was nothing in the testimony showing that Steadman, the debtor, gave any directions as to the application of the proceeds of the cotton. He sent it forward under the agreement; it was sold by the factors, and the proceeds applied by them. It was contended, however, on the part of the defendants, that the agreement, when construed with reference to the rights of Mrs. Steadman, as surety or guarantor, required the application of the proceeds of the cotton to the advances secured by her mortgage. On the other hand the plaintiffs claimed that there was no appropriation growing out of the terms or intent of these papers, of these proceeds, but that they were left open and to be applied in conformity with the principles of law governing such cases, which being applied, entitled the plaintiffs to a large decree, i. e., the sum of $1,594.52, all interest being excluded under the plea of the admitted usury; Steadman having failed to direct the application of the cotton, either when it was consigned or afterwards, and the plaintiffs having applied it first to the unsecured portion of the account.

His honor, Judge Witherspoon, concluding under all the circumstances, that it was the intention of the parties that the advances were to be made from February 1, to November 1, 1881, and that the payments made during that period, by the principal debtor, were to be applied first to the extent of the $2,000 and interest secured by the mortgage, and it appearing that Steadman was credited

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with payments during the same *period more than enough to extinguish the $2,000, found as matter of fact, that the mortgage was satisfied. He found also, as matter of fact, that Steadman was still due the plaintiffs individually the sum of $1,826.70. He therefore adjudged and decreed that the complaint be dismissed with costs as to the defendant, Alice Steadman, but that plaintiffs have judgment against G. E. Steadman for the sum of $1,826.70 with interest from April 14, 1882, and costs.

The appeal of the plaintiffs involves the finding of fact of his honor that the mortgage was satisfied, based upon the intent of the parties that the proceeds of the cotton should be applied to the $2,000. The defendant appeals from the finding of fact that he was indebted to plaintiffs in the sum of $1,826.70, and he also alleges error in that his honor decreed judgment against him individually for any amount in this action when it was upon a special agreement set forth in the complaint, which had been complied with, and therefore the outside indebtedness was not involved and should not have been adjudicated. Further, the defendant under the principle that a judgment may be sustained on appeal upon other grounds than those upon which it was based by the judge has urged that the debt of defendant was satisfied by the sealed note given by him in full of the account in June, 1881, and therefore the mortgage given to secure said account was extinguished, as held by the judge. And he also contended that the whole account was extinguished, and therefore there was no foundation for that portion of the decree which allowed judgment against Steadman.

This court has frequently declared that it will not disturb the findings of fact of the Circuit judge resting upon testimony, unless it is manifestly against the weight of the evidence; and if the finding here involved in the plaintiffs' appeal was a finding as the result of evidence introduced and directed to a question of fact, the rule referred to would apply. But it is manifest that this is not the case. The judge evidently reached his conclusion, not through the fact of payment proved by witnesses, but through the con-

struction placed by him on the terms of the mortgage, showing, as he concluded, the intent of the parties; which required in his opinion the application of the proceeds of the

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cot*ton to the $2,000 advance. Now the construction of a paper in litigation between parties is not a question of fact for the jury, but is always a question of law for the court. So that the finding of fact of the judge, as it is styled, on this subject, was really a finding of law, or at least the result of a finding of law: and therefore it is before us as any other question of law, untrammeled by the rule referred to above.

It is practically conceded by his honor below that if this case was not complicated with the presence of Mrs. Alice A. Steadman, the surety, and if it was simply a case between creditor and debtor, under the law as laid down in Williams & Co. v. Vance & Moseley, 9 S. C. 344 [30 Am. Rep. 26], and Bell v. Bell, 20 S. C. 46, and other cases, there would be no difficulty whatever, as the facts would clearly entitle the plaintiffs to recover through a decree of foreclosure. But a distinction is attempted to be drawn between a case of that kind and this, because of the suretyship in this of Mrs. Steadman. Does that difference negative the application to this case of the principle which it is admitted would apply to the first? It is true the law requires on behalf of the surety fair dealing between the creditor and debtor. It was said in Tinsley v. Kirby, 17 S. C., 1, that in determining the liability of a surety it must not be forgotten that "he is a favorite of the law, and has the right to stand on the strict terms of his obligation when such terms are ascertained." Hence there can be no extension of time, not a moment, nor can there be the slightest change or alteration made in the contract without the knowledge and consent of the surety. Hence, too, all securities and collaterals deposited by the debtor with the creditor on account of the debt, must be held for the protection of the surety; but we have found no case or principle which requires that the contract shall be construed in one way as against the principal and in another as against the surety.

Now what was the contract of Steadman? It appears in the recitals of the mortgage, and it was simply to pay the amount to be advanced, $2,000, by November 1, 1881, thereafter, with interest and commissions, and to ship to the plaintiffs all the cotton under his control during that current year, to be sold on commission. Mrs. Steadman's mortgage

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was intended to secure *the performance of this contract on the part of her husband. In other words, she bound her land to the twofold promise of Steadman, i. e., that he would pay the $2,000, interests and commissions, by November 1, 1881; and also that he would ship all cotton to the plaintiffs, not for the payment of the $2,000, not as additional and collateral security thereto, but to be sold on commission. The plaintiffs were satisfied with the mortgage of real estate as a security for the $2,000, and the stipulation as to the shipment of the cotton was evidently in furtherance and support of their business as factors, selling cotton and other produce on commission. And if, as we have said, the contest here was between Steadman and the plaintiffs alone, there could not be a difference of opinion as to the construction of this contract, and no one would contend that either by the terms or the spirit of said contract could Steadman legally claim that the proceeds of the cotton should be applied to the $2,000 advance in preference to his other indebtedness to plaintiffs, if any. Under the law he might direct such application, but in the absence of such direction he could not claim it as a matter of legal right growing out of the terms of the agreement.

Such being the proper construction of the agreement as between the original parties, where then is the equity of the surety? And by the term equity, let it be understood that we do not mean the unfortunate condition in which Mrs. Steadman has placed herself, at the solicitation perhaps of her husband—a hard case for her, no doubt, as she is likely to lose her home—but we mean that equity which flows from established equitable principles, and which the courts can administer. We would not have been displeased to have found such an equity in the case, as we know how easy and natural it is for a wife to pledge her all in behalf of a failing husband, oftentimes without examination or reflection; but after carefully reviewing the whole case, we must say that we have not found it. According to our opinion, the contract or agreement must be construed to mean the same thing with the surety as with the principal. It is an entirety, and cannot bear a double signification. As we construe it, there was no appropriation of the cotton to the advance of the $2,000 secured by the mortgage.

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Hence in plaintiffs' failing to thus *apply it, it cannot be said that they have changed, altered, or modified the contract, or that they have diverted to other purposes securities or collaterals deposited or pledged by the debtor for its enforcement, to the injury of the surety, or that they have violated any other recognized equity of the surety. As to the application of partial payments by a creditor, in the absence of directions from the debtor, we need only to refer to the recent case of Bell v. Bell, 20 S. C., 46.

This brings us to the question raised by the defendant, that the sealed note given by him June 30, 1881, and due November 1, extinguished the entire account, including that for the advance of $2,000, and therefore the mortgage was satisfied. The law upon that

subject, as found laid down in the recent case of Chalmers v. Turnipseed, 21 S. C., 126, after discussing the previous cases, is as follows: Where an equal or an inferior security is taken, a question of fact is raised as to the intent of the parties, with the burden of proof on the debtor to show that it was intended as payment, if he so claims; whereas when a higher security is taken, in the absence of testimony to the contrary the law will imply satisfaction. Chalmers v. Turnipseed, supra, and the cases there cited.

In the case before the court, it seems that a sealed note was taken, which was a higher security than the open account, and in the absence of testimony would imply satisfaction; but Steadman himself, in his testimony on the cross-examination, said more than once that this note was given to close the account. To use his own language, at one place he said: "gave them a paper to close the account, but whether it was a sealed note or not cannot remember." Now, does this come up to the law of Gardner v. Hust, 2 Rich., 608, cited in Chalmers v. Turnipseed, where it is said "that in general the taking of a higher security is an extinguishment of the same, provided the higher security is accepted as satisfaction; and if not so accepted, then it is merely additional or cumulative security for the same debt"? With the evidence of the defendant, Steadman, before us, we think that the note was neither intended to extinguish the account nor was it accepted as payment and in satisfaction

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thereof, but was in*tended, as Steadman says, merely to "close it" and to acknowledge its correctness, and must be regarded as cumulative security.

The second objection of defendant, which applies to the judgment against him individually, might and perhaps would be fatal had we sustained above the decree of his honor, the Circuit judge, as to the satisfaction of the mortgage; because then there would have been nothing left in the complaint upon which such a judgment could have been based, inasmuch as the complaint assumes that the credits of Steadman had been properly applied to the other account in excess of the $2,000. The plaintiffs, therefore, sued only for the amount remaining unpaid on the $2,000 advance secured by the mortgage, assuming that the balance of the account has been paid. We have reached the conclusion different from the Circuit judge that the $2,000 had not been extinguished, and it being a subsisting debt of Steadman, as well as secured by the mortgage of Mrs. Steadman, the plaintiffs are entitled to an individual decree against Steadman and also a foreclosure of the mortgage.

The usury is admitted, therefore all interest should be eliminated. This the plaintiffs have offered to do, by remitting all of the decree in excess of $1,594.52, which seems to be the principal of the amount really due, without interest. For this amount, we think the plaintiffs are entitled to judgment against G. E. Steadman without costs, and that the mortgage should be foreclosed for that amount.

It is the judgment of this court that the plaintiffs should have judgment against G. E. Steadman for $1,594.52, and also a judgment of foreclosure against Mrs. Alice A. Steadman for the same amount; the payment of one being the satisfaction of both, all without costs; and to this extent the judgment below is modified. Let the case be remanded to be carried out in accordance with the above.

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22 S. C. *292

*BIRD & CO. v. CALVERT.

(November Term, 1884.)

[1. *Corporations* ⇐272.]

Where suit was brought against a corporation and its individual members, all of whom (except one) answered admitting liability, an order of reference and subsequent proceedings thereunder will not be set aside as to the corporation and these non-resisting defendants at the instance of the one excepted stockholder, whose time for answering had not expired when such order was taken, and who had not then answered.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⇐272.]

2. In action by a creditor in the Court of Equity to subject property beyond the reach of legal process to the payment of his demand, are judgment and execution unsatisfied the only sufficient evidence to prove insolvency, and so give jurisdiction to the court?

[3. *Corporations* ⇐252.]

Under a charter which provides that every stockholder shall be individually liable to the creditors to the extent of five per cent. upon his stock subscribed, the liability of the stockholders individually is primary, and may be enforced by action before judgment had against the corporation and return of nulla bona.

[Ed. Note.—Cited in National Bank of Newberry v. Kinard, 28 S. C. 112, 5 S. E. 464; Compton v. Patterson, 28 S. C. 154, 5 S. E. 470; Flenniken v. Marshall, 43 S. C. 82, 20 S. E. 788, 28 L. R. A. 402; Parker v. Carolina Savings Bank, 53 S. C. 590, 31 S. E. 673, 69 Am. St. Rep. 888.

For other cases, see Corporations, Cent. Dig. § 1017; Dec. Dig. ⇐252.]

Before Hudson, J., Charleston, June, 1884.

The opinion fully states the case.

Messrs. McCrady, Sons & Bacot, for appellant.

Messrs. Smythe & Lee, contra.

March 3, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. The defendant, Wm. H. Calvert, was a member of the company incorporated in 1881, under the style and name of "The Merchants' and Planters' Transportation Company," the charter of

which provided that each stockholder, besides his stock proper, shall be jointly and severally liable to the creditors thereof "in an amount not exceeding five per cent. of the par value of the share or shares held by him," &c.

The plaintiffs, claiming to be creditors of the corporation in the sum of $74.91, instituted this action in behalf of themselves and all other creditors of the corporation. The complaint alleged that the steamer "Clarendon," which belonged to the company, "had been sold at a price inadequate to satisfy the

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debts, and *that they had no property whatever and were utterly insolvent." A list of the stockholders was attached, with the number of the shares of each, among whom was the defendant, W. H. Calvert, represented as having subscribed two shares—two hundred dollars, one hundred of which was still due and unpaid. Alleging that their debt was payable, and the action brought within the times respectively required by the charter, the plaintiffs prayed judgment as follows: First, against the corporation for the amount of the debt; second, against the stockholder, W. H. Calvert, for one hundred dollars, the unpaid portion of his original subscription; third, against each of the stockholders for five per cent. upon the value of the shares held by the corporators respectively; and fourth, for the appointment of a receiver, general relief, &c.

The company and all its stockholders were summoned, and the corporation as such and most of its members (excepting Calvert) answered, admitting the allegations of the complaint, and the individual liability of each stockholder to pay five per cent. upon the amount of his stock, according to the terms of the charter. On March 11, 1884, Judge Kershaw referred the matter to Master Sass, with instructions to collect the five per cent. from all the stockholders who had answered, and, after paying the costs and a reasonable counsel fee to plaintiffs' attorney, to hold the remainder of the fund for the payment of the debts, with leave to call in the creditors, hold references, and report any special matter. After this, on March 14, Calvert's attorney gave notice of an appearance, and further time to answer being extended to him, he filed his answer on April 10, denying that he was in default in paying his original subscription, which, as he alleged, was only one share, one hundred dollars, and had been paid in full. He further insisted that, as the plaintiffs had not before commencing action obtained judgment against the corporation and exhausted their legal remedies, they had no right to invoke the equitable jurisdiction of the court to enforce the collection of the five per cent. against individual stockholders, and that all the orders previously passed were without authority, and the complaint should be dismissed as to all parties for want of jurisdiction.

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*On June 20, Master Sass filed his report under Judge Kershaw's order, stating that the stockholders (except Calvert) had paid the assessment upon their stock, that he had taxed the costs, fixed the fee, &c., and recommending that the remainder of the fund should be paid pro rata to the creditors. This report was confirmed by Judge Hudson, who ordered the money paid out as recommended, but at the same time reserved all the rights of Calvert, who was heard the next day upon his answer. The judge referred the issues of fact raised by the answer to the master, and overruled his plea to the jurisdiction, assigning as his reasons: "1. Because the answer of the defendant, W. H. Calvert, through indulgence of plaintiffs' counsel, has been filed at a late day, and at a time when it would be inequitable to interfere with the process of winding up the affairs of the corporation begun by this court. Had the defence been interposed at the outset, and had the other stockholders joined him therein, the grounds of defence would have deserved serious consideration, and might possibly have been fatal to the complaint, although I do not hold that the action might not have been sustained. 2. The allegation of utter insolvency is positively made in the complaint, and as unqualifiedly admitted by the defendant company, and by every stockholder who has answered except W. H. Calvert, and he does not deny it, but merely declines to admit it. 3. Because this clear evidence of insolvency is sufficient to justify this court in appointing a receiver of the assets of the corporation. This has been practically done by Judge Kershaw in the order directing the master to perform certain offices usually devolved on a receiver. Under these circumstances, and after this court has, at the instance of all save Mr. Calvert, assumed jurisdiction and entered upon the administration of the affairs of the corporation, it would be trifling with important rights and interests to dismiss the complaint at the instance of a single stockholder, who does not pretend that the insolvency could here be more clearly established had a judgment been first recovered against the company and an effort made to enforce it."

From this order Calvert appeals upon the following grounds: "1. Because the order of reference of March 11, 1884, should not have been granted, and should now be set aside,

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inasmuch as *it was taken before the expiration of the twenty days allowed by law to answer or demur, and without notice to the defendant, appellant, and without his consent then or since, and also all subsequent proceedings under said order of reference, including the master's report and the order of June 19, 1884, confirming the same. 2. Because in the order of June 20, 1884, his honor, Judge Hudson, erred in overruling the plea to the jurisdiction set up by the defendant,

appellant, in his answer, and in sustaining the jurisdiction of the court over the action, certainly as to this defendant, appellant."

Under the code, different causes of action may be united in the same complaint. The plaintiffs sued the corporation, and at the same time charging that the artificial entity known as the corporation owned no property and was utterly insolvent, asked further relief against the individual stockholders under the charter. The corporation as such was regularly made a party by service upon its officers, and answered admitting the debt, and therefore the judgment against it was regular and bound all the members as corporators, whether they individually answered or not. The question as to further liability for the five per cent. on stock was personal, which each stockholder could raise or not for himself as he saw fit. When most of the stockholders admitted the utter insolvency of the corporation and their liability for the assessment, and actually paid it under orders of the court, we do not think those orders should be set aside only for the reason that one of their number had not then answered, and afterwards answered, objecting to the jurisdiction of the court. Upon that subject he had the right to speak for himself, but not to make issues for others, who had the same right to speak for themselves. The court certainly had jurisdiction to render judgment against the corporation and all those stockholders who admitted the insolvency and their liability, and the orders made as to them must stand.

It is urged, however, that as to the five per cent. claimed by the creditors to be assessed on himself, Calvert's plea to the jurisdiction should have been sustained on the ground, as we understand it, that the proceeding to enforce its payment was in the nature of a proceeding in equity, a creditor's

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bill, which will not *be entertained, except in cases where there is no adequate remedy at law, and that was not properly shown here. That is to say, that this case belongs to that class where some voidable obstacle obstructs legal process, removable only by equity, affording a remedy in aid of the law and secondary in its character, which supplementary aid will be withheld inter vivos until all legal means have been exhausted, and this fact can only be made to appear by proof of a judgment recovered and a return of nulla bona on the execution. In such cases it is not quite certain that proof of a judgment and unsatisfied execution will be inexorably required under all circumstances. They are undoubtedly the usual, and perhaps most satisfactory, evidence of the important fact of insolvency; but at last they are only evidence, and some cases of high authority hold that it is possible to prove insolvency by other satisfactory evidence. In this case insolvency was both alleged and proved, indeed admitted by the officers and most of the stockholders, and as a fact denied by none. Pettus v. Smith, 4 Rich. Eq., 197; Terry v. Tubman, 92 U. S., 160 [23 L. Ed. 537]; Case v. Beauregard, 101 U. S., 690 [25 L. Ed. 1004].

But be that as it may, it seems to us clear that this is not a case belonging to the class above described, in which the aid of equity is requested to remove some obstacle in the way of legal process, and the performance of certain primary duties is required as an indispensable prerequisite to the exercise of such jurisdiction. On the contrary, there is here no obstacle in the way of enforcing an obligation which is purely statutory, a contract created by the accepted charter of the company, which is the law of the case, not only as to the measure of liability, but also as to the conditions of its enforcement. By the common law no liability attached to the stockholders of an incorporated company beyond their subscriptions to the capital stock. Creditors had no rights except against the artificial existence known as the corporation and its corporate property. But its property, including unpaid subscriptions, was held as a trust fund for creditors, who could, by showing that the corporation was insolvent, obtain the appointment of a receiver and enforce the payment of subscriptions. Code, § 265; Clinkscales v. Pendleton Man. Co., 9 S. C., 324.

The constitution of 1868 authorized an en-

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largement of the *liabilities of stockholders. Article XII., section 5, provides that "All general laws and special acts passed pursuant to this section shall make provision therein for fixing the personal liability of stockholders under proper limitations." The third section of the charter of this company, passed in 1881 (17 Stat., 587), provides that each stockholder shall be individually liable for five per cent. upon his stock subscribed, and, differing in that regard from a number of other charters, attached no condition as to having a judgment and the return of nulla bona on the execution before the liability can be enforced. The terms are: "Sec. 3. Each stockholder in the said corporation shall be jointly and severally liable to the creditors thereof in an amount, besides the value of his share or shares therein, not exceeding five per cent. of the par value of the share or shares held by him, at the time the demand of the creditor was made; provided that such demand shall have been payable within one year; provided, also, that proceedings to hold such stockholders liable therefor shall be commenced within two years after such debt may have become due, and whilst he remains a stockholder therein, or within two years after he shall have ceased to be such stockholder," &c.

Without entering at length into the argument, it strikes us that this provision cre-

ates no liability secondary in its nature. It will be observed that regulations are made as to the time within which "proceedings to hold such stockholders liable" must be commenced; but nothing whatever is said as to any difference between stock and assessment, or, as to the latter, the necessity of having a prior judgment and execution. The individual liability of the stockholders is made as direct and unconditional for the five per cent. as for the subscribed stock itself. The words are, each stockholder shall be liable "in an amount, besides the value of his share or shares therein, not exceeding five per cent.," &c. The obligation in one sense may possibly be termed collateral, but we cannot see that in any sense it is secondary, and enforceable only after judgment and a return of nulla bona on the execution against the corporation. See Thomp. Liab. Stock., §§ 34. 292, 321; Johnston v. S. W. R. R. Bank, 3 Storb. Eq., 273; Terry v. Martin, 10 S. C., 263; Sullivan v.

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Sullivan *Man. Co., 14 Id., 494, and 20 S. C., 79; Bank v. Bivingsville Cotton Man. Co., 10 Rich., 100.

The case last cited, of the Bivingsville Manufacturing Company, was an action against the stockholders, and no prior judgment had been obtained against the corporation, and the court, construing the provisions of the charter, said: "Their primary liability on contracts made by the corporation is in their character as partners, and no obligation is imposed by the act on creditors to exhaust the assets of the corporation, nor is there any condition which requires them to pursue it to insolvency before they shall commence their actions against them as general partners. In this respect the act differs from the statutory provisions of other states, which make the absolute liability of individual stockholders for debts due by the company depend upon its dissolution, or upon the return of an execution against the corporation unsatisfied. Bank of Poughkeepsie v. Ibbotson, 24 Wend., 473; Moss v. Oakley, 2 Hill (N. Y.), 265." See, also, Terry v. Tubman, supra.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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22 S. C. 298

STATE v. HUCKIE.

(November Term, 1884.)

[*Criminal Law* ⇐645.]

Where the defendants in a criminal prosecution offer no evidence, they are entitled to the reply in argument; but where jointly indicted, and any one of them introduces evidence, the state is entitled to the reply.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1508; Dec. Dig. ⇐645.]

Before Hudson, J., Berkeley, June, 1884.

The opinion fully states the case.

Messrs. Lee & Bowen, for appellant.

Mr. Solicitor Jervey, contra.

March 3, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. The appellant

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Prince Huckie, and *one Paris Bailey, were jointly indicted for burglary and larceny, but were represented by different counsel. After the state had closed its case, Huckie declined to offer testimony in defence, but his co-defendant Bailey called one witness. The counsel for Huckie claimed the right to reply in argument, which was denied him by Judge Hudson. The jury found a verdict of "guilty" as to both, but with a recommendation to mercy as to the appellant. Huckie moved in arrest of judgment, and for a new trial as to himself; but both these motions being refused, he appeals to this court, upon the single ground "that the judge erred in refusing to allow his attorney to make the reply or closing argument in the case, no testimony having been offered in his behalf."

This is not a matter of error as to express law, but of practice. The rule of court cited (Circuit Court Rules, 59) does not reach and provide for the point, for that rule really relates to the burden of proof, and the character of the issue, as giving the right to the defendant in certain cases, to open and close both in the evidence and argument. Its terms are: "And on all motions or special matters either springing out of a cause or otherwise, the actor or party submitting the same to the court, shall, in like manner, begin and close; and so shall the defendant, where he admits the plaintiff's cause by the pleadings, and takes upon himself the burden of proof, have the like privilege." This rule, with slight modification, has been in existence in this state ever since 1796 (see Miller's Compilation), but it does not cover this case. There has been here no admission of the plaintiff's cause, or assumption of the burden of proof by the defendant.

We have looked through all the rules adopted at different times by the courts of this state, and we have not been able to find one which in express terms gave the defendant the right to reply, where there was no change in the character of the issue by admission, simply on the ground that the defendant offered no evidence. It seems, however, that, resting upon the common law, such has been the practice. In the case of Hagood v. Cathcart (Rice, 262), the defendant simply called back the plaintiff's witness, after the plaintiff had closed his case, and it was held "that the general rule as to the

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reply, is, if the defendant adduce *any evidence, the plaintiff's counsel is entitled, as of right, to the reply." 3 Chit. Gen. Prac., 900; 1 Moody & Malkin, 86 (22 E. C. L. R.,

259). And it seems that this has been the practice in criminal as well as civil proceedings. See the case of State v. Brisbane, in which it was held, that "in all public prosecutions on the part of the state, where defendant or prisoner calls no witnesses, his counsel is entitled to the last word or the privilege of concluding the arguments to the jury, notwithstanding the former practice to the contrary." 2 Bay, 451. This case has a note appended in these words: "This rule has been invariably observed in all the criminal courts throughout the state, as well as in the courts of common pleas ever since the above determination; so that it may now be considered as a standing rule of practice in our criminal courts of judicature."

But while this is the case, it appears that if any evidence is offered in defence, the general right of reply will not be transferred from the state to the defendant. Even where the defendant offered no evidence strictly in defence, but his witnesses were heard on a cross indictment between the same parties, the court held "that in ordinary cases, where the defendant offered no evidence, his counsel was entitled to the reply, but where cross indictments were taken up and heard together, and defendant's witnesses were examined in the indictment which he preferred, that the state was entitled to the reply." State v. Chreitsburgh et al., 4 McCord, 30. It follows that if appellant had been the only party charged, and he had offered no evidence, his counsel would have been entitled to the reply in argument.

Does it alter the case, when two or more are indicted for the same offence, and one of the number offers evidence? We think it does. A prosecution against several jointly for the same offence is an entirety, but one proceeding, without regard to the number of persons who may be charged. The calling of witnesses by one of the defendants, was offering evidence in the cause. The defendants did not have the right, if they had desired, to sever in the trial. State v. Littlejohn, 1 Bay, 316; State v. Wise & Johnson, 7 Rich., 412. This inability to sever in their defence, however, did not interfere with the right of each individually to claim the num-

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ber of challenges allowed by law. *As was said in the case of Wise & Johnson, supra: "The right of challenge must and will be preserved unimpaired; hence it must be permitted to each for himself. The foundation for the privileges is stated by Mr. Justice Blackstone (4 Com., 353), and hence it will be seen that the right to challenge does not draw after it the right of selection, but merely of exclusion." It has been held that this court cannot declare error in the refusal of the Circuit judge to permit more than one counsel for defendants to cross-examine a witness for the state, although the several defendants were represented by different counsel. State v. Sims, 16 S. C., 487. For the same reasons we cannot declare error in the refusal of the Circuit judge to allow the counsel of one of two defendants, the general reply in argument, the other defendant jointly indicted having examined witnesses in defence.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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22 S. C. 301

STATE v. COFIELD.

(November Term, 1884.)

[1. *Intoxicating Liquors* ⇐132.]

The provision in section 1731, General Statutes, declaring the sale of spirituous or intoxicating liquors without a license to be unlawful, applies to the incorporated cities, towns, and villages of this state as well as to the country.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 141; Dec. Dig. ⇐132.]

[2. *Criminal Law* ⇐1; *Statutes* ⇐184.]

No act is criminal unless inhibited by law or declared to be unlawful, and all penal statutes must be strictly construed; but where the selling of liquor without license is clearly prohibited under penalties, the context, the surroundings, and the evil intended to be remedied may be considered for the purpose of ascertaining the territorial limits intended to be affected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1, 2; Dec. Dig. ⇐1; Statutes, Cent. Dig. § 262; Dec. Dig. ⇐184.]

Before Aldrich, J., Union, June, 1884.

The opinion fully states the case.

Mr. I. G. McKissick, for appellant.

Mr. Solicitor Duncan, contra.

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*March 5, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The defendant, Jack Cofield, was convicted at June term of the Court of General Sessions for Union County of retailing intoxicating liquors within the corporate limits of the town of Union without a license. He has appealed on the ground that the presiding judge charged the jury that it was unlawful to sell intoxicating liquors inside of incorporate towns.

The state relies on section 1731 of General Statutes. That section is as follows: "No license for the sale of spirituous or intoxicating liquors shall be granted in South Carolina outside of the incorporated cities, towns, and villages of this state, and it shall be unlawful for any person or persons to sell such liquors without a license." The appellant contends that when this section is construed under the rules applicable to the construction of criminal statutes it makes the sale of such liquors without a license unlawful outside of incorporate towns and cities only, and that there is no law forbidding such sale without a license within the limits

of incorporate towns and cities, the offence of which he was convicted.

The question is new and is by no means free from doubt, when looking alone to the language of the act. It may be stated as a proposition which has no exception that no act can be said to be criminal unless some law of force, either written or unwritten, common or statute, has either inhibited it in terms or declared it unlawful. Has the section in question declared the sale of intoxicating liquors inside of incorporate towns without a license unlawful? The section has two parts. The first provides that no license shall be granted outside of such towns. This is a limitation upon the powers of the officials invested with the authority to grant licenses. The second declares it to be unlawful to retail spirituous liquors without a license. If these two parts stood separate and apart from each other, and in different sections, there would be no doubt in reference to the construction because, being independent enactments, each would have general application. But being in the same section, and constituting the entire section, the latter following the first, and separated therefrom only by a semicolon, there is some reason for

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saying that they refer to *one and the same subject matter, i. e., the retail of such liquors outside of said towns and villages; the one declaring that no license shall be granted within a certain boundary and the other that to sell therein, notwithstanding no license can be granted, shall be unlawful.

The object of construction is to reach the intent of the matter under consideration whether it be an act of the general assembly, a deed, contract, or other paper, and the same rules apply, except, as we are admonished, in criminal laws the rules must be strictly applied and the law strictly construed. In such laws there is no room for an enlarged or liberal interpretation under the influences of what is termed the spirit or intendment of the law as in civil matters; on the contrary, the letter must govern.

Now the difficulty here, though it is a criminal act under consideration, does not arise from any doubtful signification of the words of the act; they are plain and simple and do not require any liberal or enlarged interpretation to ascertain their meaning. "It shall be unlawful to sell spirituous liquors without a license." Nothing could be plainer than this, each word used for a well defined meaning, and he "that runs may read," &c., &c. But the matter in doubt is the territorial limit within which this unlawful sale is prohibited. How far does it extend? Does it extend simply to the country outside of the towns, or does it embrace the whole state including the towns? The rule requiring a strict and literal interpretation of the words used so as to ascertain the offence does not aid us nor hamper us here, but we may look at the context, the surroundings, the evil intended to be remedied, and the end to be accomplished, and we may advance the remedy to meet the evil.

Now when we look at the two following sections of this act, section 1732 and 1733, in connection with 1731, we find the general assembly legislating to suppress the sale of spirituous liquors, without license, and to this end section 1731 first provides that no license shall be granted outside of the incorporated towns and villages. Then sections 1732 and 1733 provide a mode of granting licenses in said towns and villages, and the latter part of section 1731 declares generally that it shall be unlawful for any person to sell without a license so to do. This could

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not *have been intended to apply to the outside territory alone for the reason, first, the evil intended to be remedied went much further than this territory; and, secondly, if this had been the purpose, there would have been no necessity or propriety in using the words "without a license," as any sale within such territory would of necessity have been without a license, the first part of the section having already provided that no license should or could be granted therein.

But sections 1732 and 1733, providing a mode of obtaining licenses in incorporate towns and villages, and thereby legalizing sales made therein with license, there was great propriety in using the words "without a license" in the portion of the act which pointed to the sale as unlawful and criminal whether inside or outside of the towns, the illegality being the fact of no license and not the place where the sale took place. So that construing the whole act together, not with reference to the offence denounced, for that is plain enough, i. e., "selling without license," but the territory within which it was to be of force, we must conclude that it was to have general application.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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22 S. C. 304

DULANY & CO. v. ELFORD & DARGAN.

(November Term, 1884.)

[1. *Appeal and Error* ⇦884; *Costs* ⇦114.]

Four days' notice should be given of a motion requiring security for costs, but where granted without notice and complied with, no delay being occasioned, there is no ground for a new trial. Doubted, whether an order requiring security for costs is appealable, unless it results in a termination of the action by nonsuit.

[Ed. Note.—Cited in Johnson v. Cobb, 29 S. C. 378, 7 S. E. 601; Avery & Son v. Wilson, 47 S. C. 97, 25 S. E. 286.

For other cases, see Appeal and Error, Cent. Dig. § 3612; Dec. Dig. ⇦884; Costs, Cent. Dig. § 470; Dec. Dig. ⇦114.]

[2. *Trial* ⇦139.]

There being some evidence tending to show that defendant was a member of a debtor part-

nership, the Circuit judge erred in granting a nonsuit as to such defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. ⟸139.]

[3. *Partnership* ⟸218.]

What constitutes a partnership is a question of law, and should be charged by the judge to the jury, leaving it for the jury to say whether there is sufficient evidence to establish the facts so charged by the judge to be necessary to the existence of a partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 427; Dec. Dig. ⟸218.]

[4. *Partnership* ⟸219.]

Where all of the partners are served, there

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is no law which authorizes *a verdict to be rendered against the effects of a firm. In such case, section 157 of the code does not apply.

[Ed. Note.—Cited in Pope Mfg. Co. v. Charleston Cycle Co., 55 S. C. 529, 534, 33 S. E. 787.

For other cases, see Partnership, Cent. Dig. §§ 429–440, 442–445; Dec. Dig. ⟸219.]

[5. *Appeal and Error* ⟸172.]

A question not presented to the Circuit judge, nor decided by him, cannot properly be brought before this court for consideration.

[Ed. Note.—Cited in Dargan v. West, 27 S. C. 157, 3 S. E. 68; State v. Turner, 36 S. C. 541, 15 S. E. 602.

For other cases, see Appeal and Error, Cent. Dig. § 1070; Dec. Dig. ⟸172.]

[6. *Partnership* ⟸216.]

In ordinary action against a partnership, the question of the liability of one of the defendants for an amount of money withdrawn from the firm, not being raised by the pleadings, cannot be considered.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 409, 412, 416–418; Dec. Dig. ⟸216.]

[This case is also cited in Pope Mfg. Co. v. Charleston Cycle Co., 55 S. C. 537, 33 S. E. 787, and distinguished therefrom.]

Before Fraser, J., Greenville, July, 1884.

The opinion fully states the case.

Messrs. Perry & Heyward, for appellants.

Security for costs cannot be demanded except upon due notice served before the commencement of the term. 1 McCord, 552; 13 S. C., 44.

The evidence was sufficient to make Mrs. Elford liable, and it was not a case for nonsuit. 19 S. C., 23, 32; 21 Id., 93; 18 Id., 537; 3 Kent, *27, *37, and *57, and citations; 16 Johns., *40; 4 B. & Ald., 663; 2 H. Bl., 247; 4 Rich., 314; 1 Bail., 146; Doug., 371; Gen. Stat. (1872), 318; Gen. Stat. (1882), §§ 1288, 1289; 1 Myl. & K., 582; Coll. Part., §§ 6, 125, and citations.

Plaintiffs have a right to judgment against the "effects of the firm of Elford & Dargan." Code, § 157.

Mr. J. L. Orr, contra.

March 5, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiffs brought this action on two notes, bearing date April 12, 1883, signed "Elford & Dargan," and in the complaint it is alleged that the defendants were copartners under that name and style. Dargan made default, but the other defendant, Mrs. Caroline Elford, put in an answer denying that she had ever been a member of the firm of Elford & Dargan, which firm, she alleged, was dissolved in October, 1875, by the death of G. E. Elford, who, it seems, was her husband.

When the case was first reached, on sound-

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ing the calendar, *the attorney of Mrs. Elford moved that the plaintiffs, being non-residents, be required to put in security for costs, which motion was objected to by plaintiffs' attorney upon the ground that no notice had been given of such a motion, and that it came too late. On the same day, being July 14, written notice was served that, on the call of the case for trial, an order requiring security for costs would be moved for. The Circuit judge ruled that a plaintiff, being a non-resident, might be required to furnish security for costs at any time, and on the same day (July 14) passed an order requiring the plaintiffs to put in security for costs, on or before the first day of September next, or be nonsuited. The required security was furnished on July 15, and the case was tried in regular order on July 17.

Dargan testified that the notes in suit were signed by him, in the firm name of Elford & Dargan; that G. E. Elford, who, with himself, originally constituted the firm of Elford & Dargan, died in October, 1875, at which time said firm was indebted to the amount of one thousand dollars; that the concern was never closed up, and was never free from debt; that he heard Mrs. Elford say she was willing for her interest to remain in the firm; that he paid Mrs. Elford out of the firm, in money and other articles, from $165 to $175 a year, and that on June 30, 1883, one McPherson bought the interest of Mrs. Elford for $2,000, out of which the witness applied $500 to the payment of the debts due by Elford & Dargan, and paid over the balance to Mrs. Elford, taking her receipt in these words: "Greenville, S. C., June 30th, 1883. Received of W. J. Dargan fifteen hundred dollars, consideration in full for my interest in the firm of Elford & Dargan. Witness my hand and seal this the 30th day of June, 1883. C. Elford. [Seal.] Witness: B. Bostick." On his cross-examination, this witness testified that the accounts for which the notes sued on were given were contracted after the death of G. E. Elford; that the interest of G. E. Elford in the stock of goods at his death was $2,287, his share being three-fifths and that of the witness being two-fifths; could not say what his interest was worth. It also appeared that G. E. Elford left a will, of which C. G. Wells, Esq., was the executor, and that, as

the event has proved. Mrs. Elford was his sole legatee.

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*On the close of the testimony for the plaintiffs, the Circuit judge granted an order, on the motion of defendants' attorney, for a non-suit as to the defendant, Caroline Elford, upon the ground "that it has not been shown that the defendant, Caroline Elford, was ever a member of the firm of Elford & Dargan, either at the date of the notes sued on or at any other time." The plaintiff's attorney then moved to take a verdict against Dargan "and the effects of the firm of Elford & Dargan," which motion was refused, the Circuit judge holding that as there was no answer put in by Dargan, it was not clear that the plaintiffs were entitled to take any verdict at all, but a judgment by default would be the proper course, and that the jury could not render a verdict against the "effects" of any one whether a party or not; the plaintiffs, however, were allowed to take a verdict against "W. James Dargan, doing business under the name of Elford & Dargan."

The plaintiffs appeal upon the following grounds: "1. That his honor erred in ruling that plaintiffs could be required, upon the call of the case upon the calendar to furnish security for costs, although no previous notice of a motion for such security had been served by the defendants. II. That the evidence was amply sufficient to make Mrs. Elford liable upon the notes proven, and his honor erred in refusing to allow it to go to the jury. III. That his honor erred in refusing to allow judgment to be entered against the effects of the firm of Elford & Dargan. IV. That it is submitted that in any event the amount paid to Mrs. Elford by the defendant Dargan, being part of the assets of Elford & Dargan, is liable for the debts of Elford & Dargan."

The point of the first ground of appeal seems to be the failure to give due notice of the motion. Section 413 of the code seems to require at least four days notice of such a motion, except in the case mentioned in section 403, but as the plaintiffs were not prejudiced by the granting of the order, inasmuch as no delay was occasioned thereby, we do not think this would furnish a sufficient ground for a new trial. Indeed, under the case of McMillan v. McCall, 2 S. C., 390, it may be doubted whether an order requiring security for costs is reviewable on appeal, unless it results in a termination of the ac-

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tion by a non-suit. *Although rule X. of the circuit court, providing for security for costs, does not require notice, yet we think that no such order should be granted without notice.

The second ground raises the question as to the propriety of the order of non-suit. The rule is well settled by recent decisions of this court, referred to in the argument, that a non-suit can only be granted where there is an entire absence of any evidence tending to establish the plaintiff's case, or some material part thereof. In this case the sole issue was whether the defendant, Mrs. Elford, was a partner in the firm of Elford & Dargan, and the only question for us to determine is not whether the evidence offered was sufficient to establish the affirmative of that issue, but whether there was any evidence tending that way. If there was, then there was error in granting the non-suit; but if there was no such evidence, then the order of non-suit was properly granted.

We cannot say that there was an entire absence of any such evidence. There was testimony to the effect that Mrs. Elford had said that she was willing for her interest to remain in the firm; that she received yearly from Dargan payments out of the firm, and in the receipt set out above she acknowledges the receipt of the sum of money there mentioned "in full for my interest in the firm of Elford & Dargan." These circumstances certainly did tend to show that she being the sole legatee of her deceased husband, and as such entitled to his interest in that firm, had agreed to continue the same arrangement which had previously existed between Dargan and her deceased husband. Whether this evidence was sufficient to establish that fact, it is not for us, or for the Circuit judge, to determine, but was a question solely for the jury, and we think should have been submitted to them.

It is true that the question as to what constitutes a partnership is a question, not of fact, but of law, and therefore where an issue of that kind is raised, it is the duty of the judge to explain to the jury what will constitute a partnership, and then leave it to the jury to say whether the testimony adduced is sufficient to establish the facts necessary to the existence of a partnership. The case of Pleasants v. Fant, 22 Wall., 116 [22 L. Ed.

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780], is not applicable, for *that case proceeds upon the idea that the judge has the authority to determine the sufficiency of the evidence, whereas, in this state, that is a question for the jury, as has often been held.

As to the third ground of appeal, we agree with the Circuit judge that we know of no law which would authorize the rendering of such a verdict or judgment. Section 157 of the code, by its express terms, applies only to those cases in which only one of two partners has been served with the summons, and affords no authority for the position of appellants.

The fourth ground of appeal raises a question not presented to, or decided by, the Circuit judge, and is therefore not properly before us. We may say, however, that we do not see how such a question could be raised under the pleadings in this case, and we do not understand that there was any application to amend the pleadings so as to bring up such a question.

The judgment of this court is that the judgment of non-suit granted by the Circuit

Court, as to the defendant, Mrs. Caroline Elford, be reversed, and that the case be remanded to that court for a new trial as to her

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22 S. C. 309

HOSFORD v. WYNN.

(November Term, 1884.)

[1. *Execution* ⟸265.]

Land assigned to a widow as homestead and dower out of her husband's estate was levied and sold by the sheriff for the payment of her individual debt antedating the constitution of 1868. *Held*, that the purchaser took so much of said land as was assigned for dower, and also the fee in so much of the remainder as descended to the widow, burdened, however, with the homestead exemption so assigned.

[Ed. Note.—Cited in Bradford v. Buchanan, 39 S. C. 245, 17 S. E. 501.

For other cases, see Execution, Cent. Dig. § 759; Dec. Dig. ⟸265.]

[2. *Homestead* ⟸90.]

A claim of homestead by a widow as against her husband's debts and out of his estate, cannot be defeated by any debt due by her individually.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 135; Dec. Dig. ⟸90.]

[3. *Homestead* ⟸141.]

Under a sheriff's deed to land all the leviable interest of the judgment debtor passes, and the debtor cannot dispute such a deed; but a right of homestead, even after assignment, is a mere right to occupy, and is not subject to levy and sale.

[Ed. Note.—Cited in Ross v. Bradford, 28 S. C. 72, 5 S. E. 84; Glover v. Glover, 45 S. C. 54, 22 S. E. 739; Ex parte Worley, 49 S. C. 54, 26 S. E. 949; Kennedy v. Kennedy, 74 S. C. 545, 54 S. E. 773.

For other cases, see Homestead, Cent. Dig. § 267; Dec. Dig. ⟸141.]

[4. *Appeal and Error* ⟸1146.]

In a case at law this court cannot modify a judgment of the court below; it can only reverse or affirm.

[Ed. Note.—Cited in Salley v. Seaboard Air Line Ry., 79 S. C. 389, 60 S. E. 938.

For other cases, see Appeal and Error, Cent. Dig. § 4480; Dec. Dig. ⟸1146.]

[This case is also cited in Jeffries v. Allen, 29 S. C. 508, 7 S. E. 828, without specific application, and in Glover v. Glover, 45 S. C. 55, 22 S. E. 739, and distinguished therefrom.]

Before Aldrich, J., Richland, November, 1883.

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*Action by Andrew J. Hosford against Martha C. Wynn for the recovery of real property, commenced in March, 1883. The opinion states the case.

[For subsequent opinion, see 26 S. C. 130, 1 S. E. 497].

Mr. John Bauskett, for appellant.

Messrs. Bachman & Youmans, contra.

March 9, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. It is stated in the case herein that in November, 1872, the defendant, appellant, Martha C. Wynn, had the land in dispute assigned to her as her homestead and dower out of her deceased husband's property, and that she has been in possession thereof ever since. At the time of this assignment there was a judgment against her, obtained May 11, 1871, on a note given by her, Mary Wynn, and Margaret Wynn, dated November 20, 1867. The husband of the defendant Martha had died anterior to the date of this note. The land was sold under the above judgment some time in 1882, and was bought by the plaintiff, the titles from the sheriff to the plaintiff being executed June 5, 1882.

Under these circumstances the action below was brought for the recovery of the land. The plaintiff relied upon the sheriff's deeds, the execution of which was admitted. The defendant claimed that she was in possession of the lands as a homestead, which had been duly set apart and assigned to her out of the estate of her deceased husband under the law which allowed homestead to the widow and children of a deceased debtor, and that the sale of the sheriff under a debt of hers, though antedating the constitution, could not disturb her. His honor, the Circuit judge, held otherwise, and ruled that inasmuch as the debt under which the sale was made was executed in 1867, prior to the constitution, a homestead could not be claimed against it. Under this charge the jury rendered a verdict for the plaintiff. The appeal questions the correctness of the judge's ruling.

It is well established that a debtor cannot claim a homestead out of his own property against his own debts antedating the constitution (Gunn v. Barry), and if such were the

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facts here, *there would be no difficulty; but those are not the facts of this case. The defendant is not claiming the homestead out of her own estate as against her own debts, but she claims as the widow of her husband, deceased, out of his estate and assigned to her as against his debts. It may be remarked here that her right to this homestead has not been questioned, although her husband died before the adoption of the constitution. For the purposes of this case, therefore, we must assume that she is legally in possession as homesteadee, with all the rights that appertain to such possession. Now the question is, can a homestead thus assigned to her out of her husband's lands, as against his debts, stand as against her own, which antedate the constitution, or can a judgment obtained against her on such a debt sell the property and divest her of the homestead, as was held in substance by the Circuit judge? It must be remembered that neither of these questions is decided by Gunn v. Barry (15 Wall., 610 [21 L. Ed. 212]) and the other cases following that, because those cases have deter-

mined nothing more than that a debtor cannot claim a homestead out of his property as against his debts contracted before the homestead exemption was provided for. Nor does the fact that a creditor obtaining a judgment on such a debt can sell the property of his debtor in defiance of the claim of homestead decide them either, because in that case there is no homestead, nor can there be.

Here, however, the homestead has been allowed, and as we assume legally assigned, and the note of the defendant antedating the constitution as it does, could not have prevented the assignment had it been presented to the court which ordered it. Because she was not claiming the homestead as a debtor entitled thereto as against her own debts, but she was claiming it because of the indebtedness of her husband and as against his debts; she was claiming it in fact as his homestead, which had descended to her under the act by his death. An old debt of his would have defeated the claim and the assignment, but no such debt of hers could have done so had it been presented. If this be sound reasoning, and it must be so, the Circuit judge was in error in charging that defendant could not claim the homestead in question against the debt in question, because, if that debt could not have prevented the original assignment of the homestead to

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her, *there can be no reason in the fact that it has since been reduced to judgment, that it should now defeat and divest the homestead after it has been assigned.

The next question is, can the judgment be sustained on the ground that the homestead (which as we have seen was legally assigned to the defendant) was sold by the sheriff and conveyed to the plaintiff under the sheriff's deeds, and is she estopped from denying this? It is true that the deed of the sheriff made in conformity with a sale under execution is the deed of the execution debtor (McKnight v. Gordon [13 Rich. Eq. 222, 94 Am. Dec. 164]), and every thing or interest of said debtor that can be and has been sold in such sale passes under the deed, and the debtor cannot afterwards either deny or oppose said deed; but was the defendant's homestead sold? The execution under which the sale was made is not before us, nor are the deeds of the sheriff, and we do not know their precise terms; we suppose, however, that whatever interest the defendant had in the lands was levied and sold, and that the deed conveyed all her right, interest, and title therein. Nothing, however, could be sold and conveyed that was not leviable, because the levy must precede the sale.

Now the defendant had no right, interest, or title in these lands by virtue of her homestead; she had nothing more than the right to occupy, a mere usufruct. The title to the lands was in the heirs at law of her husband, and though she had the right to use so much thereof as her homestead covered for life, if she chose so to do, yet as we have decided in such cases this did not constitute an estate in her either for life, for years, or of any other kind. The homestead does not change titles or create new estates, it simply takes property as it finds it, and, carving out a portion, exempts it for the time being from levy and sale, and marking it "homestead" puts the debtor or his widow and children, as the case may be, in possession with the right to hold against all comers. It is a mere protected possession and therefore was not such an interest as could pass to the plaintiff by virtue of the sheriff's deed. Was it such an interest as could have been levied upon by the sheriff, even supposing that he did attempt so to levy upon it here? We think not for the reasons already given, i. e., because it is nothing but a possession, an

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*usufruct. It certainly could not be sold by the sheriff, because in the very act of selling it would be destroyed, it would turn to ashes. The only reason that it is a homestead is because the debtor or his widow and children are in possession as such. The moment they abandon it, either voluntarily or by a forced sale, if such sale was possible, it vanishes. We conclude it was not leviable and therefore the defendant was not divested by the sheriff's deeds, as he could neither sell nor convey anything except such as he could levy.

The defendant cannot deny, however, to the plaintiff whatever interest she may have had in these lands at the time of the sale. It is said in the "case" that they were assigned to her as dower and homestead. How much was dower and how much was covered by homestead, is not stated, but whatever portion is embraced in the dower has passed to the plaintiff, and as to that portion he is entitled to both title and possession. The deed of the sheriff has also conveyed to him the fee in the entire lands quoad hoc the defendant; this fee, however, is burdened with the possession of the defendant of so much of the land as has been set apart as the homestead. The jury did not determine how much nor what particular portion had been assigned as dower, nor what has been assigned as homestead. Under the charge they simply found for the plaintiff. If they had gone further and found that plaintiff was entitled to the possession of the dower portion, then a proper judgment could have been entered entitling him to such possession, leaving the remainder subject to the homestead, which would have settled the case in accordance with the rights of the parties, as we understand it.

If it was in our power, we would modify the judgment as suggested so as to save the expense and trouble of another trial, but this is a law case and in such case we have no power to modify; we can only affirm or

reverse and remand for a new trial, if necessary.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the case be remanded for a new trial.

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22 S. C. *314

*McMAHAN v. DAWKINS.

(November Term, 1884.)

[1. *Action* ⟸46.]

A legal and an equitable cause of action may be embraced in one complaint, but must be separately tried, each according to its distinctive mode.

[Ed. Note.—Cited in Du Pont v. Du Bos, 33 S. C. 396, 397, 11 S. E. 1073; Heyward v. Farmers' Min. Co., 42 S. C. 145, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702; Sires v. Sires, 43 S. C. 275, 21 S. E. 115; Bank of Charleston v. Dowling, 45 S. C. 683, 23 S. E. 982.

For other cases, see Action, Cent. Dig. §§ 449, 451–468; Dec. Dig. ⟸46.]

[2. *Fraudulent Conveyances* ⟸241.]

In action by a judgment creditor in the Court of Equity to set aside a voluntary deed of his debtor, the action must fail unless the plaintiff show that he had exhausted his legal remedies, the highest and best evidence of which is a return of nulla bona on the execution.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 720; Dec. Dig. ⟸241.]

[3. *Cancellation of Instruments* ⟸20.]

But a purchaser at sheriff's sale of the judgment debtor's interest in a tract of land which this debtor had previously conveyed away, may bring action in the law courts for a recovery of the land, and there attack the defendant's deed for fraud, without proof that the judgment creditor had exhausted all other remedies.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 28, 31; Dec. Dig. ⟸20.]

[4. *Fraudulent Conveyances* ⟸31.]

Where an administrator, holding the senior judgment against one of the distributees, purchased the debtor's land at sheriff's sale, and, by direction of all the distributees, receipted for the proceeds and ordered deed made to this debtor in trust for his wife and children, the deed so made is not a fraud upon his (the debtor's) other creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 80; Dec. Dig. ⟸31.]

[5. *Appeal and Error* ⟸1008.]

Findings of fact by the judge in a law case tried by him without a jury are not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3960, 3962–3969; Dec. Dig. ⟸1008.]

Before Fraser, J., Fairfield, September, 1883.

The opinion sufficiently states the case.

The Circuit decree was as follows:

This case was heard by me at the term of Court of Common Pleas for Fairfield County in September, 1883. The case was heard on the pleadings, and testimony taken in open court. * * * This action has been brought to set aside the trust deed to William J. Dawkins for fraud and for the possession of the land.

The note on which the confession of judgment in favor of J. T. Dawkins as administrator was founded was given for purchases at the sale of the personal estate of John Dawkins. The delay in obtaining a judgment on this note and in enforcing the collection of it is not at all unnatural in the condition of the country and the circumstances of this family, William J. Dawkins being the youngest brother. The evidence does not show any unfairness in the sale by the sher-

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iff at which the land was bid off by *J. T. Dawkins, who for several years after the sale, but before the deed by the sheriff, received the rents to the exclusion of William J. Dawkins, and there is no evidence that the children of William J. Dawkins, who are the real beneficiaries under this deed, had any knowledge of these transactions.

I have not discovered in the evidence any actual intent to defraud creditors. The money was bona fide due to the estate of John Dawkins. The administrator proceeded in what seems to me a legitimate way to secure a first lien on the property of William J. Dawkins. When the property fell under their control by the sheriff's sale, the other distributees did what they had a right to do in having it conveyed to the children of William J. Dawkins. They were under no obligation to devote it to his creditors.

It is insisted, however, that even if there was no fraudulent intent, the fact that William J. Dawkins, the judgment debtor, had an interest in the judgment as one of the distributees of John Dawkins to the extent of one-eighth, and that to this extent his own money was a part of the consideration of the deed, and that by this the whole transaction is tainted with fraud and illegal. It will be remembered that the amount credited on this judgment and execution was only $178.40, while the amount remaining due and unpaid was over $900. No part of this $178.40 was payable to him until the full amount of the shares of the others was paid. If it is claimed that J. T. Dawkins held this title for the benefit of William J. Dawkins and other children of John Dawkins, there is nothing before me to show that the land at any time before the trust deed was made was worth any more than the amount bid for it at the sheriff's sale—$205. It is, therefore, mere conjecture that William J. Dawkins paid any portion of this bid, either directly or indirectly.

There are two classes of conveyances considered as fraudulent against creditors: 1st. Those in which there is an intent to defraud. 2d. Those in which there is a want of valu-

able consideration in whole or in part. The same principles govern, whether the conveyance is made by the debtor or by the sheriff, who sells as his agent. The very strongest case which can be made by the plaintiff in this action, and it is the one most strenuously

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insisted *on, is that this conveyance by the sheriff is void, because it is in part, at least, voluntary and without valuable consideration.

Instead of having a return of nulla bona to the execution, and then coming into this court, now a court of equity as common pleas, to have the deed set aside for fraud, the plaintiff in this case has been advised to pursue a different course—to have the land sold by the sheriff first and then come into court on this title, demanding that the other deed be set aside for fraud without any return of nulla bona, and that possession of the land should be adjudged to her. If this can be done, then the ministerial officer of this court can proceed to make a good title to land by a sale under the execution, when it is not competent for this court to order a sale until, by a return of nulla bona, it is legally ascertained that it requires the property embraced in the deed to respond to the demands of the creditors, until which time the rights of the grantee are unassailable. Suber v. Chandler, 18 S. C. 529.

There are cases in which parties have recovered judgments in the law courts for lands without it, which they claimed under deeds from the sheriff, in which the defendants failed to sustain a previous deed because it was tainted with fraud. In Jones v. Crawford (1 McMull., 373), the deed was held to be void for actual or active fraud and not bona fide. In Richardson v. Rhodus (14 Rich., 95), the deed was held fraudulent and void because voluntary and without consideration. It is still the common practice to proceed in cases of personal property in all respects as if the fraudulent conveyance had never been made.

The principles laid down in Suber v. Chandler, however, at least in case of voluntary deeds, cannot, in my view, be reconciled with the course pursued by the plaintiff in this case. If this deed should be held to be void because it was voluntary in consequence of William J. Dawkins' interest in the judgment against himself, if the return of nulla bona is necessary in cases of voluntary deeds, there is no good reason why it should not be necessary in cases of deeds not bona fide. It is held in that case that it is not the maturity of the debt or the commission or discovery of the fraud which gives the right of action, but the return of nulla bona.

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*In the case before the court there has been no right to commence an action, and I do not see how in this case the sheriff could give her a good title without any action at all. This condition of things may have existed in consequence of the separation of the courts, and that now, as both courts are united, there should be a uniform rule that in all cases of fraudulent sale of land parties should come into this court before any sale and call in creditors, and ask to have the alleged fraudulent deed set aside for their benefit. It may be that the necessities for the return of nulla bona, which is always after judgment, at the option of the creditor, puts the debtor and his grantee too much in his power, and gives the creditor the entire control of the statute of limitations; but I can only follow the cases as I find them, and apply the principles laid down.

It is therefore ordered and adjudged, that the complaint, so far as it seeks to have the deed of trust set aside, and a recovery of the possession of the land, be dismissed.

I have before me no copy of the trust deed, and am not willing to construe it so as to determine what interest William J. Dawkins took at the death of one of his children, or whether any partition can now be made. It is therefore ordered that the case be retained until parties can be heard at the next or some subsequent term of the court, as to the right of plaintiff to have a partition now, and as to how much her interest is under her deed from the sheriff, or William J. Dawkins' interest in the land, being an interest as heir of a deceased child. The parties to whom a portion of this land has been sold cannot be bound by any proceedings in this case until they are made parties. The administrator and other distributees of John Dawkins are neither necessary nor proper parties to this action. All questions of costs reserved for future order of court.

The plaintiff appealed on the following exceptions:

I. Because his honor did not find that the judgment of J. T. Dawkins, as administrator, against William J. Dawkins, was confessed by the defendant, in collusion with the plaintiff, for the purpose of hindering and delaying the creditors of said defendant, and that though the said debt has long since been paid, the said judgment has been kept open for the same purpose.

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*II. Because his honor did not find that the purchase by J. Thomas Dawkins at sheriff's sale in 1876 was merely colorable, and was solely for the benefit of the defendant, William J. Dawkins, and that the transfer of his bid and the causing of the deed to be made to the defendant, William J. Dawkins, in trust for his children, were for the purpose of hindering, delaying, and defrauding the creditors of said William J. Dawkins.

III. Because his honor did not find that the consideration for the said transfer of said bid moved in large part from the defendant, William J. Dawkins, and the same

was a fraud, as matter of law, upon the creditors of said William J. Dawkins.

IV. Because his honor concluded that even if all of said transactions, or any of them, were had with intent to hinder and delay the creditors of said William J. Dawkins, the plaintiff could not cause the said land to be levied upon and sold under her execution at law.

V. Because his honor did not decree the said deed to be vacated and annulled as fraudulent and void as to the creditors of said William J. Dawkins.

Mr. Wm. H. Lyles, for appellant.

Mr. Jno. S. Reynolds, contra.

March 9, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, appellant, recovered a judgment against the defendant, William J. Dawkins, in 1876, under which the land in dispute was sold in December, 1876. At this sale J. Thomas Dawkins became the purchaser at $205. Of this he paid $26 to the sheriff, we suppose to cover costs, and the balance, $179, he claimed should be credited on a judgment which he held against the said William J., which was allowed by the sheriff. This was a judgment by confession which Thomas J. Dawkins held as administrator of his father, John Dawkins, deceased, and based on a note which the said William J. had given in the purchase of certain property made at the sale of the estate in 1854. The confession was given 1869, and was for $854.22. On this confession was a credit of $185, and

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when *the balance of J. T. Dawkins' bid at the sale above referred to was allowed by the sheriff to be entered as a credit, i. e., $179, there still remained due thereon over $900.

William J. Dawkins was a son of the intestate, John Dawkins, as was also J. T. Dawkins, and they, with other brothers and sisters, eight in all, including these two, were the distributees. Although the bid of J. T. Dawkins was credited on his judgment, he did not demand or obtain titles from the sheriff. He, however, took control and rented it out from year to year until January, 1880, when, by directions of the said J. T. Dawkins, the sheriff executed titles to the said William J. Dawkins in trust for his children then living, and such as should thereafter be born. This deed was made in this way by the consent and direction of the other distributees of the estate of John Dawkins, deceased, and we suppose was in satisfaction of their portion of the proceeds credited on the judgment held by J. T. Dawkins as administrator as above.

After the execution of this deed the plaintiff, in November, 1882, caused the land to be again sold under the same judgment, and with renewed execution, by which she had previously sold it. At this sale she became the purchaser at $5 and received a conveyance from the sheriff. She then commenced the action below, alleging in her complaint that the deed to W. J. Dawkins in trust for his children was intended to hinder and delay his creditors; that he was insolvent, and had been for years, and that he had no other property out of which the plaintiff could make her debt; that one of his children had died, and that he unjustly retained possession of the land against her conveyance from the sheriff, by virtue of which she was seized in fee and entitled to immediate possession. Wherefore she demanded judgment: 1st. That said pretended deed of the sheriff to said W. J. Dawkins be adjudged void; 2d. For the possession of the land; and, 3d., for such other and further relief as may seem just, with costs.

The case came to trial before his honor, Judge Fraser, who heard it upon the pleadings and evidence adduced, and finding no testimony showing a return of nulla bona on the execution of the plaintiff before she began her suit, which in his opinion was necessary under Suber v. Chandler (18 S. C.,

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529), he dismissed *the complaint, both so far as it sought to have the deed of trust set aside, and also the recovery of the possession of the land. He, however, retained it until the parties could be heard at the next term of the court, as to the right of the plaintiff to have a partition as to the interest of W. J. Dawkins in the land, as heir of his deceased child, on the ground, we suppose, that this interest, if any, at least passed to the plaintiff under her deed from the sheriff.

The plaintiff has appealed, and she assigns error to the decree of his honor: 1st. Because he did not find the confession of judgment fraudulent, and long since paid. 2d. That he did not find the bid of J. T. Dawkins at sheriff's first sale colorable, and that its transfer, and causing the deed to be made to W. J. Dawkins in trust for his children, were to hinder, delay, and defraud his, W. J. Dawkins', creditors. 3d. Because he did not find that the consideration for said transfer of his bid and the execution of the deed were moved in large part from W. J. D., and was therefore fraudulent as matter of law upon his creditors.

The complaint contains two causes of action, the first to set aside a deed of land for fraud, and the second to recover possession of the land. The one is equitable and the other legal. This, however, is not objectionable under the reformed procedure. In fact, the union of these two actions in the same complaint has been especially recognized as proper pleading; because it not only prevents circuity of action, but affords prompt relief. But when they are thus combined they do not lose their distinctive features and characteristics, nor are the rules heretofore existing as to their trial changed or coalesced. On

the contrary, what was equitable before still remains equitable, and what was legal is still legal, and the mode of trial of each is still preserved. These rules required in this case that the first cause of action should be tried by the judge, and the second by the jury, unless a jury trial was waived. We suppose the jury trial was waived, and the whole case, therefore, was properly heard by the judge.

We think the judge was right in holding as to the equity cause that the action could not be maintained in the absence of a nulla bona return on plaintiff's execution before commencing it. Suber v. Chandler, supra. It is

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a general rule, established and held *in many cases, that in actions by creditors in equity to vacate voluntary deeds and conveyances of their debtors, inter vivos, to entitle them to proceed, they must have first exhausted their legal remedies. That this is the only ground upon which they can come into equity, and while it is not necessary to allege in the complaint a return of nulla bona, yet that is the sufficient evidence of the fact that all legal remedies have been exhausted. It is, too, one of the probative facts which shows the necessity under which the plaintiff is to resort to the property covered by the deed which he seeks to set aside, and it is the foundation for the charge of legal fraud on account of which such deeds are frequently assailed. It must appear, therefore, in the evidence, or the action will fail. It was not proved in this case. The judge could not do otherwise then than dismiss the complaint as to the first cause of action.

But the failure of the first cause of action on this ground did not necessarily demand the dismissal of the second. That was an action at law for the recovery of the land, and the opposing deed of the defendant might have been resisted for fraud on the law side without the evidence of a nulla bona return. It has been the constant practice of the law courts in this state in actions to try titles to allow deeds and other conveyances to be assailed in evidence for fraud without such return. Thomas & Ashby v. Jeter, 1 Hill, 380; Smith v. Culbertson, 9 Rich., 106. It is only required in equity courts, and it is required there because such courts can only take cognizance of such cases when the plaintiff has exhausted his legal remedies, of which fact such return is held to be the best and highest evidence. We do not know that the Circuit judge dismissed the complaint as to the second cause of action simply because there was a failure of evidence to sustain the first as to the nulla bona return. He seems to have heard the whole case, legal and equitable, the evidence for and against, all that the parties had, we suppose, was submitted and heard, and the judge may have dismissed the second cause because the charges of fraud made were not proved, and this part of the case being a case at law, though tried by the judge, the facts are beyond our reach; but if we could consider

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*them, we would have no hesitation in saying that there is no foundation for these charges.

There is no doubt that the defendant bought the property at the estate sale, for which he gave his note. He had a right to confess the judgment. The plaintiff herself forced the sale of his land, at which J. T. Dawkins purchased it. There was nothing wrong at the sale, no chilling of the bids, no concealment, nor anything out of the way. J. T. Dawkins had the right to have his bid credited on his judgment; in fact, it was his duty to see that the land should not go to others below its market value. He had the right to pay off the distributees in land, if they were willing to receive it in whole or in part of their shares in the personal estate, and those distributees, it seems to us, did a commendable act in surrendering their interest therein by directing the land to be conveyed for the benefit of the children of their unfortunate brother. To denounce such an act of benevolent charity as this fraudulent, and allow a party who purchased the land at $5 to recover it, would be shocking. There is no evidence that any portion of W. J. Dawkins' share in the personal estate went into this land. For aught that appears the administrator still owes him his share therein, and he still owes the administrator over $900 on the judgment. In the face of all this we cannot say that the Circuit judge erred in not holding as matter of law that the transaction was fraudulent, as assigned in exception 3.

The other two exceptions complain that the Circuit judge did not find certain matters of fact. As we have already said, the findings of facts were for him. It may be that on the death of W. J. Dawkins' child he became entitled to an interest in the land as one of the heirs of that child; if so, in all probability the plaintiff's deed would convey that interest; if so, it is her right to recover it, and the decree of the judge provides for this.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

A petition for rehearing was filed March 19, but the same was dismissed by an order passed Per Curiam May 4, 1885.

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*MOSELEY v. MILLEDGE HANKINSON. SAME v. EDGAR HANKINSON.

(November Term, 1884.)

[1. *Remainders* ⟸4.]

Where property was conveyed in trust for the separate use of a married woman during life, then to be conveyed and delivered to her issue living at the time of her death, the remainder is contingent.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 2; Dec. Dig. ⟸4.]

[2. *Judgment* ⟸681.]

Where a tract of land so held was sold by order of the court on the ex parte application of the trustee and the life tenant, none of the issue then in esse and within the reach of the court being made parties, *held*, that there being no representative of the contingent remaindermen before the court, there was no transfer of the interest in this land, either of the issue in esse at the time of the order or of those subsequently born.

[Ed. Note.—Cited in Farr v. Gilreath, 23 S. C. 503; Covar v. Cantelou, 25 S. C. 35, 39, 40; Powers v. Bullwinkle, 33 S. C. 299, 11 S. E. 971; Mole v. Folk, 45 S. C. 268, 22 S. E. 882; Rutledge v. Fishburne, 66 S. C. 160, 44 S. E. 564, 97 Am. St. Rep. 757; Faber v. Faber, 76 S. C. 161, 56 S. E. 677; Bernard v. Bernard, 79 S. C. 367, 60 S. E. 700, 128 Am. St. Rep. 852; Walker v. Des Portes, 92 S. C. 525, 75 S. E. 960.

For other cases, see Judgment, Cent. Dig. § 1202; Dec. Dig. ⟸681.]

[3. *Trusts* ⟸203.]

In the proceeding in court for the sale of this land, the trustee was not a representative of the interests of the contingent remaindermen.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 273–276; Dec. Dig. ⟸203.]

4. Thomas v. Poole, 19 S. C., 323; Ex parte Tunno, Bail. Eq., 395; Ex parte Calmes, 1 Hill Eq., 112, and Ex parte Copeland, Rice Eq., 69, explained and reconciled herewith.

[This case is also cited in Fuller v. Missroon, 35 S. C. 330, 14 S. E. 714, without specific application, in Farr v. Gilbreath, 23 S. C. 514, 515, approved, but distinguished, and in Moore v. Scott, 66 S. C. 283, 293, 294, 295, 296, 297, 299, 44 S. E. 737, and distinguished therefrom.]

Before Wallace, J., Richland, September, 1883.

The opinion of this court fully states the nature of the action and all the facts of the case. The judge charged the jury as follows:

Under the case of Faber v. Police, 10 S. C., 376, I charge you that the plaintiffs had not a vested interest in the land in dispute, but that they were contingent remaindermen. Under the decisions of the Supreme Court of the United States, and of many of the states, they would be held to be vested remaindermen, but not so in this state. The naked question now is, are the plaintiffs, who were not made parties in the proceedings under which the land was sold, bound by those proceedings? They were contingent remaindermen, and in the case of Thomas v. Poole (19 S. C., 323), a late decision of the Supreme Court of this state, it has been decided that contingent remaindermen are not necessary parties to a proceeding instituted for the sale of land. Under the case of Thomas v. Poole, I charge you that plaintiffs were not necessary parties to the proceedings in question, though some of them were then living; that

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Milledge Han*kinson and D. J. Walker, trustees, took a fee simple title, and that these plaintiffs cannot now question his title; and that hence your verdict must be for the defendants in both cases.

The jury found a verdict for the defendants, as instructed by the judge, in both cases, and the plaintiffs appealed upon the following exceptions:

I. Because his honor, the presiding judge, erred in charging the jury that the words in the deed of James Moseley and wife to Wm. Fortune, trustee, created contingent remainders in the issue or lineal descendants of Rebecca Moseley, and not vested remainders.

II. Because his honor, the presiding judge, erred in charging the jury that the plaintiffs, as well those who were then in esse as those who were afterwards born, were barred by the proceedings in the case of Ex parte James Moseley and wife and Wm. Fortune, and the deed given thereunder to Milledge Hankinson, trustee; whereas it is submitted that they were not parties thereto, and are not bound thereby.

III. Because his honor, the presiding judge, erred in directing a verdict for the defendants.

IV. Because his honor, the presiding judge, erred in not charging as requested by the plaintiffs, to wit, "that as matter of law the jury must find a verdict for the plaintiffs, because they are not barred by the proceedings in the case of Ex parte James Moseley et al., and their right of action did not accrue until the death of their mother, Rebecca, in 1881, the date of her death as admitted."

[For subsequent opinion, see 25 S. C. 519.]

Messrs. Henderson Bros., for appellants.

Messrs. Croft & Dunlap and H. M. Thompson, contra.

March 16, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. These two cases, depending upon the same principles, were heard and will be considered together. The questions involved in this appeal arise out of the following state of facts:

Rebecca Moseley, the wife of James Mose-

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ley, and the mother *of the plaintiffs, being entitled, as one of the heirs at law of her father, to a share of his estate, the land which is the subject-matter of controversy in these cases was, with certain personal property, set apart as her share, under proper pro-

ceedings for the partition of her father's estate. But she being a married woman at the time, the court ordered that the share so allotted to her be settled on her "for her sole and separate use for life, and on her death, on her issue then living, in equal shares, as in cases of intestacy, and that the said parties execute deeds, to be approved by the commissioner of this court, to proper persons as trustees, for the purpose of effecting the said settlement thereby ordered." In pursuance of this order, a deed was duly executed to Wm. Fortune, on April 3, 1844, conveying to him the said land in trust "for the sole, separate, and exclusive and special use, benefit, and behoof of her, the said Rebecca Moseley, wife of the said James Moseley, for and during the term of her natural life, * * * and upon the death of the said Rebecca Moseley, that he, the said William Fortune, his heirs, executors, or administrators will convey, transfer, assign, and deliver over all and singular the said estate and property, both real and personal, that shall then [be] remaining, unto the issue or lineal descendants of her, the said Rebecca Moseley, which she shall or may have living at the time of her death, in such shares and portions as they, the said issue or lineal descendants, would be entitled to by the laws of this state, now of force, regulating and controlling the distribution of estates of intestates." This deed was approved by the commissioner in equity and duly recorded.

In February, 1845, an ex parte petition was filed in the Court of Equity by James Moseley and wife and Wm. Fortune, as trustee, praying that the trustee might be authorized to sell said land and invest the proceeds in the purchase of slaves, alleging that the land was unproductive, and being woodland yielded no support to the petitioner, Rebecca. This petition was referred to the commissioner to inquire and report upon the facts stated therein, "and also upon the expediency and probable benefit to the said Rebecca Moseley and children to change the property by selling the land and investing the proceeds in negro property." The commissioner having

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made his report, saying that the evi*dence submitted to him showed that the change of investment proposed would be for the interest of Mrs. Moseley and her children, and recommending that the prayer of the petition be granted, an order was passed on February 12, 1845, confirming the report, and authorizing the trustee, Wm. Fortune, to sell the land and reinvest the proceeds in slaves, to be held by him upon the same trusts as are declared in the deed above mentioned.

The trustee having failed to make this change of investment as authorized, a rule was taken out against him on February 16, 1850, at the instance of James Moseley, requiring him to show cause why he should not be attached for a contempt in not obeying the order of February 12, 1845. In his return to this rule, which is sworn to on February 23, 1850, Wm. Fortune, amongst other things, stated that soon after the passage of said order, he was earnestly requested by Mrs. Moseley not to sell the land and buy slaves, as she was apprehensive that if this was done her husband would run the slaves and sell them, whereas he could not run the land; and disavowing any intention to treat the order of the court with contempt, averred his willingness to comply with the same by forthwith selling the land and in all other respects complying with the terms of said order of February 12, 1845.

On hearing this return, an order was granted, on May 22, 1850, that the rule "be discharged upon the following conditions, to wit: That the said Wm. Fortune do by the first of August next enter into bond and security, to be taken and approved by the commissioner, in the penalty of double the value of said land, conditional for the faithful performance of the trusts described by the order of Chancellor Harper, dated February 12, 1845, that is to say, if he has not hitherto given bond upon being appointed trustee." Whether this trustee ever gave such bond does not appear in the record. On April 15, 1851, the trustee, Wm. Fortune, in pursuance of the order of February 12, 1845, executed a deed for the land in controversy to the defendant, Milledge Hankinson, and Darling J. Walker, as trustees of Mrs. Sarah L. Hankinson, under which the defendants claim. The consideration mentioned in this deed was eleven hundred dollars, which, according to the evidence, was paid

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to the said *Wm. Fortune, but the same does not seem to have been invested in slaves, as required by the order of February 12, 1845.

Wm. Fortune died some time in 1853, and upon the petition of James Moseley and Rebecca, his wife, one John E. Plunkett was appointed trustee in his stead, and having duly executed his bond to the commissioner in equity, seems to have received the amount of the trust funds in the hands of the former trustee, Wm. Fortune, as would appear by his returns. In 1856 the said Plunkett having failed to make his annual returns, and having left the state, he was removed from office, and N. G. W. Walker was appointed trustee in his place, who likewise gave bond as such. Walker made several returns as trustee, in which he does not charge himself with anything received from his predecessor, and he having died in 1875, no further action appears to have been taken until after the death of Mrs. Rebecca Moseley, which event took place in the fall of 1881, when the present plaintiffs, on April 11, 1882, by proceedings in the Court of Common Pleas procured the appointment of W. J. Moseley as trus-

tee in the place of Wm. Fortune, under the original deed of trust hereinabove mentioned, ignoring the intermediate substitutions mentioned above; and on June 12, 1882, the said W. J. Moseley, as trustee, conveyed the land in question to the plaintiffs, who were then the surviving children of Mrs. Rebecca Moseley, and soon thereafter these actions were commenced to recover possession of the said land.

The Circuit judge instructed the jury that under the original trust deed of April 3, 1844, executed under the order of the court requiring the share of Mrs. Rebecca Moseley in her father's estate to be settled to her sole and separate use for life, with remainder to such of her issue as might then be living, the children of Mrs. Moseley were entitled to contingent and not vested remainders, and that, therefore, they were not necessary parties to the proceedings under which the trustee, William Fortune, sold the land, and that consequently the defendants have valid title to the land in controversy which these plaintiffs cannot question. From the judgments rendered in accordance with such instructions the plaintiffs appeal, and by their appeal raise two questions: 1st. As to the nature of the estate which the chil-

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dren *took under the original trust deed. 2d. Conceding that they were contingent remaindermen, whether their rights, which have now become vested, are concluded by the order of sale in proceedings to which they were not parties.

Upon the first point raised by the appeal, we agree with the Circuit judge that the remainders were contingent and not vested under the authority of the case of Faber v. Police, 10 S. C., 376, cited by him, which has been recognized and affirmed by the very recent case of LeRoy v. City Council of Charleston, 20 S. C., 71.

The second question, however, presents much more difficulty. It appears from the evidence that at the time the petition was filed by James Moseley and wife and the trustee, William Fortune, for the sale of the land, and the reinvestment of the proceeds in slaves, Mrs. Moseley had five children living with her, and within the jurisdiction of the court, all but one of whom (Silvania, who predeceased her mother, leaving no issue) were originally plaintiffs in these actions, though one of them, Mrs. Price, has died since these actions were commenced, and her heirs have been substituted in her place. It also appears that before the deed under which defendants claim was executed, two more children were born to Mrs. Rebecca Moseley, Mary Ann and Sarah, and that the other two plaintiffs, Septima and Susan, were born after the execution of said deed. It seems, then, that at the time the petition for the sale of the land was filed, some of the contingent remaindermen, whose rights have subsequently become vested, were in esse, and could have been made parties, and the real question is whether they were necessary parties. Could their rights be divested unless they were made parties?

The general rule in equity undoubtedly is that all persons who are materially interested in the subject of the suit must be made parties, but it is equally true that this rule is subject to some exceptions; and the practical inquiry is, does this case fall within any of the exceptions? Without undertaking anything like a review of the cases, we think the authorities show that the contingent remaindermen who were in esse, and within the jurisdiction of the court, were necessary parties. In Mitford's Equity Pleadings, *174, it is said: "Contingent lim-

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itations and executory *devises to persons not in being may in like manner be bound by a decree against a person claiming a vested estate of inheritance; but a person in being claiming under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance by which it may be defeated, must be made a party to a bill affecting his rights." See, also, Story Eq. Pl., §§ 144–147, and 1 Dan. Ch. Pl. & Prac., 314; Hopkins v. Hopkins, 1 Atk., 590; Giffard v. Hort, 1 Sch. & Lef., 386; Lloyd v. Johnes, 9 Ves., 37; Sherrit v. Brich, 3 Bro. C. C., 229. These authorities establish the doctrine that while as a general rule the contingent remaindermen are necessary parties, yet where they are not in esse at the time, and there is before the court a person entitled to a prior vested estate of inheritance, and perhaps, if there is no prior vested estate of inheritance, then if the person entitled to the prior life estate and the trustees are parties, the court may make a decree that will conclude the rights of such contingent remaindermen; but they do not warrant the idea that contingent remaindermen who are in esse and can be made parties, can be safely dispensed with.

The subject seems to have been first considered in this state in the case of Van Lew v. Parr, 2 Rich. Eq., 321. The question there, was whether a decree for the sale of real estate would bar the rights of contingent remaindermen who were not in esse, and who were not, and, of course, could not be made parties to the proceedings under which the land was sold. But the court hesitated even to decide that question, not deeming it essential to the case then before the court. Subsequently, however, the same question was again presented to the court in the case of Bofil v. Fisher, 3 Rich. Eq., 1 [55 Am. Dec. 627], and there the court did decide that the court had power by its decree for the sale of real estate to bar the rights of contingent remaindermen not in esse, or residing abroad, whose names and places of residence are unknown, and who could not, therefore, be

made parties. This, of course, implied that if such remaindermen were in esse, and could be made parties, that then they would be necessary parties. Accordingly in the recent case of Le Roy v. City Council of Charleston, 20 S. C., 71, this court held that in such a case the contingent remaindermen must be made parties in order to bar their rights.

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*The case of Thomas v. Poole, 19 S. C., 323, does not, as seems to be supposed, conflict with this view. In that case the object was to set aside a sale made under proceedings in the Court of Probate, and one of the grounds relied upon was, that the children of Mrs. Thomas, who were contingent remaindermen, were not parties to such proceedings. All that the court held was that such a ground was not sufficient. Their rights had not vested and might never vest. Mrs. Thomas was still alive and might survive all of her children. It is true that the court did say that they were contingent remaindermen, and therefore it was unnecessary that they should have been made parties to the proceedings in the Court of Probate, and this remark, detached from the context in which it is found, has been relied upon to show that the court there decided the general proposition that contingent remaindermen are not necessary parties to a proceeding for the sale of real estate in which they have such contingent interest. But when the remark is read with reference to the context, it is perfectly manifest that all that was meant was that so far as the case then before the court was concerned, they were not necessary parties to the proceeding in the Court of Probate in such a way as to require the court to set aside the sale made under such proceedings. And when the language of the court, following that which is relied upon, is considered, it is perfectly clear that the court did not intend to decide, and did not decide, the general proposition that contingent remaindermen were not necessary parties. For the court proceeds to say: "It may be that the action of the court now will not bind them if they should happen to survive, but of this we give no opinion; we only mean to say that until they have vested rights they are premature in asking the assistance of the court by way of protection." This shows, beyond all dispute, that the question whether their rights, when they became vested, would be concluded by a decree in a case to which they were not parties was not passed upon.

The cases of Ex parte Tunno, Bail. Eq., 395; Ex parte Calmes, 1 Hill Eq., 112; and Ex parte Copeland, Rice Eq. 69, relied upon by respondents to show that it had always been the practice of the Court of Equity in

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this state to entertain appli*cations for the change of investment of trust property upon the ex parte application of the trustee, are in no wise in conflict with the view which we have advanced. In no one of these cases was the question which we are called upon to determine decided or even considered; and in the only one in which the question of parties was even mentioned (Ex parte Tunno) the cestuis que trust were required to be made parties. In fact, these cases were not applications for the sale of trust property at all, but were really applications for the removal of trust funds from this state to a state in which the parties beneficially interested resided, or for leave to invest a sum of money in the hands of a trustee, arising from a residuary bequest, in the purchase of land and slaves to be held by the trustee upon the same trusts as had been declared by the testator with reference to a specific bequest of slaves for the benefit of the cestuis que trust.

It seems to us, therefore, clear that this case does not fall within any of the exceptions to the general rule requiring all persons materially interested in the subject matter of the suit to be made parties, and that as far as the courts of this state have ever gone in dispensing with the presence of contingent remaindermen is, that where such remaindermen are not in esse or reside abroad, and their names and residences are not known, and they cannot therefore be made parties, their presence may be dispensed with and the court may proceed to make a decree which will bar the rights of such contingent remaindermen.

Now in this case, as we have seen, several of the contingent remaindermen whose rights have subsequently become vested were not only in esse at the time the petition for the sale of the land was filed, but were within the jurisdiction of the court and could have been made parties, and that these facts were known to the defendant, Milledge Hankinson, when he, with Darling J. Walker, became the purchasers from the trustee. It follows, therefore, that the rights of these contingent remaindermen are not barred, nor are those of the unborn contingent remaindermen; for, as it was practicable to have made some of the class parties who could have represented the interests of those who could not be made parties, and this was not done, there was no one before the court to represent the interests of the contingent re-

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mainder*men when there could have been; and as the exception to the general rule, by which it is allowable to proceed without making contingent remaindermen who are not in esse parties, seems to be based wholly upon considerations of necessity, this case does not fall within the exception, and hence the rights of none of the contingent remaindermen are barred.

It may be said that the trustee who was invested with the fee in the legal estate being before the court he could represent, and

did represent, the interests of all the parties, and there is some countenance for this suggestion in a dictum of Chancellor Dargan in Williman v. Holmes, 4 Rich. Eq., at page 490–1; but we think a more correct view is taken by Chancellor Wardlaw in Moore v. Hood, 9 Rich. Eq., at page 325 [70 Am. Dec. 210], where he says: "The rule requiring beneficiaries to be parties where they are interested in the questions for adjudication is applicable although the trustees have the legal title, for trustees are not the real owners of the trust estate, and are rather agents of the beneficiaries for the execution of certain trusts, and it is among their duties to require the real owners to be brought before the court." Any other view, it seems to us, would logically lead to the conclusion that a trustee might convey without any order of the court. The very object of applying to the court is to obtain authority for disposing of the interests of others, and those really entitled to such interests must, if practicable, be made parties to any proceeding by which it is proposed to dispose of their interests.

The judgment of this court is that the judgments of the Circuit Court be reversed in both of the above entitled cases, and that the said cases be remanded to that court for a new trial.

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22 S. C. 332

WOOLFOLK v. GRANITEVILLE MANUFACTURING CO.

(November Term, 1884.)

[1. *Dismissal and Nonsuit* ⟸51.]

Where an issue is ordered out of chancery, the judge presiding at the trial of such issue cannot grant a non-suit, but must try the case and report back the result.

[Ed. Note.—Cited in Rynerson v. Allison, 30 S. C. 537, 9 S. E. 656; Strong v. Weir, 47 S. C. 322, 25 S. E. 157; McClenaghan v. McEachers, 47 S. C. 451, 25 S. E. 296; Barnes v. Rodgers, 54 S. C. 123, 31 S. E. 885; Hall v. Boatwright, 58 S. C. 550, 36 S. E. 1001, 79 Am. St. Rep. 864; Garner v. Garner, 72 S. C. 439, 52 S. E. 194; Windham v. Lafferty, 83 S. C. 447, 65 S. E. 526; Broom v. Helms, 83 S. C. 448, 65 S. E. 602.

For other cases, see Dismissal and Nonsuit, Cent. Dig. § 103; Dec. Dig. ⟸51.]

[2. *Equity* ⟸381.]

If error be committed on the trial of such an issue, the decree based on the verdict would be affected by this error, and subject to exception therefor.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 813–817; Dec. Dig. ⟸381.]

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[3. *Evidence* ⟸182.]

*The rule admitting ancient deeds as evidence upon production and inspection, without further proof of execution, does not apply to copies, however old they may be.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 602; Dec. Dig. ⟸182.]

[4. *Vendor and Purchaser* ⟸231.]

A deed cannot properly be recorded without proof of its execution, and if recorded without proper probate, the registry does not operate as notice of its existence.

[Ed. Note.—Cited in Woods v. Reeves, 23 S. C. 387; Fuller v. Missroon, 35 S. C. 332, 14 S. E. 714; Armstrong v. Austin, 45 S. C. 81, 22 S. E. 763, 29 L. R. A. 772; Watts v. Whetstone, 79 S. C. 362, 60 S. E. 703.

For other cases, see Vendor and Purchaser, Cent. Dig. § 538; Dec. Dig. ⟸231.]

[5. *Acknowledgment* ⟸17.]

Under the registry laws of force in 1820, a deed executed in South Carolina, and proved before a magistrate in Georgia, was not properly probated, and its record did not operate as notice.

[Ed. Note.—Cited in Arthur v. Screven, 39 S. C. 84, 17 S. E. 640.

For other cases, see Acknowledgment, Cent. Dig. § 83; Dec. Dig. ⟸17.]

[6. *Partition* ⟸63.]

Plaintiffs, claiming a moiety of a tract of land which defendant claimed in severalty, offered to show by an alleged copy-deed, that defendant acquired only a moiety of the land under their chain of title. *Held*, that the evidence so offered was not collateral to the matter at issue.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 183–185; Dec. Dig. ⟸63.]

[This case is also cited in Marine Wharf & Storage Co. v. Parsons, 49 S. C. 136, 158, 26 S. E. 945, and distinguished therefrom.]

Before Hudson, J., Aiken, September, 1884.

The opinion fully states the case.

Messrs. J. E. Bacon, B. L. Abney, for appellants.

Messrs. Henderson Bros., Sam'l Lord, contra.

March 16, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action for partition of a tract of land now in Aiken, formerly Edgefield, County, containing one thousand acres, upon a part of which the Graniteville Factory and appurtenances now stand, and in which the plaintiffs claim that they are entitled to certain interests as tenants in common. Briefly, they allege that on March 8, 1808, one John C. Allen, the then sheriff of Edgefield, conveyed by deed the tract of land, now sought to be partitioned, to John Woolfolk and Christian F. Breithaupt; and that the said John Woolfolk, having never disposed of his moiety in the said lands, died on May 12, 1861, leaving a number of children him surviving, and that these, together with the heirs of such as predeceased their father, are now entitled by descent to certain shares in the premises, and they are the plaintiffs.

The answer of the defendant denied in the most positive terms that there was any tenancy in common, and claimed that John Woolfolk, in his lifetime and many years before his death, disposed of all his interest in

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the said lands, and having no interest *at the time of his death, none could pass to his heirs. But, on the contrary, that they were

seized and possessed in their own right, in severalty and in fee, of the land sought to be partitioned; that on April 10, 1846, they purchased for valuable consideration, and without notice of plaintiffs' claim, or any encumbrance whatever, from the South Carolina Railroad Company, the land known as the "Hamilton tract," containing 450 acres, and parcel of the aforesaid land sold at sheriff's sale, and believing their title to be perfect, erected thereon the valuable property known as the Graniteville Factory, and that "they have held the said tract of land in open, adverse, exclusive, continuous, and undisturbed possession for more than thirty years; and that the plaintiffs herein are barred from asserting any title or claim to the same by the operation and effect of the statute limiting the period within which such actions may be brought, and by lapse of time, and the presumptions thence arising," &c.

The case was placed on Calendar No. 2, and on motion of plaintiffs' attorney, an issue in the following form was submitted to the jury: "Have the plaintiffs title to a moiety of the land sought to be partitioned, or any part thereof?" Upon the trial of this issue the plaintiffs, after due notice, offered in evidence a certified copy from the register's office at Edgefield (then the proper office) of what purported to be a deed from Christian Breithaupt to Ransom Hamilton, bearing date August 24, 1818, conveying "an undivided moiety of a tract of land commonly called Richardson's Old Mills, lying on Big Horse Creek," &c. Said certified copy represented the probate of the deed to have been made as follows: "Georgia, Richmond County. Came before me A. D. Knight, and made oath that he was present and saw Christian Breithaupt sign, seal, and deliver within deed for the uses within mentioned, and also saw Ralph Thomas subscribe with himself as a witness. (Signed) A. D. Knight. Sworn to before me this September 23, 1820. (Signed) R. Bush, J. P. South Carolina, Edgefield District. Recorded in Book O O, folio 239, and examined this October 2, 1820. M. Mims, C. C. P."

The defendant company objected to the introduction of the deed on the ground that it had never been properly probated, hence the clerk had no right to receive it, and conse-

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quently a *certified copy was not evidence. The presiding judge ruled that the copy was not evidence. The plaintiffs then asked that the paper might be admitted to show that such a deed had been in existence; and that also being refused, the plaintiffs' counsel asked leave to enter a non-suit, with leave to move to set it aside in the Supreme Court, which being also refused, the trial of the issue proceeded. The jury found "that the plaintiffs have shown no title to a moiety or any part of the land sought to be partitioned, and on the issue referred to us, we find for the defendant;" and thereupon the presiding judge, sitting as chancellor in the case, affirmed the finding of the jury and dismissed the complaint, and the plaintiffs appeal to this court upon the following grounds:

"1. Because his honor erred in refusing to admit in evidence the certified copy of the deed from C. Breithaupt to Ransom Hamilton, upon the ground that the execution of the said deed having been proved in Georgia, the Clerk of Edgefield District was not authorized to record it, and therefore being a deed not duly recorded, there could be no certified copy of it.

"2. Because his honor erred in refusing to allow the said certified copy in evidence to show that a deed from Breithaupt to Ransom Hamilton had been in existence.

"3. Because, after ruling the said certified copy to be inadmissible, his honor refused to grant the plaintiffs a non-suit with leave to move to have the same set aside, stating that he had neither the power nor the discretion to do so."

We do not understand that the plaintiffs asked leave to discontinue their whole case, but that they might have an order of nonsuit as to the issue ordered, leaving the proceeding in equity still standing. We do not see how the judge could have granted a non-suit as to the issue, which was not an independent action, but "an issue from chancery," ordered at the instance of the plaintiffs themselves, to determine (in a manner they had a right to demand) a question which had arisen in the progress of the cause. We suppose the plaintiffs might have brought an original action at law, or possibly may have obtained an order in their case, that an action of law should be brought; but, probably for some good reason, they chose not to do so. They institut-

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ed, on the equity *side of the court, an action for partition, and obtained an order out of chancery for the issue. This being the case, the officer who tried that issue sitting as a law judge, could not grant a non-suit, for that would have been precisely equivalent to revoking the order. He had no right to do that, or refuse to try the issue, or to grant a new trial or non-suit. He had no option but to try the case and report back the result. McEwen v. Mazyck & Bell, 3 Rich., 214; Taylor and wife v. Mayrant, 4 DeSaus., 505; Mayrant v. Miller, 8 Rich., 284; Thomasson v. Kennedy, 3 Rich. Eq., 440.

But while this is so, if a serious error was committed on the trial of the issue, the verdict being incorporated into the final decree, we cannot doubt that a party considering himself aggrieved may except to that decree on the ground of error in the trial of the issue. If such error was committed, it attached to all the subsequent proceedings, and affected the final result. Upon this sub-

ject we are not embarrassed, as were the old courts of law and equity, when one tribunal ordered an issue, and another with different modes of procedure tried it. Now both law and equity (though kept separate) are administered by the same tribunal, with the right of appeal to the same appellate court.

This makes it necessary to consider whether the judge who tried the issue committed error of law, in excluding the certified copy of the deed from Breithaupt to Hamilton, on the ground that it had been placed on the books of registry without proper probate. A deed is good between the parties with or without registry, but in all cases it must be proved to have been signed, sealed, and delivered—that is necessary to its existence. The ordinary words of proof are familiar, and they are dispensed with only in one single case—that of "an ancient deed." If there are on the paper itself certain unmistakable indicia that it has been in existence over thirty years, there is a rule of evidence which declares that it proves itself. But this rule only applies when the original deed itself, the ancient paper, is produced. There is no such rule as to copies, no matter how old they may purport to be. Registry of a deed is a matter entirely different from its proof, the principal object being to affect

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third parties, *through notice, and as secondary thereto, to give certain advantages, such as that of authorizing certified copies to be offered in evidence in particular cases.

The whole system of registry is artificial, and rests on the terms of the statutes; but as a deed must be proved before it can exist for any purpose, all laws upon the subject require some kind of probate, proof of its execution, as an indispensable prerequisite to its going on the record. As to those laws, we think it settled, that the mere copying a paper in the books of registry does not give notice or any of the rights of registry, unless it has been first probated in the form and manner prescribed by law. "The recording of the deed therefore, not being authorized by the act of assembly, gave to it no additional validity, and the record thus made, or the exemplified copy therefrom, is no more evidence of the existence of the deed than would be a copy of such deed certified by a private individual," &c. Budd v. Brooke, 43 Am. Dec., 333; see 1 Whart. Evid., § 115; Kerns v. Swope, 2 Watts, 78; Heister v. Fortner, 2 Binney, 44. We do not consider that the case of Lamar v. Raysor, 7 Rich., 509, is in conflict with this view. In that case the probate actually made did not appear (there was no requirement that it should). Under these circumstances the facts not appearing, the court felt at liberty to presume that all things were done which should have been done, and resting upon this presumption, there was a probate in compliance with the law.

The question then is, was the Breithaupt deed (1818), a copy of which was offered in evidence, admitted to registry without a compliance with the law as to probate? As before stated, the case is different from that of Lamar v. Raysor in this, that the certified copy here shows the actual probate upon which it was admitted to record, and there is, therefore, no room for presumption. The oath was made before one "R. Bush, J. P." It does not appear that the said Bush was an officer under the laws of this state, but it does appear that the affidavit was made in the State of Georgia, probably in the City of Augusta. Our registry law in force at that time (1820) was the act of 1788, which provided that "the acknowledgment of the deed by the grantor before a judge of the Supreme Court, or oath

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of one witness *before a magistrate out of court, swearing that the deed was duly and legally executed as hereinbefore has been the practice to make proof, shall be sufficient for that purpose," &c. 7 Stat., 247.

This related to a deed executed within the state, for the act of 1788 had provided for the proof of a deed executed out of the state "that when any deed of land * * * within any county in this state shall be executed out of the state, then and in all such cases the justices of the county where such lands lie * * * are authorized to issue their dedimus to any two or more justices," &c. 7 Stat., 244. If the Breithaupt deed was executed in Georgia, there can be no question that the probate, being before one magistrate and not under a dedimus issued from this state, was void. But the caption of the deed is "South Carolina, Edgefield District," and we will assume that it was signed and witnessed in this state. Under these circumstances, could it be well proved out of the state by the affidavit of one of the subscribing witnesses before a magistrate of the State of Georgia? We think not. The words of the act "before a judge of the Supreme Court or a magistrate out of court," manifestly meant officers of this state, commissioned by this state, and acting within this state.

But it is strongly urged that, even if the certified copy of a deed registered without legal probate is not admissible as evidence directly to prove title, yet being a question of competency of evidence, the rule is different when the paper is designed to serve a purpose merely collateral and subsidiary; and this copy, having been offered merely for such purpose, should have been admitted at least to the extent of showing as a matter of fact that such a paper was in existence. We are not sure that, in its application to this case, we understand the distinction indicated. The plaintiffs claimed that, as heirs of one

John Woolfolk, they were tenants in common with the defendant company in a certain tract of land in the possession of the latter. The deed, of which the copy was offered, purported to be a conveyance from Breithaupt (once the joint owner with Woolfolk) of "an undivided moiety" of the land to one Hamilton. We do not think there could be any serious question as to the identity of the

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lands, and *we do not see the purpose for which the copy was offered, unless it was to show by the terms of the paper that the original tenancy in common continued down to that time (1818), and tended to raise the presumption that the other "moiety" was still at that time the property of their ancestor, Woolfolk, and continued to be so down to the time of his death in 1861, a period of over forty years. Such evidence, however slight, it seems to us was directly upon the issue. But even if the copy deed had been admitted, we do not perceive how it could have helped the plaintiffs as against the defendant company; for never having been legally recorded, it could not have been held that the registry afforded either express or implied notice of its contents so as to affect the company.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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22 S. C. 339

CITY COUNCIL OF CHARLESTON v. RYAN.

(November Term, 1884.)

[1. *Appeal and Error* ⇐1022.]

Findings of fact by the master, concurred in by the Circuit judge, approved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. ⇐1022.]

[2. *Vendor and Purchaser* ⇐239.]

If the satisfaction of a mortgage be fraudulently accomplished, nevertheless the rights of a subsequent purchaser for valuable consideration without notice of such fraud, will be secure against the mortgage.

[Ed. Note.—Cited in Wheeler v. Alderman, 34 S. C. 540, 13 S. E. 673, 27 Am. St. Rep. 842; Werber v. Cain, 71 S. C. 350, 51 S. E. 123.

For other cases, see Vendor and Purchaser, Cent. Dig. §§ 583–600; Dec. Dig. ⇐239.]

[3. *Mortgages* ⇐181.]

Where the mortgagee endorsed his name in blank, under his seal, on the back of the mortgage, and then parted with its possession, and a satisfaction was thereafter written above his signature and duly entered of record, he must bear the consequences of the act made possible through his negligence, and an innocent subsequent purchaser will be protected.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 436; Dec. Dig. ⇐181.]

[4. *Jury* ⇐28.]

Where the right to jury trial exists, it is waived if all issues of law and fact be referred by consent to the master.

[Ed. Note.—Cited in Trenholm v. Morgan, 28 S. C. 277, 5 S. E. 721.

For other cases, see Jury, Cent. Dig. §§ 176–196; Dec. Dig. ⇐28.]

[5. *Mortgages* ⇐313.]

The satisfaction of a mortgage does not require two subscribing witnesses.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 909; Dec. Dig. ⇐313.]

[This case is also cited in Blohme v. Lynch, 26 S. C. 301, 2 S. E. 136, as to facts.]

Before Kershaw, J., Charleston, April, 1884.

Master Hanckel thus states the case:

The present case grows out of a previous case. In that case the City Council of Char-

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leston filed their complaint against *Mary A. Ryan, one of the defendants in the present case, to foreclose a mortgage of the property described in the pleadings herein, executed by her to secure her bond to the City Council of Charleston, conditioned for the payment of fifteen hundred dollars; and under proceedings duly had therein, the mortgaged property was ordered to be sold; and at the sale the defendant, Dorothea Blohme, became the purchaser at the price of twenty-five hundred dollars. She refused to comply with the terms of sale. A rule to show cause why she should not comply was served upon her. In her return to this rule she showed for cause, that she was about to comply with the terms of the sale to her when she was informed that a certain mortgage so sold to her, hereinafter more fully described, had been fraudulently satisfied, upon the record of it.

The rule and the return thereto came on to be heard before the honorable B. C. Pressley, presiding judge, and by an order made by him and dated April 22, 1880, it was ordered, that the rule be discharged; and it was further ordered, that Mrs. Dorothea Blohme, the purchaser in that action, be discharged from her said purchase, unless proceedings be instituted with proper parties to test the validity of the title. From this order an appeal was taken by the City Council of Charleston to the Supreme Court of this state, and after being there heard, by a decree, filed April 11, 1881. the decree of the Circuit Court was affirmed. [City of Charleston v. Blohme] 15 S. C., 124 [40 Am. Rep. 690].

The present action is therefore now instituted in pursuance of the requirements of that decree to test the validity of the title to the property in question.

I find the case to be as follows: William B. Ryan, now deceased, being in his life-time seized and possessed of a certain house and lot on the west side of Pitt street, in the city of Charleston, and fully described in the complaint in this case, executed a mortgage of that property, dated December 17, 1866, to Patrick H. Ryan, trustee of Thomas J. Ryan, who was a minor, and the son of the mortgagor, W. B. Ryan, to secure a bond of even date therewith, and conditioned for the payment of the sum of $3,500, and this mortgage was duly recorded in the office of the regis-

ter of mesne conveyance for Charleston County, on January 30, 1869.

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*Not long after the execution of that mortgage the trustee, Patrick H. Ryan, died, and thereupon the cestui que trust, Thomas J. Ryan, by his father and next friend, W. B. Ryan, filed his petition in the Court of Equity for Charleston District (now county), praying that Thomas E. Ryan be appointed trustee, and for other relief therein stated. This petition was referred to Master Gray, and on May 26, 1868, he reported, among other things, as follows: "I find also that Patrick H. Ryan, the trustee, departed this life as stated in the petition. From the evidence of Wm. B. Ryan taken, he is in a destitute condition since the war, all his resources having been swept away in that great overthrow; and he is unable to maintain and educate his son. I therefore respectfully recommend the appointment of Thomas E. Ryan as trustee, under the said bond and mortgage, and recommend at the same time that power be given the newly appointed trustee to pledge the aforesaid mortgage for the purpose of borrowing the sum of twelve hundred dollars for his maintenance and education."

Thereupon, on May 26, 1868, the Hon. H. D. Lesesne, chancellor, ordered and decreed as follows: "On the report of Master Gray in this case, and on motion of M. P. O'Connor, solicitor pro pet., it is ordered, that Thomas E. Ryan, be substituted as trustee for Thomas J. Ryan, in the place and stead of Patrick H. Ryan, deceased; and that upon his giving bond with surety, faithfully to account for the estate of the minor that may come into his hands, the bond and mortgage described in the petition be delivered to him. It is further ordered, that the said Thomas E. Ryan, substituted trustee, have leave to pledge said bond and mortgage as a collateral security for any loan or advance of money to the amount of $1,200, that may be necessary to provide for the maintenance and education of said minor, Thomas J. Ryan."

Subsequently and before the filing of the complaint in the present case, the infant cestui que trust, Thomas J. Ryan, died, under age, and the defendant, Mary A. Ryan, has administered upon his estate; and the other defendants, William B. Ryan and Mary L. Ryan, now claim as his distributees under the statute.

I also find as a fact that upon the said

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bond and mortgage *being delivered to him, Thomas E. Ryan, the substituted trustee, signed his name and affixed his seal on the back of the same, leaving a blank space above such signature and seal; that this was done in the presence of a witness, to wit, M. P. O'Connor, and that the bond and mortgage, with the blank signature and seal, so endorsed thereon, was delivered by the trustee to the mortgagor, William B. Ryan, for the purpose of enabling him to pledge the same as collateral security in borrowing money thereon. I find these to be facts, because the trustee, Thomas E. Ryan, in his testimony in this case, expressly states that he signed a paper of some kind in blank, for the purpose of enabling the mortgagor, W. B. Ryan, to pledge the bond and mortgage, to raise money for the maintenance and education of the cestui que trust, his son. The trustee does indeed testify that the paper so signed by him in blank was not on any part of the mortgage, but was a distinct and separate paper. But the usual and very frequent method of pledging bonds and mortgages as collateral security is to place such a blank signature and seal upon the back, in the presence of a witness or witnesses. From a receipt also, signed by Z. B. Oakes, which is evidence in this case, it appears that this very bond and mortgage was lodged with him as a collateral. It could not have been so pledged, unless some such signature and sealing had been endorsed upon it.

In the satisfaction also which is recorded across the face of the record of mortgage, and which has given rise to this litigation, it is distinctly stated that "the bond for which this mortgage was made as security having been paid," &c. The register of mesne conveyance must therefore have found the signature and seal of the trustee attached to this mortgage, that being the mortgage then in his hands, from some part of which he was recording the satisfaction he found upon it. The faith and credit due to the public records requires that this be assumed as a fact. In addition to this is to be considered that Mr. M. P. O'Connor, the witness and a member of the bar in good standing, upon oath deposes that he witnessed the execution of the above written satisfaction.

And it is to be noticed further that the trustee also testifies that hearing of the satisfaction, he consulted Mr. R. S. Duryea,

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*a prominent member of the bar, who took him (to the court house, he says, but evidently to the fire-proof building, where the records are kept) and showed him some paper there pasted across the record of the mortgage. The testimony is obscure, but what was shown him was evidently the record of the satisfaction he had heard of and was inquiring about. And yet he took no steps to question the satisfaction until Mr. O'Connor and Mr. Duryea were both dead, and did nothing until after the defendant, Dorothea Blohme, had purchased the property at the sale under the foreclosure of Mrs. Mary A. Ryan's mortgage to the City Council; and then only made an affidavit that he had never signed the satisfaction; and never instituted any proceedings to set aside the satisfaction he so repudiated. It is not unreasonable, therefore, to suppose that at the time of his consultation with Mr. Duryea, he was convinced that the record of satisfaction across the record of the mortgage was the record of a paper,

to which his genuine seal and signature was attached, even if the writing over it was not the writing he intended should be there written.

I am therefore satisfied that the trustee, Thomas E. Ryan, is entirely mistaken in his testimony, that the blank paper he signed and delivered to W. B. Ryan, the mortgagor, formed no part of the mortgage deed, and was not in fact on the back of it. On the contrary, I find as a fact that the substituted trustee, Thomas E. Ryan, did sign his name as trustee of Thomas J. Ryan, and affix his seal thereto, on some part of the mortgage in question, leaving a blank space over such signature and seal; and that this was done in the presence of M. P. O'Connor as a witness, and that the copy of that signature and seal which appears in the record of the satisfaction of that mortgage, afterwards to be considered, is the copy of the trustee's genuine signature and seal. I also find as a fact that this bond and this mortgage, with the blank signature and seal of the trustee so attached to it, was delivered by him to the mortgagor, W. B. Ryan, and were in the possession of the latter at the time when the satisfaction next to be mentioned and considered was written above them.

There is, indeed, in evidence the receipt of one Z. B. Oakes, which shows that the bond

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and mortgage were in his possession *at one time as collateral security for money advanced upon it. But this receipt itself states that they were delivered to Oakes by the mortgagor, W. B. Ryan, to whom it had been delivered by the trustee; and they must have been again returned to the possession of the mortgagor, who had delivered them to Oakes; because if it had remained as a collateral in the possession of Oakes, he would not have allowed a satisfaction to be endorsed upon the mortgage, but would have required an assignment to himself to be written instead; and Oakes has made no claim to such an assignment. It is evident that this loan being paid, he naturally returned the bond and mortgage to W. B. Ryan from whom he had received them.

I also find as a fact that on the blank space above the signature and seal of the trustee on the mortgage there was on September 1, 1870, written by some one (in the view I shall take of the case it is not necessary to decide by whom) a full satisfaction of the mortgage in the following words, to wit:

"State of South Carolina.

"The bond for which this mortgage was made as security having been paid, I declare the within mortgage fully satisfied and discharged.

"Witness my hand and seal this first of September, 1870.

"Thomas E. Ryan, [L. S.]
"Trustee for Thos. J. Ryan.

"In the presence of
"M. P. O'Connor."

And that this satisfaction was proved for record by an affidavit of the witness, M. P. O'Connor, as follows, to wit:

"State of South Carolina.

"Personally appeared, M. P. O'Connor, who deposeth that he saw Thomas E. Ryan sign and seal the foregoing satisfaction, and witnessed the execution thereof.

"M. P. O'Connor.

"Sworn to before me this 2d September, 1870.

"A. P. Sampson, Notary Public."

I also find as a fact that on or about September 1, 1870, Mary A. Ryan, the defendant in the original case of foreclosure and one of the defendants in the case at bar, being seized and possessed of the fee in the house

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and lot on Pitt street, described in *the complaint, under a deed of conveyance from E. W. M. Mackey, sheriff of Charleston County, dated June 6, 1870, contracted with the City Council of Charleston to borrow what are known as fire loan bonds, to the amount of $1,500, and that in order to secure the payment of this loan the said Mary A. Ryan executed her bond conditioned for the payment to the City Council of Charleston of the sum of fifteen hundred dollars, in fifteen equal successive annual instalments, with interest at the rate of seven per cent. per annum, payable quarterly in advance.

That, in order to secure the payment of the said bond, the said Mary A. Ryan executed a mortgage, dated September 1, 1870, of the house and lot on Pitt street described in the complaint, and of which she was seized and possessed in fee as above stated. And that the mortgage so executed and dated September 1, 1870, was not proved for record and not recorded until September 9, 1870, at which last date M. P. O'Connor, the attorney of Mrs. Mary A. Ryan, the mortgagor, gave his receipt for an instalment of $1,000 of the said fire loan bonds, the second instalment of $500 being received by him on September 14, 1870.

I also find as a fact that the City Council of Charleston, at the time of their making their loan to the defendant, Mary A. Ryan, did not know, and had no good reason to suspect, that the satisfaction recorded across the face of the record of the mortgage of W. B. Ryan to Patrick H. Ryan, the original trustee of T. J. Ryan, above mentioned, was not written at the time of the signing and sealing of the same by the substituted trustee, Thos. E. Ryan; and that they did not know, and had no good reason to suspect, that such signature and seal had not been originally signed and affixed with a blank space above it; and that they did not know, and had no good reason to suspect, that the satisfaction written above the signature and seal was not such a writing as Thos. E. Ryan, the substituted trustee, intended should be there written. I find these as facts, because the

burden of the proof of the contrary was on the substituted trustee, and he has produced no evidence whatever to prove the contrary.

In this connection it has been argued before me, that although the City of Council of Charleston might not have actually known,

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*yet they had sufficient reason to suspect that something was wrong, and were reasonably put upon inquiry by reason of the fact that in the proceedings in which Thomas E. Ryan was appointed substituted trustee, and which formed a part of the chain of title, it appeared that the mortgagor, W. B. Ryan, was in so destitute a condition that it was necessary to permit the substituted trustee to pledge the mortgage which constituted the trust estate, to raise money for the maintenance and education of the son of the said mortgagor, and that therefore the City Council of Charleston had good reason to believe that the mortgagor could not have paid the bond, or at least had sufficient reason to put them upon inquiry, whether he had really paid the bond, as he appeared to have done by the recorded satisfaction.

I cannot agree with this view of the case. Because, in the first place, there is no evidence whatsoever that the City Council of Charleston had any other reason to be suspicious. We can perhaps see now, with our present knowledge, that the circumstance referred to was in fact calculated to excite the further suspicion of any one who had previously some other reason to be suspicious of wrong in the matter. But we have now all the allegations in the case. The City Council of Charleston knew nothing of all these at that time. In looking at the proceeding referred to, their attention would be naturally chiefly directed to the authority of the substituted trustee to satisfy the mortgage. His power to pledge it, had apparently no significance or importance under the circumstances of the case. It would not naturally be much dwelt upon by one who suspected nothing. And then it must be remembered that the pecuniary condition of all persons is constantly changing, and the destitution of the mortgagor might have been in some way relieved. Friends might have aided him to enable his wife to effect her loan, and besides all this, the defendant, Mary A. Ryan, was the owner of the fee. It was to her interest that the bond should be paid, and the mortgage satisfied. She might have paid her husband's bond. The plaintiffs could not know that she had not the means of doing so. The examination of titles to property is already sufficiently burdensome. It would be unreasonable to require those taking a title to investigate the private pecuniary cir-

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cumstances of all *parties to the title, and to inquire into the probability of their being able to do what the public records stated they had done.

I therefore find as before stated, that the plaintiffs did not know, and had no good reason to suspect, that the recorded satisfaction of the mortgage in question, by the substituted trustee, was not the record of a bona fide satisfaction.

These being the facts of the case, the next inquiry is, what are the respective rights of the parties, under the state of the facts, and what is the law by which they are to be determined? Let us suppose, in the first place, that the obligor of the bond and the maker of the mortgage had alleged that they were paid and satisfied, and in proof of that fact had produced them as being in his own possession, with the signature and seal of the substituted trustee endorsed in blank upon each of them. Such possession of a bond and mortgage, and seal of the lawful holder, would be rightly interpreted according to circumstances. If found in the possession of a third person, it would naturally be interpreted to mean that an assignment was intended to be written over such signature and seal, whenever it should become necessary (and this in fact is constantly done in a thousand instances); but if found in the possession of the obligor and mortgagor, an equally fair presumption would be that it was evidence of payment of the bond, and that a satisfaction of the mortgage was intended to be written over such signature and seal on that security. And in fact and law the writing of either an assignment to the mortgage or of a satisfaction, would equally operate to satisfy the mortgage.

But the apparent evidence of satisfaction, in the case under consideration, is much stronger than in the case last supposed. What in that case might have been rightfully presumed, appeared by the records of this case to have been actually done. A certificate of the mortgage had in fact been written over the signature and seal in blank, had been duly proved for record by the affidavit of a credible and competent witness, and had been plainly recorded across the face of the record of the mortgage. And this alleged fraud (if fraud it was) had been made possible by the acts of the substituted trustee, Thomas E. Ryan, in endorsing on the mortgage his blank signature and seal in the presence of a witness, and so enabling the person

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entrusted by him with the *possession of the mortgage, to mislead and deceive, or to permit others to mislead or deceive, the plaintiffs, and to induce them to lend money on the faith of the recorded satisfaction.

The law in such a case seems to me to be very clearly settled by authoritative decisions in this state. In the case of State Bank v. Cox & Co., 11 Rich. Eq., 350 [78 Am. Dec. 458], Chancellor Dargan in his decree on Circuit, says: "There is no doctrine of equity jurisprudence better supported by reason as

well as authority than this, that when one of two innocent persons must suffer loss, it must fall on the party who by incaution or misplaced confidence has occasioned it, or placed it in the power of a third party to perpetrate the fraud by which the loss has happened." And upon appeal from this decision this doctrine of the Circuit Court was affirmed, and the appeal was dismissed; the Court of Appeals saying that whoever comes fairly by a security, as Cox did in this case, in the course of business, is entitled to hold it against him who passed it, or enabled another to pass it on him. In that case a power of attorney to transfer the bank stock in question (as is customary in sales of stock) had been endorsed upon the certificate of stock in blank. It was alleged and proved, on the part of the real owner, that the blank power of attorney was so endorsed on the certificate and delivered to the holder of it, only to be delivered by him to her agent in this country, to enable the latter to collect the dividends, and perhaps sell the stock, whenever he should be so directed. The person to whom it was so delivered by her never did deliver to her agent, but pledged it to Cox & Co., to secure his own debt to them. The Court of Appeals held that this blank power of attorney to transfer, enabled the person to whom it was entrusted to claim that the stock was his own property, and by pledging it to Cox & Co., to secure his debt, to deceive the lenders.

The same doctrine was affirmed in substance in the cases of Reynolds v. Witte, 13 S. C., 15 [36 Am. Rep. 678], and in Calais Steamboat Company v. Scudder, 2 Black, 372 [17 L. Ed. 282]. See also 2 Jones Mort., § 967. Indeed, the doctrine of equity jurisprudence, so clearly stated by Chan. Dargan, in the case of State Bank v. Cox & Co., has become a stereotyped maxim of law. The application of this doctrine to the present case is

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so obvious that I need not dwell *upon it. If there ever was a case in which the incautious and misplaced confidence of one person enabled a third person to perpetrate the fraud which has occasioned the loss, or if sanctioned would occasion the loss, to an innocent lender of money, this is such a case.

It has been argued before me upon the authority of many cases, beginning in this country with the leading case of the United States v. Nelson, 2 Brock., 64 [Fed. Cas. No. 15,862], that the blank space over the signature and seal of the trustee in this case could not be filled by writing a satisfaction, because the satisfaction is under seal, and such a blank cannot be filled in a sealed instrument. But in all the cases cited, this rule of law was admitted to be purely technical, and upheld simply by the weight of gradually accumulating authority. And in the later cases, notably in that of Pence v. Arbuckle, 22 Minn., 417, the strictness of the technical rule is largely relaxed, by invoking the doctrine of estoppel, especially in favor of innocent third parties. In this connection see also Gourdin v. Commander, 6 Rich., 497.

I question also whether a satisfaction of a mortgage can be regarded as technically a sealed instrument, any more than the endorsement of a promissory note would be made a sealed instrument by writing the words "signed and sealed" in the presence of a witness under the endorsement. Proof of payment of the bond would of itself operate as a satisfaction, and the register can be ordered to enter satisfaction upon such proof. And a simple receipt of payment of the bond, or the writing the words, "this mortgage is satisfied," would be a satisfaction. As conclusive, it seems to me, of the question, in the case of the State Bank v. Cox & Co., above cited, the blank power of attorney was under seal, and yet the filling up of the blank was held valid in favor of an innocent holder of the certificate of stock as a pledge. In view, indeed, of the wide-spread custom of holders of bonds and mortgages endorsing their signatures and seals thereon in blank, in the presence of a witness or witnesses, for the purpose of ready assignment, and ultimate satisfaction, many titles would be now jeopardized by now declaring such blank endorsements to be void.

The objection was also urged that the sat-

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isfaction in the pres*ent case was signed and sealed in the presence of, and proved by, only one witness. But the mortgage in the body expressly provides that it shall be null and void whenever the debt it is executed to secure is paid; and this in equity, whether the mortgagor is in possession or out of possession. One credible and competent witness is certainly sufficient to prove payment of the bond, and by such proof to make the mortgage null and void, or, in other words, to satisfy it. In fact, in a great number of instances, the satisfaction is acknowledged directly, and by an original writing, across the face of the mortgage itself, in the presence of the register alone.

It was also argued before me that the infant cestui que trust, who was over the age of choice, was not a party to the petition under which Thomas E. Ryan was appointed substituted trustee, and therefore was not bound by his acts. It is sufficient to say to this question that the infant cestui que trust was a party to that petition, which was filed in his name by his next friend, his own father, in accordance with the well established practice of chancery at that time recognized.

It was also submitted in argument that in the order by which the substituted trustee was appointed power was given such trustee to pledge the bond and mortgage, and no power was given to satisfy the mortgage. But it is very evident the substituted trustee had all the ordinary powers of the original

trustee. The bond was past due. He had therefore power to receive payment of it, and if he received payment of the bond, he not only had the power, but it was his stringent legal duty, to satisfy the mortgage. The power to pledge was only additional and extraordinary power, which he would not have had without such an order conferring it. It does not deprive him of the ordinary power of a trustee.

There is one view of the case which I think deserves consideration. The original bond and mortgage of W. B. Ryan to the original trustee are lost or destroyed, or not produced. The best evidence we have of their having existed is the record of the mortgage, proved by the affidavit of one of the witnesses in the register's office. The same record in evidence carries on the face of it the record of a satisfaction, duly proved by the af-

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fidavit of a *credible and competent witness. The evidence of the satisfaction is prima facie, just the same as the evidence of the mortgage.

Prima facie, therefore, by intendment of law the mortgage is satisfied, and the faith and credit which is due to the public records of the state, which are established by law for the guidance and security of its citizens, requires that they should not be questioned, as against innocent third parties, without unmistakable proof, not only of a fraud, but of one to which the person alleging such fraud has in no way contributed. In this case the allegations of the non-existence of the satisfaction endorsed on the mortgage, or of the forgery of the trustee's signature, cannot be proven, because the original mortgage cannot be produced, and the witness is now dead. And if there was a fraud, the proof of it is obscure, and rests wholly on the testimony of the trustee, who repudiates his recorded satisfaction, and that testimony relates to transactions with the mortgagor, who is dead, and involves the conduct of the defendant, Mary A. Ryan, and of M. P. O'Connor, who was evidently the family solicitor, and who is dead. And if there was a fraud in the matter of the satisfaction, we have seen besides that the trustee contributed to the recording of that satisfaction, by making the fraud not only possible, but easily and readily accomplished.

After full and careful consideration of the whole case, I therefore find as a matter of law, that as between the plaintiff, the City Council of Charleston, and all persons claiming under them, and the defendants, the trustee, and the cestui que trusts, the record of the satisfaction of the mortgage of William B. Ryan to the original trustee, afterwards held by the substituted trustee, is the record of a valid satisfaction of that mortgage. That so far as that mortgage is concerned the title offered by the City Council of Charleston to the defendant, Mrs. Dorothea Blohme, to the property purchased by her, under the foreclosure of the defendant, Mrs. Mary A. Ryan, is a good and valid title. And that therefore the defendant, Mrs. Dorothea Blohme, the purchaser, is bound to comply with the terms of sale in the original case of foreclosure between the City Council of Charleston as plaintiff and Mrs. Mary A. Ryan as defendant above stated.

As incidental matter, I further report that

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the defendant, Mary *A. Ryan, never renounced her dower on the mortgage of William B. Ryan to Patrick H. Ryan, trustee of T. J. Ryan, above reported. In view of the conclusions I have reached in this case, as above reported, it is unnecessary for me to consider the effect of that fact.

This report came before the Circuit Court upon the following exceptions taken thereto by the defendant, T. E. Ryan, trustee, and by Mrs. Ryan and the minor defendants:

T. E. Ryan's Exceptions.—1. Because the testimony shows that he never did receive satisfaction of the mortgage held by him as trustee, nor that he expressly authorized the entry of satisfaction.

2. Because if, as trustee, he had marked, or caused to be marked, the mortgage as satisfied on record without receiving satisfaction in fact, he would have been guilty of a breach of trust, and any person who accepted such satisfaction with knowledge or notice shares in the breach of trust.

3. Because the testimony shows that he never did receive the satisfaction of the mortgage in fact, but the City Council was in possession of facts sufficient to put it on the inquiry, and thus had notice of this.

4. Because a trustee cannot enter satisfaction on a mortgage without in fact receiving satisfaction; he cannot by deed authorize to satisfy a mortgage without in fact receiving satisfaction therefor, and such authority cannot be presumed against him.

Other Exceptions.—1. Because no interest or estate can pass under a satisfaction signed in blank upon a stolen mortgage such as that given to the trustee of the minor now dead, as stated in the facts of the report.

2. That the alleged satisfaction of the mortgage is no estoppel to the allegation that the bond and mortgage was unpaid when such truth was proven.

3. That the mortgagor, W. B. Ryan, now deceased, was out of possession when the alleged satisfaction was entered, and nothing but a deed from the mortgagee could then release the mortgage; and, secondly, that the alleged satisfaction is not a deed, having been signed in blank.

4. That the mortgagee was in possession

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of the mortgaged *premises at the time of the alleged satisfaction; and the alleged satisfaction is not a deed, having been signed in blank. That the alleged satisfaction,

without other proof, is not a legal satisfaction against proof to the contrary; in this, that it is witnessed by only one witness.

5. That the minor defendants are innocent mortgagees in possession, and cannot be ousted, except, first, by conclusive proof, wherein the burden is always on the plaintiff; or, secondly, by a trial by jury, if it should be necessary to establish title.

6. That the minors, by law, are innocent parties to the wrong which has been done; and as to the City Council, their position, first, is at least doubtful; and, secondly, they were particeps criminis in the wrong—and in either case the loss should fall upon the city.

7. That the power of attorney, signed in blank by the trustee, was exhausted when the mortgage was pledged to Oakes, and it could not be exercised again; and, secondly, such satisfaction as this cannot be signed in blank.

8. Beyond the equity of redemption purchased by Mrs. Ryan at the sheriff's sale, no other estate passed in this land to her so that it could be by her mortgaged to the city, because she testified she knew nothing of this satisfaction; and there is no evidence of its delivery to her, or any pretence connecting her with this fraud.

10. That Mrs. Mary A. Ryan is entitled to dower in the premises in any event.

The Circuit decree was as follows:

This case was heard upon the report of Master Hanckel, and exceptions taken thereto by the defendants. The decision depends upon two questions: 1. Whether the City Council advanced the loan in question to Mary A. Ryan, the defendant, upon the belief that the satisfaction entered upon the mortgages to Thomas E. Ryan was regular and bona fide in all respects. 2. Whether the parties who induced such belief and consequent action of the plaintiff were enabled so to do by the fault, negligence, or other act of the said Thomas E. Ryan, trustee, mortgagee, without contributory negligence or other fault of the plaintiff. Both these points

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have been determined by the master *adversely to the defendants, and such findings are well sustained by the evidence. The case is brought clearly within the principles of the cases of Bank v. Cox & Co. and Gourdin v. Commander, cited by the master, with others.

I need not consider seriatim all the matters argued before me, because they are all concluded by the principles laid down in these cases and the reasoning upon them of the master. That doctrine of stolen mortgage, invoked by Mary A. Ryan in her first exception, does not apply, because the mortgage was not stolen. It might apply if the satisfaction had been written in blank and the paper on which it was written, after having been safely put away, had been afterwards stolen and filled up, without fault or neglect of the mortgagee; but this is not this case.

I do not find anything in the second exception of Mrs. Ryan that need be discussed, because the facts here, as they appear, entitle the plaintiff to the protection afforded by the principles of equity referred to.

That the mortgagor is out of possession can make no difference here. A deed may be necessary to reconvey the estate when title has passed out of the mortgagor; but a satisfaction of a mortgage, by the authority of the mortgagee, would in equity release all the interest of the mortgagee, and the principles cited require that effect be given to this entry of satisfaction as if it had been actually intended by the mortgagee after payment of the debt, so far as the title of the purchaser of the premises in the present case is concerned.

The doctrine of the execution of uses under the statute does not apply here. The statute does not transfer the mortgage to the cestui que trust, and that would be necessary to divest the trustee mortgagee of the right to collect the debt and satisfy the mortgage. Nothing less would serve the purpose of defeating the equities of the plaintiff.

It is also contended that this is to be treated as the entry of an agent who has already exhausted his powers by a previous exercise of them. This would not avail the defendant unless it had been shown that the plaintiff had some means of knowing of the previous exercise of authority by the agent, of which there is nothing here.

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*The eighth exception of Mrs. Ryan seems to proceed upon the supposition that Mrs. Ryan's consent was in some way necessary to make the satisfaction valid; that if she did not so consent, it would not operate to enlarge her estate so that she could make a mortgage that would extend beyond her equity of redemption. To this I cannot agree. The mortgagee had the power to satisfy the mortgage without her, and when that was done, she was seized in fee, and the new mortgage attached to that estate.

The fourth exception of Mrs. Ryan insists that this was not a legal satisfaction, because it was against proof to the contrary, in that it was witnessed by only one witness. I agree with the master that one witness was sufficient, and adopt his reasoning on that point.

The master is undoubtedly right in leaving the question of Mrs. Ryan's dower out of this case. The existence of the claim in its present condition would not discharge the purchaser here.

The exceptions taken by Thomas E. Ryan, the trustee, may be disposed of by what has been said, with the additional remark that they could only apply to the case of a party dealing with the entry of satisfaction who was in possession of facts sufficient to put

him on the inquiry; and that is not this case

It is therefore ordered, adjudged, and decreed, that the defendant, Dorothea Blohme, the purchaser, do comply with the terms of sale in the original case of foreclosure between the City Council of Charleston as plaintiff and Mary A. Ryan as defendant. Also ordered and adjudged, that the costs of this case be paid out of the proceeds of said sale.

Mrs. Ryan and the minors gave notice of appeal upon the following exceptions: 1. Because the minors should have been granted a trial by jury of their title to the land. 2. Because the law declares their innocence and the facts declare the negligence of the city. 3. Because the power of the agent to fill the blank was exhausted after the hypothecation to Oakes. 4. Because the satisfaction was insufficient, having only one witness; especially when the mortgagor was out of possession. 5. Because the minors being mortgagees in possession, and vested with the fee under the statute of uses and trusts,

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nothing but a legal *deed can divest them of title. 6. Because there was no delivery of the satisfaction to Mrs. Ryan, because the same was a forgery, and because the mortgage was stolen.

Mr. Wm. M. Thomas, for appellants.
Mr. G. D. Bryan, contra.

March 16, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. [Omitting his statement of the case.]

The correctness of the conclusion reached below is so satisfactorily shown by the reasoning employed and the authorities cited by Master Hanckel, confirmed and endorsed as they are by the Circuit judge, that but little is left for us to add. There can be no doubt that at the time of the issue of the fire loan bonds which constituted the consideration of the bond and mortgage under which the lot in question was sold, the records, which was the proper source for the lender to go to to obtain such information, showed that the mortgage to the trustee, which is now claimed to be a prior lien, was fully satisfied and discharged by the mortgagee, or rather by one who stood in his place. This entry of satisfaction may or may not have been fraudulently done; but, even conceding that it was fraudulent, we do not see how it could affect the rights of the City Council unless they had notice of such fraud. The fact that they had such notice is negatived by the findings of the master, which are not only fully concurred in by the Circuit judge, but are likewise sustained by the evidence, and therefore, according to the well-settled rule, we are bound to conclude that the City Council had no such notice.

And when to this is added the further finding of fact, equally well sustained by the evidence, that the means of making such fraudulent entry of satisfaction (if indeed it was so) was afforded by the negligence of Thomas E. Ryan, the mortgagee, there cannot be a doubt about the result; under the wise and well-settled principle of equity "that where one of two innocent parties must suffer loss, it must fall on the party who, by incautious and misplaced confidence, has occasioned it or placed it in the power of a third party to perpetrate the fraud by

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which the loss *has happened." Thomas E. Ryan, being the legal owner and holder of the bond and mortgage, was the proper person to receive payment and enter satisfaction; and when he endorsed his name, under his seal, on the back of the mortgage, as the master finds that he did do, he placed it in the power of any person into whose hands the mortgage might fall to write above his name an acknowledgment of payment and a discharge of the mortgage, as was in fact done. There cannot be a doubt, therefore, as to whose negligence caused the loss.

But, as we have said, the case has been so fully considered and so satisfactorily disposed of that it is not necessary for us to enter into any further discussion of it, but will confine ourselves to a brief consideration of the several grounds of appeal. The first ground clearly cannot be sustained, inasmuch as it appears that the issues of law and fact were, by consent, referred to the master; and this would amount to a waiver of the right to a jury trial, if indeed such a right could ever have been claimed. The second ground raises mere questions of fact which have been disposed of by what we have already said. The third ground cannot be sustained: First, because it does not appear, and in fact the contrary does appear, that the blank above the mortgagee's name was ever filled but once; second, because the act of the mortgagee, in endorsing his name upon the mortgage and parting with the possession of it, afforded the opportunity and the means of perpetrating the very fraud which appellants allege has been committed; and whether so intended by the mortgagee or not can make no difference.

The fourth ground rests upon the proposition that a satisfaction of a mortgage must be executed in the presence of two subscribing witnesses. The statute in reference to the satisfaction of mortgages, as found in the General Statutes of 1872, p. 427-8, the law which was in force at the time of this transaction, does not require two witnesses, and we see no ground upon which the proposition contended for can be maintained. The fifth ground rests upon the assumption of fact that the minor mortgagees were in possession at the time the entry of satisfaction was made, but the evidence shows the con-

trary to be the fact: and we are utterly at a loss to conceive what the statute of uses

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*has to do with the question. At the time the entry of satisfaction was made, the cestui que trust, Thomas J. Ryan, was alive, and the minor defendants had no interest whatever in the mortgage. The sixth ground also rests upon assumptions of fact not sustained by the evidence, and cannot therefore be maintained.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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SPROUSE v. LITTLEJOHN.

(November Term, 1884.)

[1. *Appeal and Error* ⊂⊃706.]

An order of the Circuit judge on appeal from a trial justice, directing a new trial in the court below, cannot be declared erroneous where this court is not informed of the grounds upon which the order was granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2944; Dec. Dig. ⊂⊃706.]

[2. *Gifts* ⊂⊃48.]

A gift of personal property is not complete without delivery; but where declarations of the donor to the effect that he had given are received in evidence as competent, it should be left to the jury to determine whether the gift has been proved.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 91; Dec. Dig. ⊂⊃48.]

Before Pressley, J., Spartanburg, October, 1884.

The opinion states the case.

Mr. Stanyarne Wilson, for appellant.

Mr. J. S. R. Thomson, contra.

March 17, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This action was originally brought in a trial justice court for Spartanburg County for damages for the taking and detaining by W. G. Bryant, the defendant's intestate, of a cow, the alleged property of Texana Sprouse, of whom the plaintiff is guardian ad litem. The case was heard in the trial justice court by a jury duly impannelled and a verdict rendered for the plaintiff for $76.50, whereupon the defendant appealed to the Circuit Court. Upon the hearing of this appeal his honor, Judge Pressley, ordered and adjudged that the appeal be sustained, and that the case be sent

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back for a *new trial, with instructions to the court below, "that in order to presume a gift of a chattel there must be some proof of its delivery to the donee, and the subsequent declarations of the donor that he has given the chattel, are not sufficient of themselves to prove such gift."

From this order the plaintiff has appealed to this court on the grounds: "1. That his honor erred in holding that in order to presume a gift of a chattel there must be some proof of its delivery to the donee, and the subsequent declarations of the donor that he has given the chattel, are not of themselves sufficient to prove such gift. 2. That upon the evidence the appeal should have been dismissed and judgment rendered for plaintiff."

It does not appear in the order of the Circuit judge granting the new trial, nor in the exceptions of the appellant by which the case is before us, upon what grounds this order was made. Nor is there any statement in the case from which said grounds may be inferred. We are at a loss, therefore, to know what errors of law we are called upon to correct as to the granting of the new trial. The appellant in his first exception objects to the proposition of law as to the effect of declarations of a donor which the judge sent down as instructions to the trial justice in the new trial which he had just ordered, and in his second and last exception he simply alleges in a general statement that the appeal below should have been dismissed and judgment rendered for the plaintiff upon the evidence. Such an exception we have often held is too general and cannot be considered. Besides, we have no power in a case at law to consider the facts with a view to correct errors, if any, therein. We see nothing in the "Case" which leads us to the conclusion that the Circuit judge ordered the new trial on the ground that the trial justice in his charge to his jury laid down the law different from the instructions which he sent down. On the contrary, the trial justice in his report of the case in which his charge is found does not seem to have said anything as to the effect of the donor's declarations, but he left the whole question of gift to the jury as a matter of fact.

Having no information, then, as to the ground upon which the new trial was ordered, we cannot say that there has been legal error committed in granting it, but the cor-

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rectness of the instruc*tions accompanying the order is distinctly questioned and is before us, and it is the only question which is properly before us. There can be no doubt that to constitute a complete gift of a chattel there must be a delivery—some act which indicates a relinquishment of possession and dominion on the part of the donor in behalf of the donee. That, however, is not the question here, but the question is, will the subsequent declarations of the donor, saying that he had given the chattel, amount in themselves when competent to sufficient proof that this delivery had taken place, or must there be other evidence showing such delivery? The only cases that we have been able to find bearing upon this question are the two cited in appellant's argument, Mc-

Kane v. Bonner, 1 Bail., 115; and Caldwell v. Wilson, 2 Speers, 79. And neither of these decides the precise question.

In the first case Johnson, J., in delivering the opinion of the court, did say: "That cases do sometimes arise, in which proof of the gift is made up of repeated declarations of the donor running through several years," or such declarations are brought in, by the party claiming under it, in support of doubtful evidence of the gift. In these and in such cases, such declarations are admissible in reply to such evidence, and this was the question in the case, i. e., whether declarations of the donor subsequent to the gift, that he had not given, were admissible, and they were held admissible in reply to declarations that he had given.

In the second case the Circuit judge charged: "That a delivery was a transfer of possession, either by actual tradition from hand to hand, or by an expression of the donor's relinquishment, that the donee should take when the chattel was present, and in a situation to be taken by either party; that there could be no gift without a delivery; that in a case like this, where the defendant claims under the alleged donor, a gift may be proved by the acknowledgments of the donor, if the jury be satisfied that it was attended with all necessary formalities." Upon appeal the court said, in few words, that upon this question "it was satisfied with the instructions given to the jury."

We do not think that the instructions sent down in the case at bar were entirely correct, because they were calculated to mislead. It is true that delivery must be proved, but this

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is a ques*tion of fact for the jury, and inasmuch as there can be no complete and legal gift without delivery, the very use of the term "gift," or "I have given," may sometimes be intended to include the delivery, and where therefore such declarations have been used by the donor, and they are admitted by the court as competent, we think it ought to be left to the jury to say whether the gift has been proved, including the delivery, and it ought not to be laid down as a rule of law to govern the jury, that such declarations in themselves are insufficient to prove the gift.

For the reasons already given we have not been able to see clearly the grounds upon which the new trial was granted, and consequently we have not considered the question of the legality of that order, and no error having been pointed out, of course we cannot disturb the order, in so far as the new trial is granted, but the instructions accompanying the order, to which the appellant has excepted, we think contained error as above.

It is the judgment of this court that the judgment of the Circuit Court, in so far as the instructions sent down to govern the new trial are concerned, should be reversed, and it is so adjudged.

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22 S. C. 361

DUREN v. SINCLAIR.

(November Term, 1884.)

[1. *Evidence* ⊂⊃370.]

The necessary oath and notice being given, a certified copy of a recorded power of attorney, under which a deed was executed, may be offered in evidence without other proof of the execution of the original.

[Ed. Note.—Cited in State v. Crocker, 49 S. C. 247, 27 S. E. 49.

For other cases, see Evidence, Cent. Dig. § 1575; Dec. Dig. ⊂⊃370.]

[2. *Evidence* ⊂⊃183.]

The record book of the register of mesne conveyance is not admissible in evidence to prove a deed, not even as color of title, no oath of loss having been made nor notice given of intent to introduce.

[Ed. Note.—Cited in Stone v. Fitts, 38 S. C. 397, 17 S. E. 136; State v. Crocker, 49 S. C. 248, 27 S. E. 49.

For other cases, see Evidence, Cent. Dig. §§ 605–637; Dec. Dig. ⊂⊃183.]

[3. *Adverse Possession* ⊂⊃48.]

Occasional acts of trespass by others, even though claiming under color of title, and an action of trespass during the period, would not necessarily prevent the ripening of an adverse possession into title.

[Ed. Note.—Cited in Love v. Turner, 78 S. C. 519, 59 S. E. 529.

For other cases, see Adverse Possession, Cent. Dig. § 236; Dec. Dig. ⊂⊃48.]

[4. *Adverse Possession* ⊂⊃46.]

Adverse possession must be peaceable, without force and violence, notorious and visible, and founded upon a claim of ownership; but it will not be broken by every trespass or claim by another inconsistent with a recognition of such adverse holding.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 232–254; Dec. Dig. ⊂⊃46.]

[This case is also cited in Duren v. Kee, 26 S. C. 221, 222, 2 S. E. 4, and Sparkman v. Jones, 81 S. C. 456, 62 S. E. 870, without specific application.]

Before Fraser, J., Lancaster, October, 1883.

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*This is a continuation of the case of Duren v. Strait, 16 S. C., 465, George Sinclair having been appointed administrator in place of S. L. Strait, executor, removed from office. It was an action to recover the value of certain timber alleged to have been cut and carried from plaintiff's land by John Sinclair, defendant's testator.

The points of evidence raised are sufficiently stated in the opinion. The judge refused to charge the jury that any acts of ownership by others than the plaintiff over the land claimed under color of title within the statutory period or any action for trespass thereon against him within such period will prevent his possession from ripening into

title; but charged that for a possession to be peaceable in the contemplation of law it must be without force or violence, and might be peaceable even if during the statutory period there were occasional acts of trespass by others, even if they were claiming under some color of title, or even if actions of trespass were brought in consequence of the adverse possession of the party who claimed the benefit of it.

The jury found a verdict for plaintiff and from the judgment entered thereon defendant appealed upon the following exceptions:

1. Because the presiding judge, it is respectfully submitted, erred in holding that a certified copy of the record of the power of attorney alleged to have been executed in 1858 by one William Robinson to Wylie R. Duren could, upon notice, be introduced as part of the chain of title without any proof whatever of the execution of the said paper by the said Robinson.

2. Because the presiding judge, it is respectfully submitted, erred in holding that the record of the deed by Abden Alexander, sheriff, to Alexander Craig could not be introduced by the defendant as a copy of the original which was more than thirty years old, upon proof of loss of original, &c., but on the contrary held that only a certified copy of such record could be introduced under the act and after notice.

3. Because the presiding judge erred, it is respectfully submitted, in holding that the said record of the deed by Abden Alexander, sheriff, to Alexander Craig could not be introduced as color of title for the defendant upon proof of claim under the original and loss of the same.

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*4. Because the presiding judge erred, it is respectfully submitted, in refusing to charge the jury that any acts of ownership by others than the plaintiff over the land claimed under color of title, within the statutory period, or any action for trespass thereon against him within such period, would prevent his possession from ripening into title.

5. Because the presiding judge erred, it is respectfully submitted, in charging the jury that the peaceable possession which would confer title was any possession held without a breach of the peace and not by strong arm or force of numbers, and that the possession would be peaceable and confer title although within the statutory period others claiming adversely should be in possession of a part of the same land under color of title to the whole.

6. Because the presiding judge erred, it is respectfully submitted, in charging the jury that possession by the plaintiff for ten years under color of title, although within the ten years others were in possession under color of title covering the whole of the same land and claiming adversely to plaintiff continuously, would give title to the plaintiff not only to the part in actual possession but also to the limits of his color of title.

Mr. Ernest Moore, for appellant.

Messrs. R. E. & R. B. Allison, contra.

March 17, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The questions of law involved in this case, we think, can be understood without a statement of the facts. Such statement will therefore be omitted. The legal questions referred to are as follows:

1. Whether a certified copy of a power of attorney, under which a certain deed had been executed, and which had been recorded with the deed—both of which had been lost—could be introduced in evidence, the party offering it having made oath of the loss, and having given the ten days' notice as required, but offering no proof of its execution.

2. Whether the defendant or any party, in

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an action to recover *real estate, relying upon adverse possession with color of title, can be allowed to sustain his color of title by introducing the books of the register of mesne conveyance, showing the record of a certain deed covering the land, having made no proof of its loss, nor given any notice as required by General Statutes, §§ 2224–5.

3. Where both parties claimed by adverse possession, whether it was error for the judge to refuse to charge "that any acts of ownership, by others than the plaintiff, over land claimed under color of title within the statutory period, or any action for trespass thereon against him within such period, will prevent his possession from ripening into title;" and in charging instead, "that for a possession to be peaceable in the contemplation of law, it must be without force or violence, and might be peaceable even if, during the statutory period, there were occasional acts of trespass by others, even if they were claiming under some color of title, or even actions of trespass were brought in consequence of the adverse possession of the party who claimed the benefit of it."

The Circuit judge held affirmatively as to the first proposition, and therefore admitted the certified copy of the power of attorney. He held negatively as to the second, and excluded the books of the register of mesne conveyance, and he declined to charge as requested in the first paragraph of the third, and charged as stated in the second paragraph. The verdict was for the plaintiff, and the defendant has appealed upon six exceptions. The only questions raised, however, are substantially the questions mentioned above.

In sections 2224 and 2225, General Statutes, is found the authority for the introduction of certified office copies of grants, plats,

and deeds of land in evidence, and section 2224 prescribes the conditions upon which such evidence may be introduced, which are that the persons so applying to produce such copy, must swear that the original is lost or destroyed, or out of his power to be produced, &c.; and ten days' notice must be given of the intention to offer said copy. The power of attorney, by virtue of which the deed relied on by the plaintiff was executed, was a part of said deed; it was recorded with

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the deed, and the *necessary oath and notice, as required in the sections supra, were made and given. We think, therefore, that the evidence was competent, notwithstanding there was no testimony of the execution of the power, such testimony not being required under said sections. Darby v. Huffman, 2 Rich., 532.

In reference to the second question. The defendant proposed to introduce not a copy but the books of record, and that, too, without having laid the foundation by averring as to the loss and by giving the necessary notice as required in the act. We do not know by what authority such evidence could have been allowed. Certainly not by the sections above, for the simple reason that it was not proposed to introduce a copy as provided for therein, nor was any oath made as to the loss, &c., nor any notice given as to the intent. There was in fact not the slightest approach to a compliance with the requirements of the act in such case made and provided.

It is said, however, that it was not the purpose of the defendant to rely upon this deed as a link in his chain of titles, but simply to show a color of title as supplemental to his adverse possession. Be it so; and yet we cannot see how this should make any difference, or why this should relax the rules of evidence in such cases. The defendant desired to introduce this copy on the books to show the extent of his adverse holding. Certainly the original deed in which the boundaries of the land were described would have been the primary and best evidence of these boundaries, and was the evidence which the general rules of evidence demanded, and before the defendant could ask that these rules should be suspended in his behalf he should have brought himself under the act which provides for such suspension. This he failed to do entirely.

The point underlying the third question is whether where a plaintiff claims by adverse possession under color of title, any acts of ownership exerted by others over the land during the statutory period, or any and every action of trespass against him, will prevent such adverse possession from ripening into a title at the expiration of said period. His honor, Judge Fraser, charged upon this point that occasional acts of trespass by others, even though those others claimed under col-

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or of title, would not pre*vent the ripening of the adverse title of plaintiff, nor would an action of trespass during the period necessarily have that effect. Was this error? We think not. The foundation of title by adverse possession is the fact that the party holds possession by virtue of a claim of ownership and in his own right as contradistinguished from permission granted by another, the true owner; and while it may be true that certain acts of ownership exerted by others during the statutory period, submitted to by the plaintiff, or that an action of trespass under some circumstances might afford evidence that he was not holding as owner himself but by permission of the true owner, yet it would not be true that any act of ownership by another, or that any and every action of trespass, as the judge was requested to charge, would have that effect.

We think the qualification given to this doctrine by the judge, in what he did charge, was correct. The possession must be peaceable, without force and violence, notorious and visible, and founded upon a claim of ownership, and occasional acts of trespass by others, and even an action brought against him, would not necessarily and under all circumstances prevent him from standing on his adverse possession and of obtaining title thereby. Each case must be governed by its own facts and circumstances, and what would be the law in reference to one state of facts might not be in reference to another. Adverse possession is one of the modes of acquiring title to land. At the beginning of such possession the actual title is in some one other than the adverse holder, i. e., the true owner. If he submits for the statutory period, the adverse holding ripens into a title against him and of course against all others, and the fact that others not being the true owner may have attempted during his possession to exercise some acts of ownership, or commit some trespass, or may have brought action of trespass against him and failed, would not prevent the title of the true owner from passing to him at the expiration of the statutory period.

We have not found in the "Case" that the judge charged as stated in exceptions five and six. In those exceptions the charge as stated therein is stronger than as found in the "Case." The judge does not seem to

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have been requested nor did he charge *upon the effect that would result where the defendant was in possession of a portion during the ten years with a color of title covering the whole as well as the plaintiff. The request to charge as found in the case did not raise this question. It simply raised the question of the effect of acts of ownership exerted by others during the possession of the plaintiff, and it claimed that any such

act, whether occasional or otherwise, whether single or repeated, and any action brought, whether successful or not, would defeat the adverse possession. The judge responded to this request as herein above stated.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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22 S. C. 367

NORWOOD & CO. v. FAULKNER.

(November Term, 1884.)

[*Contracts* ⇐64; *Usury* ⇐58.]

In consideration of an advance by plaintiffs, who were cotton factors, defendant agreed to repay the amount advanced with ten per cent. interest, and also to ship to plaintiffs two hundred bales of cotton, to be sold on commissions, and failing so to do, to pay commissions for every bale deficient. *Held*, that the agreement to pay commissions on bales not shipped did not render the contract usurious, and was supported by a sufficient consideration.

[Ed. Note.—Cited in Witte v. Weinberg, 37 S. C. 593, 17 S. E. 681; Brown v. Brown, 38 S. C. 182, 17 S. E. 452.

For other cases, see Contracts, Cent. Dig. § 269; Dec. Dig. ⇐64; Usury, Cent. Dig. § 131; Dec. Dig. ⇐58.]

Before Wallace, J., Darlington, July, 1884.

This was an action by Norwood & Co. against L. Faulkner, commenced February 1, 1884, to foreclose a mortgage given to secure the payment of $1.25 a bale for 149 bales of cotton not shipped as required by contract. The mortgage secured a bond in the penal sum of $5,000, the condition of which was as follows:

That if the above bound L. Faulkner, his heirs, executors, and administrators, shall and do well and truly pay, or cause to be paid, unto the above named G. A. Norwood & Co., their certain attorneys, executors, administrators, or assigns, the full and just sum of twenty-five hundred dollars, if so much shall be advanced (or whatever sum or sums may be advanced) by them to me in moneys, merchandise, or other supplies or

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credits, to be evidenced *by my drafts, orders, and requests, and by their books, or otherwise, with factor's rate of interest on each advance from the time of the advance, by the first of December next; and shall also ship to them at least two hundred bales of cotton—commencing early in the season—to be sold by them on usual commission and applied to this indebtedness, or in default thereof to pay them the commissions on deficit shipment without fraud or further delay, then the above obligation to be void and of none effect, or else to remain in full force and virtue.

The Circuit decree (omitting its statement of the case) was as follows:

There being mutual stipulations, from which benefit was expected by each, the contract was certainly not without consideration; and this agreement as to the shipment of cotton being a part of the contract, is supported by the consideration that supports the contract.

The second ground of defence is that the agreement in relation to the shipment of cotton makes the contract usurious. We have just seen that the contract is supported by a consideration; a failure to perform, therefore, by either would immediately raise in the other a right of action for damages. To recover damages, proof would be required as to the extent of the injury. It being stipulated between the parties, however, that if the defendant failed to perform that part of the contract in relation to the shipment of cotton, he would pay one dollar and twenty-five cents for each bale of the number not shipped according to agreement, this amount becomes liquidated damages. This has been expressly declared in the case of Williams & Co. v. Vance & Moseley, 9 S. C., 374 [30 Am. Rep. 26]. In that case a contract almost precisely similar to this was the ground of the action. Williams & Co. agreed to make advances to Vance & Moseley; Vance & Moseley agreed to pay interest on the advances and to ship cotton to Williams & Co., or to pay a stipulated sum for each bale not shipped, according to the agreement, just as in this case; they did not ship the number of bales they agreed to ship, just as in this case. Williams & Co. brought their action to foreclose for the payment of the balance due, and part of the balance was made up of the sum agreed to be paid upon the non-shipment of the number of bales agreed to be shipped. The court held in that case that the

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*agreement to pay one dollar and twenty-five cents for each bale not shipped was liquidated damages and recoverable, and I must so hold here.

It is therefore adjudged, that plaintiffs have judgment for the sum of one hundred and eighty-six dollars and twenty-five cents. It is further ordered that plaintiffs have leave to apply at the foot of this decree for an order of foreclosure of the mortgage described in the complaint, and of the sale of the mortgaged premises.

Defendants appealed upon the following exceptions:

I. Because, it is respectfully submitted, that it was error for his honor, the presiding judge, finding as a matter of fact that "the agreement as to the shipment of cotton being a part of the contract, is supported by the consideration that supports the contract," to hold that the contract between plaintiffs and defendant was not usurious.

II. Because it was error for his honor to find that the covenant on the part of defendant to ship 200 bales of cotton to plaintiffs, to be sold by them on commission, was not a nudum pactum.

Messrs. Ward & Nettles, for appellant, contended that if the agreement to ship cotton was in consideration of the money advanced, the promise to pay $1.25 a bale for cotton not shipped was usurious; if not so supported, then there was no consideration at all for such promise; and they cited, 9 S. C., 374; 16 Stat., 325; 18 Stat., 35; Pars. Cont., 108; Bac. Abr., tit. Usury, 405, 409; Jones Mort., § 639; 17 Ves., 46; 13 Pet., 47; 15 S. C., 468; Tyl. Usury, 104, 105; 20 Am. Dec., 301.

Messrs. Edwards & Rankin, contra.

March 17, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiffs, who were factors and commission merchants, doing business in the city of Charleston, entered into an agreement with the defendant, doing business in Darlington County, whereby the plaintiffs were to make advances to defendant of money and supplies to an

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amount not exceeding *$2,500, and the defendant agreed to repay the same with interest at the rate of ten per centum per annum; and also agreed to ship to the plaintiffs at least two hundred bales of cotton to be sold by them on the usual commissions, shown by the evidence to be $1.25 per bale, or in default thereof to pay the like commissions on such number of bales as he might fail to ship. To secure the performance of these stipulations the defendant executed his bond and mortgage to the plaintiffs, which constitute the cause of action in this case. It is conceded that the defendant has repaid all the advances with interest, but having shipped only fifty-one bales of cotton the action is brought to recover the amount of the stipulated commissions on the one hundred and forty-nine bales which the defendant failed to ship according to contract.

The defence is rested upon two grounds; first, that the contract, so far as the stipulation to pay commissions on the cotton not shipped is concerned, is usurious. Second, that such contract was without any consideration. The Circuit judge held otherwise and rendered judgment for the plaintiffs. From this judgment defendant appeals upon the same grounds.

First, was the contract usurious? The act of 1882 (18 Stat., 35,) forbids the taking of a greater rate of interest than seven per centum per annum "for the hiring, lending, or use of money or other commodity," except upon contracts in writing where the parties may stipulate for a rate not exceeding ten per cent. It is incumbent, therefore, upon the defendant to show that the charge for commissions was for the hire, loan, or use of money or other commodity, and this we think he has not shown. If this were so, then the plaintiffs would be converted from factors and commission merchants into mere money lenders, and there is nothing in the evidence to warrant us in so doing. The object of the contract, so far as the plaintiffs were concerned, was not merely to secure a return of the money which they might advance, or the amounts which they might expend in the purchase of supplies shipped to the defendant, with interest on the same, but also to promote their business in which their capital was invested and to which their personal services were devoted, besides the necessary outlays in the way of store rent, clerk hire, &c. Hence the contract obligated the defendant to do two things—to refund

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the *advances made to him with interest, and to ship the stipulated amount of cotton to the plaintiffs which they had prepared themselves to take charge of and sell, and in so doing had incurred expense not only in loss of time but in money actually paid out. The plaintiffs having thus equipped themselves for business as factors and commission merchants would very naturally endeavor to take all lawful means of extending their business as such, and, therefore, they very naturally required that the defendant should not only secure them the repayment of any advances they might make, with the lawful interest thereon, but, in order to forward their primary object required the defendant also to ship them cotton, the main staple of their business. These views are fully sustained by the cases of Matthews v. Coe, 70 N. Y., 239 (26 Am. Rep., 583,) and Cockle v. Flack, 93 U. S., 344 [33 L. Ed. 949], cited in the argument of the counsel for respondent. We are satisfied, therefore, that there was no error on the part of the Circuit judge in holding that there was no usury in the transaction.

The only remaining inquiry is whether there was any consideration for the contract. The obligation of the defendant being under seal necessarily imported a consideration, but waiving that we think that the Circuit judge was right in holding that "there being mutual stipulations from which benefit was expected by each, the contract was certainly not without consideration." The defendant desired the plaintiffs to sell his cotton for him in Charleston, and this they agreed to do upon certain terms. In order to perform their part of the contract it was necessary for the plaintiffs to prepare themselves and hold themselves in readiness to receive and sell defendant's cotton as it was shipped to them, and necessarily involved, on their part, an expenditure of time and money. If the defendant incurred no liability by a failure to ship a part of the cotton which he agreed to ship to the plaintiffs, then he would incur no liability by a failure to ship any cotton at all; and if he could thus relieve himself from liability by a failure to perform his obligation, then all of the customers of the plaintiffs could do likewise, and this would certainly cause damage to the plaintiffs. It

is clear, therefore, that the defendant would be liable to the plaintiffs for any damages which they might be able to show that they

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had sustained by reason of *the failure of the defendant to ship them the stipulated number of bales of cotton, if there had been no special contract between the parties fixing the amount of such damages. But in this case such special contract was entered into, which, it is conceded, under the case of Williams v. Vance (9 S. C., 344 [30 Am. Rep. 26]), was an agreement for the payment of liquidated damages, and not a mere penalty to secure the performance of the contract on the part of defendant.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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22 S. C. 372

ZIMMERMAN v. McMAKIN.

(November Term, 1884.)

[1. *Libel and Slander* ⟸7.]

An allegation that "defendant, on January 7, 1882, in the city of S., and in the presence of T. and others, did falsely and maliciously defame and slander the plaintiff, by saying that she had sworn lies on that day before Trial Justice Thomason, on the trial of a cause in which one M. was plaintiff, and one Z. was defendant, thereby injuring the said plaintiff"—states facts sufficient to constitute a cause of action. If more particularity was desired, a motion should have been made, before trial, to require the allegations to be more definitely stated.

[Ed. Note.—Cited in Whaley v. Lawton, 53 S. C. 583, 31 S. E. 660.

For other cases, see Libel and Slander, Cent. Dig. § 56; Dec. Dig. ⟸7.]

[2. *Libel and Slander* ⟸112.]

In action of slander it is not incumbent on plaintiff to show, beyond a reasonable doubt, that the defendant uttered the words charged, or their substance.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 328; Dec. Dig. ⟸112.]

[3. *Libel and Slander* ⟸100.]

In action of slander it is not necessary to prove the words precisely as laid in the complaint, but it is sufficient to prove them substantially as laid.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246–256, 258–272, 291, 322, 323; Dec. Dig. ⟸100.]

[4. *Libel and Slander* ⟸100.]

There seems to be no substantial difference between the words, "public whore," charged in the complaint, and "whorish bitch," the words proved at the trial; and it should have been left to the jury to say whether the words proved were used in the sense of those alleged. The Circuit judge erred in charging, as matter of law, that they were not substantially the same.

[Ed. Note.—Cited in Hubbard v. Furman University, 76 S. C. 512, 515, 57 S. E. 478.

For other cases, see Libel and Slander, Cent. Dig. § 269; Dec. Dig. ⟸100.]

Before Fraser, J., Spartanburg, March, 1884.

This was an action commenced February 20, 1882. The allegations of the complaint were as follows:

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*I. That the plaintiff, Rachael Zimmerman, is the wife of the plaintiff, Edward J. Zimmerman.

II. That the defendant, Elizabeth E. McMakin, is the wife of the defendant, Peter C. McMakin.

III. That after the plaintiff, Rachael Zimmerman, became the wife of the plaintiff, Edward J. Zimmerman, the defendant, Elizabeth E. McMakin, being then the wife of the defendant, Peter C. McMakin, and being in his presence, and encouraged by him, did, on the seventh day of January, 1882, in the city of Spartanburg, S. C., in the presence of one Isham Turbyfill, and a number of other persons, falsely and maliciously defame and slander the plaintiff, Rachael Zimmerman, by calling her a public whore, whereby said Rachael Zimmerman was injured in her reputation to the damage of plaintiffs, in the sum of twenty-five hundred dollars.

IV. That at the time and place aforesaid and in the presence and hearing of the persons aforesaid, the said Elizabeth E. McMakin, in the presence of, and encouraged by, her husband, the defendant, Peter C. McMakin, did falsely and maliciously defame and slander the plaintiff, Rachael Zimmerman, by saying that she, the said plaintiff, had sworn lies on that day before Trial Justice W. S. Thomason, on the trial of a cause in which one B. J. McMakin was plaintiff, and Edward J. Zimmerman was defendant, thereby injuring the said Rachael Zimmerman in her reputation, to the damage of plaintiffs as aforesaid.

Wherefore plaintiffs demand judgment against the defendants for the sum of twenty-five hundred dollars, and for costs and disbursements of this action.

The defendants denied each and every allegation of the complaint. Other matters are stated in the opinion. The judge charged the jury substantially as stated in the opinion.

Messrs. Duncan & Sanders, for appellant.
Messrs. Bobo & Carlisle, contra.

March 23, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. This is an action brought by the plaintiffs to recover damages for certain slanderous words alleged to have been spoken by the wife of defendant McMakin, of and concerning the wife of the plaintiff Zimmerman. The slander alleged in the third paragraph of the complaint was

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in calling *Mrs. Zimmerman "a public whore." In the fourth paragraph of the complaint, the slander alleged is that Mrs. Zimmerman

"had sworn lies on that day before Trial Justice W. S. Thomason, on the trial of a cause in which one B. J. McMakin was plaintiff, and Edward J. Zimmerman was defendant." The defendants demurred to the fourth paragraph of the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained. At the trial, the testimony on the part of the plaintiffs tended to show that Mrs. McMakin called Mrs. Zimmerman a "whorish bitch," with certain additional adjectives appended, much more forcible than polite, and also that she called her "an infernal, stinking whore," "a whore in most every form." On the part of the defendants, Mrs. McMakin testified that she did not use the words attributed to her above, but that she called Mrs. Zimmerman, a Moorish looking bitch or devil, she did not remember which.

The Circuit judge charged the jury that it was incumbent upon the plaintiffs "to show, by a preponderance of the evidence, beyond a reasonable doubt, that the words, or at least the substance of the words alleged to have been spoken, were used by the defendant;" that if they come to the conclusion that the charge made was that Mrs. Z. was "a whorish bitch," this would not be sufficient to establish the allegation of the complaint, for those words only indicate that she had the tendencies of character of a whore, but do not necessarily import that she was a whore. But if they come to the conclusion that the words used were that she was "a stinking whore," or an "infernal stinking whore," then those words, being substantially the same as the words "public whore," would be sufficient to support the allegation in the complaint.

The jury having rendered a verdict in favor of the defendants, and they having entered judgment thereon, the plaintiffs appeal substantially on the following grounds: 1. Because of error in sustaining the demurrer. 2. Because of error in charging that the plaintiffs must prove the words as alleged in the complaint, or at least their substance, beyond a reasonable doubt. 3. Because of error in instructing the jury that the words

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"whorish *bitch" were not sufficient to establish the allegation of the complaint.

As is said in several of our cases, even prior to the adoption of the code, the strictness formerly required both in regard to the pleading and evidence in actions for slander has been much relaxed in modern times; and certainly since the adoption of the code, no court can be expected to require a strict adherence to those rigid rules which at one time prevailed. As is said in Pomeroy on Remedies, § 549: "The true doctrine to be gathered from all the cases is that if the substantial facts which constitute a cause of action are stated in a complaint or petition, or can be inferred by reasonable intendment from the matters which are set forth, although the allegation of these facts are imperfect, incomplete, and defective, such insufficiency pertaining, however, to the form rather than to the substance, the proper mode of correction is, not by demurrer, nor by excluding evidence at the trial, but by a motion, before the trial, to make the averments more definite and certain by amendment." This doctrine has been distinctly recognized in this state. Childers v. Verner, 12 S. C., 1.

Now, testing the fourth paragraph of the complaint by this rule, we do not think it was demurrable upon the ground that it did not state facts sufficient to constitute a cause of action. The allegation was that Mrs. Zimmerman had sworn lies before a certain trial justice, on the trial of a cause in which certain persons named were parties. This was in effect a charge of perjury, for it was not simply a charge that Mrs. Z. had sworn falsely, but that the false oath was taken before an officer competent to administer an oath, and in a judicial proceeding, to wit, a trial of a cause. The defendant certainly could not have been misled or misinformed as to the nature of the charge; and if any more particularity in the statement of the facts was desired, then, under the rule which we have cited, the proper mode of attaining that end was by a motion, before the trial, to require the plaintiffs to make a more specific statement. Even under the former and more strict system of pleading, it was held, in the case of Simpson v. Vaughan (2 Strobh., 40), that it was not necessary, in an action for slander for charging the plaintiff with false swearing, "to so charge and

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state the false swearing, in the pre*liminary part of the declaration, as would be necessary in an indictment for perjury. Still, enough ought to appear, in words or by legal intendment, to show an oath in a court of justice." In this case it did appear, if not in words, certainly by legal intendment, that the oath was taken in a court of justice.

So in a case like the one now under consideration, Dalrymple v. Lofton (2 McMull., 112), it was held that it was not necessary to aver in the declaration that the justice had jurisdiction of the cause in which the plaintiff was sworn as a witness, or that his testimony was on a point material to the issue, for these things will be presumed until the contrary is made to appear. So when the same case subsequently came before the court, as reported in 2 Speer, 588, it appeared that the allegation was, "You swore falsely on the trial of a case between me and Jerry Joiner before Squire Johnson," it was held that the words spoken did not per se impute the guilt of perjury, because the addition of "squire" to the name of Johnson did not impute that he was an officer competent to

administer an oath; but if the words "court," or "magistrate," or "justice," had been used, the crime of perjury would have been imputed; "but in the absence of any word aptly denoting a court or judicial officer, the word 'squire' or 'esquire,' which is unknown to our law, and is, by the usage of our society, applied without any just discrimination, can be of no avail." In the present case, however, the word trial justice was used, a word which denotes a judicial officer, competent to administer an oath, with jurisdiction for the trial of causes.

The case of Morgan v. Livingston (2 Rich., 573) is cited by counsel for respondents to show that the words "you swore a lie," or "he swore a lie," are not actionable per se, nor can an action be maintained for the use of such words by an innuendo that they were intended to impute perjury, but that there must be an averment and colloquium of a judicial proceeding to which such words referred. This, no doubt, is good law, for it is not every false swearing which constitutes perjury. In that case the words were introduced by a colloquium, in which was set out a suit before a magistrate between certain parties, in which the plaintiff was examined as a witness, and that defendant, speaking of his testimony so given, said to

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the plaintiff, "you swore a *lie," and that allegation was held sufficient. In the present case, however, the allegation was not simply that Mrs. Z. had sworn lies, in which case some prefatory averment would have been necessary to connect such false swearing with a judicial proceeding, but here the words used were that the plaintiff "had sworn lies on that day before trial justice W. S. Thomason, on the trial of a cause in which one B. J. McMakin was plaintiff and Edward J. Zimmerman was defendant;" and inasmuch as the words used, of themselves, showed that the false swearing was before an officer competent to administer an oath in the course of a judicial proceeding—the trial of a cause—there certainly could be no necessity for introducing such words by a prefatory averment, or colloquium, in which the very same facts should be stated as appear in the words themselves. We are satisfied, therefore, that the Circuit judge erred in sustaining the demurrer to the fourth paragraph of the complaint.

The next question is as to that portion of the charge in which the Circuit judge instructed the jury that it was incumbent on the plaintiffs "to show by a preponderance of the evidence the fact, beyond a reasonable doubt, that the words, or at least the substance of the words alleged to have been spoken, were used by the defendant." The point of the objection is that the jury were instructed that the burden was on the plaintiff, to show not only by a preponderance of the evidence, but "beyond a reasonable doubt," that the words alleged, or their substance, were spoken by the defendant. In this we think there was error, as the distinction between civil and criminal cases seems to have been overlooked. The well settled rule in the former class of cases is, that it is sufficient for the plaintiff to establish his case by a preponderance of the evidence, and that he is not, as in criminal cases, bound to establish it beyond a reasonable doubt. This long established and well settled rule was disregarded when the jury were told that the plaintiffs must establish the words alleged, not merely by a preponderance of the evidence, but also "beyond a reasonable doubt;" and inasmuch as it seemed to be a question of great importance in the view taken by the Circuit judge, whether the words used were those testified to by Mrs. Z., or those testified to by other wit-

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nesses, it is not unlikely *that the plaintiffs sustained prejudice from this erroneous instruction.

The only remaining inquiry is, whether there was any error in instructing the jury that if they came to the conclusion that the words "whorish bitch," and not the words "public whore," or "stinking whore," or "infernal stinking whore," were the words actually used, then the allegation of the complaint was not sustained and the action could not be maintained. There is no doubt that it is not necessary to prove the words precisely as laid in the complaint, but that it will be sufficient to prove them substantially as laid; and this rule was recognized by the Circuit judge in this case. Now the practical question in this case is whether there is any substantial difference between calling a female a public whore or calling her a whorish bitch. In Webster's Unabridged Dictionary the word "whore" is defined: "A woman who practices unlawful sexual commerce with men, especially one who does it for hire; a harlot," and the synonyms given are "harlot, courtesan, prostitute, strumpet, punk, wench, concubine." His definition of the word "whorish" is: "Resembling a whore in character or conduct; addicted to unlawful sexual pleasures; incontinent; lewd; unchaste." In Worcester's Unabridged Dictionary the word "whore" is defined: "A woman who practices illicit intercourse with men for hire; a prostitute; a harlot; a concubine; a strumpet; a punk." And his definition of the word "whorish" is "unchaste; lewd; incontinent." In view of these definitions, and in view of what we suppose would be the common understanding of such terms, we confess that we are unable to see any substantial difference between them.

But aside from this, and whatever may be the strictly correct definitions of these unsavory words, we think there was error on the part of the Circuit judge in instructing

the jury as matter of law that these words were not substantially the same. In Hogg ads. Wilson (1 Nott & McC., 216) it is said: "Words are to be construed according to their most obvious meaning and import; and courts and juries cannot understand them differently from all the world besides. That they shall be substantially proved as charged is all that can or ought to be required. Could any person understand the words proved in this case in any other sense

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*than as conveying a direct charge of hog stealing?" In Sawyer ads. Eifert (2 Nott & McC., 511 [10 Am. Dec. 633]) the action was for slander in charging the plaintiff with having stolen iron and steel from defendant. In one count the defendant was charged with having spoken the words by way of interrogation, and in the other with having accused him directly of the larceny. The proof was that the words were spoken interrogatively. In delivering the opinion of the court, Nott, J., said: "It is now very well settled that words are to be construed by a court and jury in the same manner as they were, or ought to have been, understood or construed by the person to whom they were spoken. A person may convey a charge of felony as well by way of question as by a direct allegation. And it must always be a question of construction whether such is his meaning or not. The question was therefore properly referred to the jury." In Davis v. Johnston (2 Bail., 579) it is said: "The rule in verbal slander, as to the construction of words, is that they are to be understood in their ordinary and popular meaning. If words are susceptible of two meanings, one imputing a crime and the other innocent, the latter is not to be adopted and the other rejected, as a matter of course. In such a case, it must be left to the jury to decide in what sense the defendant used them. Their conclusion must be formed from the whole of the circumstances attending the publication, including the sense in which the witnesses understood the words."

In Morgan v. Livingston (2 Rich., 573), the words alleged to have been used, in one of the counts, as imputing a charge of larceny, were: "You hired a negro to kill a beef and bring it to you; you are a sheep-killing son of a bitch; you make your living at night when honest people are abed; you get your living by sneaking about of nights; you stole a beef; you are a roguish rascal; you stole some hogs; you got some hogs dishonestly." The proof was that the words used were, "You get your living by sneaking about when other people are asleep. What did you do with the sheep you killed? Did you eat it? It was like the beef you got negroes to bring you at night. Where did you get the little wild shoats you always have in your pen?" The witness, who proved these words, was asked what he understood by them, and he replied that he understood the defendant to

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charge the plain*tiff with stealing. The defendant appealed upon the grounds, amongst others, that the words proved were not those laid in the declaration; that the words proved were not actionable; and that whether the words proved impute the charge of larceny, should have been decided by the court, and that it was error to permit the witness to prove his understanding of the words. All of these grounds were overruled, the court saying: "It is not necessary that the words, in terms, should charge a larceny. If taking them altogether, in their popular meaning, such is the necessary inference, then there is no doubt that they are actionable. * * * But if the words were doubtful and ambiguous, the plaintiff had the right to inquire of the bystanders, how did you understand the words? And if they said they understood them as charging larceny, and such understanding might fairly have been received from the words, it would prevent a non-suit, and make it necessary for the jury to inquire, did the defendant use the words in the offensive sense in which the hearers understood them?" In this case the language quoted above, from Davis v. Johnston, supra, is repeated with approval.

It seems to us, therefore, that the Circuit judge erred in instructing the jury, as matter of law, that the words "whorish bitch," were not substantially the same as those laid in the complaint, and that it should have been left to the jury to say whether those words were used in the sense of those contained in the complaint, and whether they substantially conveyed the same imputation.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

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22 S. C. 380

CORLEY v. HOLLOWAY.

(November Term, 1884.)

[1. *Death* ⇦2.]

When a person has been shown to be alive at a certain period, the presumption is that he continued to live for at least seven years; but when he has been missing and has not been heard from during that period of time, then the presumption is the other way.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1–3; Dec. Dig. ⇦2.]

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[2. *Death* ⇦2.]

*Whether the death of a person not heard from for seven years occurred at the beginning or end of that period is a matter to be determined upon the facts and circumstances of each particular case, the burden of proof being upon him whose interest it is to fix the death prior to the expiration of the seven years.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 3; Dec. Dig. ⇦2.]

3. Naisor v. Brockaway, Rich. Eq. Cas., 449, disapproved.

[4. *Appeal and Error* ⇐1012.]

The decision of the Circuit judge that the person here not heard from in seven years did not die at the beginning of that period, was a finding of fact in a chancery case, and is approved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3990; Dec. Dig. ⇐1012.]

[5. *Appeal and Error* ⇐843.]

Where the Circuit judge, in reaching his conclusions did not consider certain testimony admitted by the master, this court declined to pass upon its competency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. ⇐843.]

[6. *Tenancy in Common* ⇐28.]

A tenant-in-common cannot be called upon by a co-tenant to pay rent during the time of occupancy before action brought, it not appearing that the occupant cultivated more than her share, and all the owners, including plaintiff, having permitted her to use the land.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 76-88; Dec. Dig. ⇐28.]

Before Cothran, J., Edgefield, June, 1884.

The opinion states the case. The Circuit decree, after stating the facts, continued as follows:

The main question involved in the case, growing out of the foregoing statement of facts, is an exceedingly nice one, and I have to regret that the extraordinary pressure upon my time forbids much more than a statement of the conclusions attained. At the hearing, the famous case of Pell v. Ball, first reported in Cheves Equity, 99, was constantly in my mind, and I looked forward with pleasure to the preparation of this decree, which I now find must be so hastily and perfunctorily done.

I assume at the outset, as a well settled proposition of law, that as the plaintiff's claim here depends upon the death of Henry W. before the demise of their child in January, 1865, which she affirms, that the burden of proof is upon her to establish this as a fact, in order that she may acquire the enlarged inheritance. It may with equal confidence be assumed as settled law that when one is proven to have been alive at a particular time, the presumption in favor of continued existence holds until broken down by proof of death or of seven years of absence and unheard of. It is not enough to show that the absent party was exposed to great danger, not even in battle when thousands

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perished. For the *fact is even more notorious now than when the ill-fated Pulaski foundered at sea, that in the most desperate engagements, thousands survive the casualties of battle. Some are killed, more are wounded, and still more survive as captured or as vanquished.

The testimony of Captain Holloway and of Rufus Harling, so full and so singularly perspicuous upon this point, is not only insufficient to break down the legal presumption of continued life, but it goes, I might venture to say, to the extent of proving satisfactorily the affirmative proposition that Henry W. was captured at Deep Bottom; and it being contrary to the usages of civilized warfare to take the lives of prisoners, the negative proposition, that he was not killed, is inferentially proven. Captain Holloway says, substantially, that the first advance of the brigade was made through a corn-field, under a scattering fire, the alignment was broken, and a halt was made at the fence to rectify it. Here Pick Holloway was wounded, and Henry W. was ordered to take him to the rear. The charge was renewed through an old field for 100 or 150 yards, and the line becoming again deranged, was halted and reformed in a ravine. Captain H. was wounded then and went to the rear. In the meantime, or soon afterwards, Henry W. regained his place in ranks. Rufus Harling concurs in this description of the situation, and takes up the thread at the ravine from which Captain H. had retired wounded, and says that he and Henry were together some thirty paces in advance of the main line; that they could not see the enemy from the ravine, and that he and Henry ascended the hill beyond, so that they might see and shoot them. The firing had ceased, and whilst upon this eminence, on looking to his right, he discovered that our people had retreated, and he saw the enemy advancing upon his right and in rear of him. He called Henry's attention to this, and hastily retreated, leaving Henry there. He crossed back over the ravine and ran the gauntlet of the approaching Federals; was called to by them to halt and was fired at, but escaped unhurt. He saw no more of Henry, who was left on the other side of the ravine, and in a place of comparative safety. He further says that he retreated as rapidly as possible, and knows that if he had not done so, he would have been captured. He saw no effort made by

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Henry to escape. There was no *firing, he thinks, beyond the ravine, directly at Henry and himself.

In view of all this and more, I am unable to resist the conclusion that the proof fails to establish the proposition that Henry W. was killed at Deep Bottom. The master has reported in the testimony set up proof of a very extraordinary incident, to which the plaintiff, by her counsel, duly objected. I am inclined to believe that the testimony referred to is competent, but as it is doubtful in its character, as being obnoxious to the rule as to hearsay evidence, I have attained a conclusion without its aid. I shall, nevertheless, reproduce it here in the very words of the witness, as a curious incident, having the verisimilitude of truth itself and as confirming the conclusion already attained. Greenleaf says: "All rules of evidence are adopted for practical purposes in the admin-

istration of justice, and must be so applied as to promote the ends for which they were designed." §§ 83, 348.

W. V. Corley, sworn, says: That he belonged to same company that H. W. Holloway did. Witness was a teamster. Question: Where, when, and what did you hear of H. W. Holloway after the battle of Deep Bottom? Answer: Witness had been out after some forage, between Petersburg and Richmond, in March, 1865. On witness's return, a man belonging to the 14th or 24th North Carolina regiment came up with witness, and noticing the regiment and brigade on the wagon sheet to which witness belonged, said to witness: "Do you know a man by the name of Henry Holloway belonging to that regiment?" (1st South Carolina). Witness told him yes, that he belonged to the company witness belonged to. To which he replied: "Do you know anything of Henry Holloway now?" Witness replied: "No, I do not; he was taken missing at the battle of Deep Bottom." And asked him: "How do you know anything of Henry Holloway?" He replied: "We were in prison together, and he told me that he had a brother in that company by the name of Pickens Holloway; that he (the North Carolinian) had been exchanged, and that Henry came within three or four numbers of being exchanged also; that he had just been exchanged, and was then on his way to his command." As soon as witness got back to headquarters of wag-

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on team, he got permission from the quar*termaster and went to Captain Holloway and reported to him what he had heard as stated concerning Henry Holloway. The whole company was under the opinion that Henry had been captured; the battle-field had been searched and he had not been found. Captain Holloway, upon being recalled, stated that W. V. Corley did report to him the information he had received about Henry as stated in his testimony.

As to the rents: It appears from the testimony that the children all agreed that their mother should be allowed to live upon the land—the old homestead—as long as she pleased to do so, and without any accountability for rent. In this arrangement the plaintiff, although not actively participating, was consulted, and said that she would not be contrary about it. This was equivalent to assent, and certainly barred her until demand for rents was made, which was on August 29, 1883, the day that this suit was begun. The plaintiff is not entitled to interest.

It is therefore ordered, adjudged, and decreed as follows: 1. That the writ of partition be issued according to law, for the purpose of making partition of the premises in question amongst the several parties in interest and according to their respective rights as herein adjudged, &c.

The plaintiff appealed upon exceptions alleging the following errors in the Circuit decree: 1. In decreeing that from the evidence and circumstances in the case, Henry W. Holloway was not killed at Deep Bottom on July 28, 1864, and therefore did survive his child by the plaintiff herein. 2. In not decreeing that the testimony of W. V. Corley was incompetent. 3. In decreeing that the plaintiff was not entitled to recover rents previous to August 29, 1883. 4. In not sustaining the exceptions of the plaintiff to the testimony of Capt. W. Holloway when called as a witness by the defendants to corroborate the evidence of W. V. Corley. 5. In not sustaining all of the exceptions by the plaintiff to the master's report.

Mr. C. W. Creighton, for appellant.
Messrs. Sheppard Bros., contra.

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*March 23, 1885. The opinion of the Court was delivered by

Mr. Justice McIver. Ransom Holloway, being seized and possessed of the land, which is the subject of contention in this case, departed this life intestate on May 14, 1862, leaving as his heirs at law his widow and eight children. One of these children, Henry W. Holloway, intermarried with the plaintiff, who bore to him two children, one of whom died in September, 1862, and the other in January, 1865. This is a proceeding for the partition of the said land, in which a claim is made that the widow of the intestate shall account for the rents and profits thereof, under the allegation that she has enjoyed the exclusive use of the land. Henry W. Holloway was a soldier in the Confederate army and disappeared at the battle of Deep Bottom on July 28, 1864, and has not since been heard from. The plaintiff claims that he was killed in that battle, and that his share of his father's estate, as well as his share of the estate of his two brothers, who died intestate after their father, one in May, 1862, and the other in May, 1864, descended to her as his widow and his child, and that by the subsequent death of the child in January, 1865, the whole interest became vested in her. This claim is disputed by the defendants, who allege that there is no evidence sufficient to show that Henry W. Holloway predeceased his child, and hence that the plaintiff, as his widow, is only entitled to one-half of his estate, and his next of kin to the other half. They also dispute the claim for an account of the rents and profits from the widow. The Circuit judge sustained the positions taken by the defendants and rendered judgment accordingly. From this judgment plaintiff appeals upon the various grounds set out in the "Case."

The main question in the case is whether Henry W. Holloway predeceased his child, who died in January, 1865, and this really

turns upon the question whether the evidence shows that Henry W. Holloway was killed at the battle of Deep Bottom, on July 28, 1864. There is no direct evidence of this fact, but the plaintiff claims that it must be inferred from the fact that he was then last seen, and has not been heard from since—a period much more than seven years. The

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rule, as we understand it, is that *when a person has been shown to be alive at a certain period, the presumption is that he continued to live for at least seven years; but that when he has been missing, and has not been heard from during that period of time, then the presumption is the other way. But these are both mere presumptions of fact, capable of being rebutted by evidence of such facts or circumstances as will be sufficient to induce a different conclusion. From this follows another rule, that the burden of proof is upon him who undertakes to overthrow the presumption. For example, a party who claims that a certain individual was dead at a certain time, prior to the expiration of the period of seven years from the time when he was last heard from, must overcome the presumption of continuance of life, for that period of time, by evidence of such facts and circumstances as will be sufficient to rebut such presumption. But on the other hand, when a party claims that a certain person was alive after the expiration of seven years from the time when such person was last heard from, the burden of proof is upon him to show such facts and circumstances as will be sufficient to rebut the presumption of death arising from his being absent and not heard from for a period of seven years. This latter presumption, however, does not fix absolutely the time of the death, either at the end, or at the commencement, of the period of the seven years, but that is a matter to be determined by the facts and circumstances of each particular case. These principles are fully sustained by the elementary writers, as well as by our own cases. 2 Stark. Evid., 457–8; 1 Greenl. Evid., § 41; 2 Ibid, § 278f; Chapman v. Cooper, 5 Rich., 452; Canady v. George, 6 Rich. Eq., 103.

In Godfrey v. Schmidt (Cheves Eq., 57), the question whether a person absent and not heard from for a period of seven years, is to be presumed to have died at the commencement, or at the expiration, of that period, is left open, and authorities are cited both ways. The only case in this state, however, which is cited to sustain the doctrine that the presumption is that the death took place at the commencement of the seven years, is a Circuit decision of Harper, Ch., in Naisor v. Brockaway, Rich. Eq. Cas., 449; while, on the other hand, the Court of Appeals in the case of Craig v. Craig (Bail.

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Eq., 102) fixed the time of the death *at the expiration of the period of seven years. The view taken by Chancellor Harper, in his Circuit decision above cited, is evidently not sustained by the more recent cases, and is not sustained by reason. As is said by Wardlaw, J., in his separate opinion in Chapman v. Cooper, supra, in speaking of this question as to whether the time of the death is to be fixed at the beginning or the termination of the seven years: "To fix the time at the end of the seven years would be almost always contrary to the fact; to fix it at the beginning, immediately after the continuance of life had been positively ascertained, would be plainly contrary to truth and common-sense. Circumstances may enable a jury to say when it took place, or that it preceded a given event within the seven years. But there must be some circumstances to overcome the presumption that life continues for at least seven years; or if that presumption has been overcome by the lapse of the seven years, to fix at one period rather than another, the time of death left wholly uncertain; and these circumstances must be shown by the party whose interest it is to establish the time of death anterior to the expiration of the seven years."

Considering this case, then, in the light of these principles the question presented is really a question of fact, and under the well settled rule the conclusion reached by the Circuit judge must be sustained, unless it is without any testimony to sustain it, or is manifestly against the weight of the evidence. We not only do not think that this is the case, but we fully concur in the conclusion reached by Judge Cothran, and deem it scarcely necessary to attempt to add anything to what he has so well said. To sustain the claim of the plaintiff, it was necessary for her to show that Henry W. Holloway died prior to January, 1865, when her child died; and the burden of proof was upon her to show this fact. Practically she was bound to show, by the preponderance of the evidence, that her husband was killed in the battle of Deep Bottom; but, in our opinion, the testimony rather tends to show that he was captured, and not killed, in that battle. He had passed through the thickest of the fight unharmed, and when last seen he was at a place where there was but slight danger of his being killed by the bullets of

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the enemy, but where he was in *the greatest danger of being captured, and the natural inference would be that he was captured. If the testimony had been that, when last seen, he was going into battle where many were killed, there might have been good ground for the inference that he was killed. Such, however, is not the testimony; but, on the contrary, the testimony tends to show that when he was last seen the battle was practically over, or at least was not raging at the spot where he was seen alive and unharmed, and that the real danger to which

he was exposed, was capture and not death. But we do not propose to discuss the testimony, being quite willing to adopt the view of it taken by the Circuit judge.

The next question raised by the grounds of appeal, is as to the competency of the testimony of W. V. Corley, in regard to his interview with a member of a North Carolina regiment on his return from prison, in which he learned that he and Henry W. Holloway had been in prison together, and as to the competency of Capt. Holloway's testimony, in which he stated that W. V. Corley had communicated the fact of such interview to him, upon his return to camp. Inasmuch as this testimony was not ruled competent by the Circuit judge, and as he says expressly that he did not consider it in reaching his conclusion, we do not see how it can afford any basis for a ground of appeal. Whether the testimony was competent or incompetent (about which we do not wish to be understood as intimating any opinion), is wholly immaterial, for practically the judge did rule it out.

The only remaining inquiry is as to the claim for rents and profits. It is quite clear that this claim cannot be allowed. In the first place, it does not appear satisfactorily that the widow cultivated more than her share of the land, and, in the second place, the testimony shows that she used the land by the permission and acquiescence of all the heirs, including the plaintiff, and this alone would be sufficient to exclude her claim for rents prior to demand, which was not made until this action was commenced; and that she has been allowed.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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22 S. C. *389

*TEMPLETON v. LOWRY.

(November Term, 1884.)

[1. *Ejectment* ⟸145; *Improvements* ⟸4.]

Under the express terms of the statute, a party after verdict against him for recovery of land, is entitled to recover the value of all improvements made upon the land, where he supposed, at the time of his purchase, that he had a good title in fee, not excluding those made after subsequent knowledge of title in another.

[Ed. Note.—Cited in Tumbleston v. Rumph, 43 S. C. 280, 21 S. E. 84; Bethea v. Allen, 85 S. E. 904.

For other cases, see Ejectment, Cent. Dig. § 478; Dec. Dig. ⟸145; Improvements, Cent. Dig. § 14; Dec. Dig. ⟸4.]

[2. *Ejectment* ⟸142; *Improvements* ⟸4.]

Whether such party so supposed is a question of fact. In determining this question, his knowledge of facts which in law render his title defective, is a circumstance to be considered, but does not in itself show that he did not suppose his title to be in fee.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 501; Dec. Dig. ⟸142; Improvements, Cent. Dig. §§ 25, 26; Dec. Dig. ⟸4.]

[3. *Judgment* ⟸715.]

The verdict in the action for the recovery of the land, and for damages, was no adjudication of the issue here raised, as to improvements by clearings on the land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1244–1246; Dec. Dig. ⟸715.]

Before Fraser, J., York, November, 1883.

Action by John M. Templeton against John T. Lowry, to recover under the betterment law for the value of improvements. The opinion states the case.

Messrs. G. J. Patterson and Hart & Hart, for appellants.

Mr. Stanyarne Wilson, contra.

March 23, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. The facts of this case, out of which the questions presented for our consideration arise, are substantially as follows. In June, 1875, a tract of land containing 228 acres was sold as the property of Bratton under executions against Allison & Bratton, and bought by Adickes & McGill, the lien of the judgments upon which these executions were issued extending as far back as the fall of 1873. The defendant, Lowry, was in possession of a portion, at least, of this land at the time of this sale, and held a deed from Bratton, dated April 30, 1875, and recorded June 14, 1875, but he claimed to have gone into possession in January, 1872, under a bond for titles from Bratton. In December, 1875, Adickes & McGill conveyed without warranty to the plaintiff, Templeton, 106 acres of said land, and

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he went immediately into possession, *and made improvements upon the portion thus conveyed to him. The land was uncleared, except one or two acres, and was all unenclosed when Templeton bought.

At that time the defendant, Lowry, had tenants on the portion which was not sold to Templeton; but the testimony is somewhat conflicting as to whether he had any possession of the part conveyed to Templeton. Lowry testified that he "was cultivating some land on the part included in Templeton's deed from Adickes & McGill;" but this is denied by Templeton. It seems that Adickes & McGill brought an action against Lowry to recover possession of the whole tract, and we infer from the report of the case, in 12 S. C. Rep., 97, that they failed to recover, by reason of the fact that Lowry had gone into possession under a contract to purchase from Bratton prior to the time when the judgments, under which the land was sold, became a lien, although his deed was dated subsequent to that time. After this Adickes & McGill refunded to Templeton the purchase money paid them for the 106 acres, and in an action brought by Lowry to recover possession of the 106 acres "and

for damages for cutting and removing timber from the premises," the jury found the land for Lowry, and three hundred dollars damages. Thereupon this proceeding was instituted by Templeton for betterments under the statute.

The defendant requested the Circuit judge to charge the jury as follows: "1. If you shall find that Templeton had actual notice of Lowry's title when he bought and entered, or had notice of such facts in regard thereto as would put a man of ordinary prudence on inquiry, then his purchase and entry were in bad faith, and he is not entitled to recover in this issue." This request was refused except with the following qualification. "Unless he had made due inquiry, and he was not able to find any ground for the counterclaim." "2. If you shall find that Lowry was in possession of this land by his tenants at the time Templeton bought and entered, this is such a fact as would put a prudent man on inquiry, and a disregard thereof is such evidence of bad faith in Templeton that he is not entitled to recover in this issue." This request was likewise refused except with this proviso: "If he had the whole land under fence, or was in the

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actual and constant use of *it in reference to well known natural boundaries." "3. In no event can you allow anything to the plaintiff for clearing lands, inasmuch as that has already been adjudicated by the verdict in the previous action for damages against plaintiff." His honor refused this request, saying, "Nothing in the other verdict can be considered here." 4. The last request was that the jury should be instructed that "virtual or actual possession of land, under color of title, is evidence of right of so high a character that he who disregards it and steals unawares into the possession of any part of it, can only rebut the legal presumption, thence arising, of bad faith, by proving title in himself, which plaintiff has failed to do." This request was refused.

The jury was instructed "that plaintiff could recover for value of improvements put upon this land after he had notice of defendant's title, provided his original purchase and entry were in good faith, and provided the notice was received after the purchase and entry." The jury having found a verdict for the plaintiff, the defendant appealed on the ground of error in refusing to charge the several propositions requested, and in charging that the plaintiff might recover for improvements put upon the land after notice of defendant's title.

This is a proceeding under a special statute, which reads as follows: "That after final judgment in an action to recover lands and tenements in favor of the plaintiff, if the defendant has purchased the lands and tenements recovered in such action * * * supposing at the time of such purchase such title to be good in fee * * * such defendant shall be entitled to recover of the plaintiff in such action the full value of all improvements made upon such land by such defendant," &c. A careful consideration of the terms of this statute, which the courts have no right to abridge or extend, will show conclusively that none of the grounds of appeal can be sustained. It may be that the statute should have been more carefully framed and its operation limited, but of this we are not the judges. That belongs to another department of the government whose province we have no power or desire to encroach upon. By the express terms of the statute the condition upon which the party making the improvements is entitled to re-

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cover is declared in language which *admits of no doubt as to its meaning, and which, therefore, affords no room for construction or inference. That condition is that the person from whom land has been recovered shall have purchased a title to the same, "supposing at the time of such purchase such title to be good in fee." The statute makes no provision or exception for a case in which the purchaser shall afterwards obtain notice or even knowledge that the title was in another, but the only thing necessary to his recovery is that he supposed, at the time of his purchase, that the title he was purchasing was a good title in fee.

This must necessarily be a question of fact, for it cannot be doubted for a moment that a person may in the best faith purchase a title which he honestly supposed to be good, but which turns out, as matter of law, to be bad. Indeed, the very purpose of the statute was to relieve in just such a case. Every man is presumed to know the law, and to say that if he knew, even at the time of his purchase, certain facts, which the court subsequently determines were sufficient, as matter of law, to show that the title he was purchasing was not good, and therefore that he had no right to suppose that the title was good, would defeat the manifest object of the act. Of course, the proof of such facts might, and in some cases undoubtedly would, have a very strong bearing upon the question whether he really and honestly supposed at the time of his purchase that he was procuring a good title, but they could not be said, as matter of law, to be conclusive, for the question is, as we have said, a question of fact to be determined by that branch of the court entrusted with the trial of such issues.

So, too, the question as to what a party is entitled to recover is not left in any doubt, for the statute expressly declares that he is entitled to recover the value of all improvements made upon the land by the party from whom it has been recovered. There is no limitation as to the time when such improvements may have been made, whether

before or after notice, or even knowledge of title in another. Here again there may possibly be room for legislative action, but certainly none for the action of the court. In fact, it might prove a very difficult task to fix any definite limit. It certainly would not

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do to say that where one has in *good faith bought and paid for a tract of land, honestly believing that he had obtained a good title and has commenced the construction of improvements, say the building of a dwelling house, he should be compelled to suspend the work when half complete, or run the risk of losing the value of what he might subsequently add, simply because he has received notice that some one else claims the land. But it is not for us to suggest difficulties that might arise in the attempt to improve upon the terms of the statute. We are simply called upon to administer the law as we find it written.

These views, it seems to us, dispose of the first, second, and fourth requests to charge, for they are all based upon the assumption that the question of whether Templeton supposed at the time of his purchase that he was obtaining a good title was a question of law, and not a mere question of fact. The Circuit judge could not have charged any one of these requests without first assuming to determine what would be sufficient evidence to show that Templeton did not suppose that he was obtaining a good title. If the requests had been that the jury should be told that the circumstances therein mentioned should be considered by them and given due weight in determining the question whether Templeton supposed he was buying a good title, then they would have been unexceptionable; but they could not properly be told that any one or more of these circumstances were conclusive, and if established would defeat Templeton's right to recover.

The third request was also properly refused. The verdict in the former case only established the right of Lowry to recover the land and the damages he had sustained "for cutting and removing timber from the premises." That was the only thing he sued for, and the question at issue in this case could not arise or be determined in that case.

The only remaining ground of appeal complains of error in instructing the jury that plaintiff could recover for improvements put upon the land after notice of defendant's title, provided his original purchase and entry were in good faith, and provided the notice was received after purchase and entry. This is disposed of by what we have already said. The statute does not limit the

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*recovery to those improvements put upon the land before notice of another's title, and we think the Circuit judge in his charge to the jury simply followed the terms of the statute.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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22 S. C. 394

BOMAR v. EZELL.

(November Term, 1884.)

[1. *Executors and Administrators* ⟸537.]

Under the practice prevailing in 1859, in action by the ordinary on an administration bond after decree, the parties at whose instance the action was prosecuted were required to endorse their names on the record, and only they could claim any rights in the action, or be liable for the costs.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2453, 2485–2581; Dec. Dig. ⟸537.]

[2. *Executors and Administrators* ⟸537.]

When, therefore, such an action was brought, and afterwards discontinued, distributees whose names were not so endorsed, and for whose benefit the action was not instituted, cannot have an order to restore the case to the docket.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2493; Dec. Dig. ⟸537.]

Before Kershaw, J., Spartanburg, June, 1883.

The opinion fully states the case.

Messrs. J. S. R. Thomson and S. Wilson, for appellants.

Messrs. Bomar & Simpson, contra.

March 23, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. This was an application for an order to restore the above entitled case to the docket and refer the same to Geo. W. Nichols, judge of probate, "for the purpose of passing upon and assessing the amounts due upon the claims of those legatees of Ezekiel Dobbins, deceased, against the defendant, James H. Ezell, that have not been satisfied." The notice of this motion was signed by Messrs. J. S. R. Thomson and Stanyarne Wilson, "attorneys for William Potter and other children of Nancy Potter, deceased."

The application was based first upon the

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affidavit of one of the *above named attorneys, stating, upon information and belief, that the above entitled cause was on the docket of the Court of Common Pleas on March 29, 1871, when an order was taken, on the motion of Mr. Elford, plaintiff's attorney, referring the case to Benjamin Wofford, judge of probate, "for his adjudication and to assess the amounts due the several legatees in interest, more especially that due to Marvel Cash;" that no action was taken under this order, and the case, remaining in abeyance, was left off the docket until March

29, 1879, when, on motion of Duncan & Cleveland, the case was restored to the docket, "it having been left off by mistake," and the reference previously ordered was directed to be held by Geo. W. Nichols, judge of probate and successor in office of Wofford, the former referee; that, in accordance with this order, a reference was held and testimony taken on August 22, 1879, but no report was made and no further proceedings had, owing to the fact that the claim of the legatee represented by the attorneys who took the order was settled by the defendant, Ezell, and the referee being of opinion that said legatee was the only party in interest, and not knowing of the existence of others, or misconstruing the scope of the order of reference, concluded that it was unnecessary for him to take any further steps in the matter; that the case remained on the docket until March, 1880, when it was marked "discontinued" by consent of the attorneys representing the defendant and the said satisfied legatee; that there are other legatees of said Ezekiel Dobbins, to wit, the children of Nancy Potter, whose claims have not been satisfied, now represented by the attorneys making this motion, and that said claims have not yet been adjudicated, or the amounts due upon them assessed; that the action was commenced for the purpose of enforcing the payment by the said Ezell of the amounts which had been previously decreed by the said ordinary to be due by the said Ezell as administrator (with the will annexed, as it subsequently appears) of Ezekiel Dobbins to his several legatees, among whom were the said Marvel Cash and the said children of Nancy Potter.

Next follows the affidavit of Mr. Cleveland, one of the firm of Duncan & Cleveland, to the effect that his firm represented Marvel Cash, and did not represent the children of

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Nancy Potter, *and therefore when their client was settled with, as has been stated, they took no further proceedings in the case, and consented that it should be marked "discontinued." Finally the record in the case was presented, being a declaration on the administration bond of the defendant, filed October 2, 1867, with order for judgment November 2, 1867; but as a plea is also endorsed on the declaration, and the case seems to have been at issue for many terms of the court, the probability is that this order for judgment was set aside and the defendant allowed to put in his plea, although the rule to plead had expired, as was very frequently done under the old practice.

The motion was resisted by the defendant, who made the following showing: First, his own affidavit, stating that in May, 1872, in answer to a citation issued by Benj. Wofford, judge of probate, which appears, from the copy appended to the "Case," was entitled "Marvel Cash v. J. H. Ezell," and required him to show cause "why an execution should not be issued against you in the above stated case," he appeared and showed for cause "that he had invested the amounts decreed against him in favor of Marvel Cash and the other legatees of Ezekiel Dobbins in Confederate bonds;" that his showing was deemed satisfactory, and the matter was abandoned by the attorney then representing said Cash, who was present at the hearing, and at whose instance the citation was issued; that he heard no more of the matter until after the case had been restored to the docket in 1879, which was done without any notice to him; that thereafter he did compromise and settle the claim of said Cash, and that before said compromise was made, he had frequent conversations with one John Potter, who claimed to have a power of attorney from the heirs of said Nancy Potter to collect whatever might be due them out of the estate of said Ezekiel Dobbins, and said John Potter knew that this case was then pending for the benefit of the said Marvel Cash.

Then follows the affidavit of Benj. Wofford, who stated that he as judge of probate did, on May 27, 1872, issue the citation above mentioned, and that said Ezell appeared in obedience thereto and made the showing above stated, which was deemed satisfactory, and the matter was thereupon abandoned by

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the *attorney of said Marvel Cash, at whose instance the citation was issued; that he never held any reference in the case of John Earle Bomar, Ordinary, v. James H. Ezell, and according to his recollection and understanding that action (being the same in which the motion now under consideration was made) was brought for the benefit of Marvel Cash.

Upon hearing these affidavits and the argument of counsel, Judge Kershaw passed an order refusing the motion made by the plaintiff to redocket the case, stating at the time "that as the decree of the ordinary against the defendant herein in favor of the heirs of Nancy Potter, deceased, among the other legatees of Ezekiel Dobbins, deceased, had been rendered on April 26, 1859, and more than twenty years had elapsed since that date, and no action brought within that time by the heirs of Nancy Potter, deceased, they were barred by presumption of payment, and could have no interest in having the case redocketed."

The plaintiff appeals upon the ground "that the Circuit judge erred (1) in holding that the decree of the ordinary having been rendered against the defendant herein in favor of the heirs of Nancy Potter, among the other legatees of the deceased Ezekiel Dobbins, on the 26th day of April, 1859, and more than twenty years having elapsed since that date, and no action having ever been brought by the heirs of said Nancy Potter

upon said decree, they are now barred by presumption of payment, notwithstanding the fact that this cause was begun as a declaration upon the administration bond of the defendant in 1867, was never pressed into judgment, and was on the calendar of this court as late as March, 1880. (2) In refusing to grant their motion to restore this cause to the docket, so that the rights of the heirs of Nancy Potter under said decree may be enforced and restored."

As we understand the practice which prevailed at the time this action was originally commenced, after a decree by the ordinary, or by the Court of Equity, ascertaining the amounts due by an administrator to the distributees of his intestate, an action could be brought, in the name of the ordinary, at the instance of any one or more of the distributees, against the administrator upon his administration bond, and upon proof of the

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breach thereof *judgment would be rendered for the penalty; whereupon the parties at whose instance the action was commenced, and any others who might choose to come in upon the same conditions, might have their damages assessed and execution for the same. But the parties at whose instance the action was commenced were required to endorse their names upon the record as the real parties in interest, and as such liable for costs. Until this was done, no distributee, even though he might have a decree of the ordinary in his favor, could be regarded as a party to the action on the bond, or claim any rights as such, or to be subject to any liability for the costs of such action.

It seems to us, therefore, that the insuperable obstacle which the children of Nancy Potter, in whose behalf this motion is made, have to encounter, is the fact that it does not appear that they were ever parties to the case which they are seeking to redocket; for certainly one who is not a party cannot have any right to such an order. This is doubtless the real ground upon which the motion was refused in the Circuit Court, for it is manifest that Judge Kershaw did not consider them as parties to the action, and we think he had good reason for reaching that conclusion. In the first place, it does not even yet appear who are the children of Nancy Potter, what their names are, or what their number. All that does appear in the "Case," and that only incidentally, by the signature to the notice of the motion, is that William Potter is one of them. We are, therefore, bound to conclude that they were not made parties in the proper way by endorsing their names on the record as the real parties in interest, and as such liable for costs. But more than this, the testimony of Wofford shows that the action was brought for the benefit of Marvel Cash, and this is confirmed by the action of the other Judge of Probate, Nichols, who, when the claim of Cash was satisfied, regarding him as the only party in interest, took no further steps in the case. So that there is not only no evidence that the children of Nancy Potter ever made themselves parties to this action, but, on the contrary, all the testimony goes to show that they were not parties.

It may be said, however, that they can come in now and make themselves parties, and thus obtain such a standing in court as

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*would entitle them to have their motion granted. But to say nothing of the effect of the great lapse of time which might of itself be sufficient, we think they are too late. The case was entered on the docket as "discontinued" in March, 1880, and, in the absence of any showing to the contrary, we are bound to assume that the judge did so, either by the consent of the plaintiff, or of the real party in interest, or that such a showing was made as would justify such an entry even without consent. And certainly after a case has been discontinued it is too late for any person to become a party thereto.

The first ground of appeal which imputes error to the Circuit judge, in saying that after the lapse of twenty years the decree of the ordinary would be presumed paid, is based upon the assumption that the children of Nancy Potter were originally parties to this action, which, as we have seen, is without foundation, and therefore it cannot be sustained. Indeed, we do not understand that Judge Kershaw based his refusal of the motion upon the ground that the decree would be presumed paid after the lapse of twenty years, but, after refusing the motion, he merely stated that after such a lapse of time the presumption of payment would arise, and therefore the children of Nancy Potter "could have no interest in having the case redocketed."

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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22 S. C. 399

Ex parte EPTING.

In re GIST v. RUTHERFORD.

(November Term, 1884.)

[1. *Appeal and Error* ⇐1022.]

Findings of fact by the master concurred in by the Circuit judge approved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. ⇐1022.]

[2. *Trusts* ⇐217.]

Where a trustee was ordered by the court to purchase a tract of land for the separate use of a married woman (his cestui que trust) from her husband, and he paid for the place by purchasing a judgment against such husband, and put her in possession, he substantially made the investment directed, although the deed

from the husband was not executed nor the judgment marked satisfied until long afterwards.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 302; Dec. Dig. ⟸217.]

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[3. *Equity* ⟸431.]

*A master's report, confirmed by the court in a creditor's action, is res judicata as to a decree in a former cause reported against, and of all matters arising under such decree, and may be pleaded as such in a subsequent proceeding seeking to enforce a claim under such decree.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1048-1051; Dec. Dig. ⟸431.]

[4. *Executors and Administrators* ⟸437; *Wills* ⟸746.]

A claim for a legacy prosecuted twenty-four years after decree ascertaining its amount, and directing its investment, is barred by lapse of time.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1761; Dec. Dig. ⟸437; Wills, Cent. Dig. § 1929; Dec. Dig. ⟸746.]

Before Aldrich, J., Newberry, June, 1884.

The opinion fully states the case. The master's report of his conclusions of law was as follows:

The claim of the petitioner is for a balance of legacy under the will of William Rutherford, deceased, ascertained by the settlement in the ordinary's office in 1849, and again ascertained by the decree in Epting v. Epting and Rutherford, in 1857, while the administrator de bonis non of the estate of Thomas B. Rutherford, deceased, sets up in his answer that the whole claim is satisfied by the investment by Thomas B. Rutherford of petitioner's legacy in land, pursuant to the decree of the court in Epting v. Epting and Rutherford, dated September 23, 1857, payment of the interest on said legacy up to the time of the investment, and the receipt by the petitioner of the rents and profits of said land since said investment, and that this claim has been heretofore adjudicated in this action and rejected.

Has this claim been theretofore adjudicated in this action and rejected? We have seen that the creditors of the estate of Thomas B. Rutherford, deceased, were called in and required to establish their demands under the bill in this action, and enjoined from prosecuting their claims elsewhere. And the referee states in his report in this case, dated May 21, 1874, that, amongst other claims, this one was presented, and was ascertained to have been satisfied, except as to certain costs. This report was confirmed, and became the judgment of the court, from which no appeal was taken.

It is said in the case of McDowall v. McDowall (Bail Eq., 330), that what parties have once had an opportunity of litigating in the course of a judicial proceeding, they

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shall not draw in *question again; but whatever might properly have been put in issue, shall be concluded to have been put in issue and determined. And in the case of Manigault v. Deas (Ibid, 293), Judge O'Neall, in delivering the opinion of the court, used the following language: "It may be laid down, as a general rule, that a direct final judgment of a court of competent jurisdiction, on the same subject matter between the same parties and privies in law or estate, is conclusive, and cannot be re-examined in a subsequent original action in the same or any court."

It is argued, however, in behalf of this petitioner, that the record does not show in what manner the decree in Epting v. Epting and Rutherford, was ascertained to have been satisfied. But the referee expressly states, in his report, that the decree in Epting v. Epting and Rutherford, was presented and ascertained to have been satisfied. True, he does not say in terms that petitioner's interest was actually represented, or in what way the conclusion was arrived at, that the decree had been satisfied; but I think the presumption must be now that petitioner's interest was duly represented, and that the conclusion that the decree had been satisfied was reached through a full investigation, unless the contrary is shown, which has not been done.

We have no doubt either but that every presumption is to be made in favor of the regularity of the proceedings of the court, and that we must take for granted that all persons were properly made parties, on whose rights, as parties, the decree purports to decide. Chancellor Harper in Cruger, Adm'r, v. Daniel, Riley Eq., 106. I conclude that this claim must be held to have been heretofore adjudicated in this action and rejected, and that it cannot now be re-examined.

As to the questions, whether the claim has actually been fully paid, as alleged in the answer to the petition, or whether it is presumed paid by the lapse of time, as argued by the counsel for the administrator de bonis non of the estate of Thomas B. Rutherford, deceased, I think it unnecessary, after the foregoing conclusion, to advert to them for the purposes of this case. However, they have been made, and I will notice briefly the latter, as it seems wholly unnecessary, under the circumstances, to go into any mathematical calculation for the purpose of determining the former.

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*We find this petition presented in June, 1882, about 33 years after the settlement, in 1849, in the ordinary's office; about 25 years after the petitioner says she received the $180 note from Thomas B. Rutherford, in 1858; about 14 years after the order in Gist and wife, et al., v. Rutherford, Adm'r, et al., in 1868; about 8 years after the report of the referee in Gist and wife, et al., v. Ruth-

erford, Adm'r, et al., was filed in 1874; and about 5 years after that report was confirmed in 1877.

It is now well settled in this state, that the lapse of twenty years is per se conclusive evidence of the payment of a bond conditioned for the payment of money, or for doing any other act, but this can, in my view, make no difference in that respect. Judge Nott in Ordinary of Charleston District v. Steedman, Ex'or, Harper, 289 [18 Am. Dec. 652]. After the expiration of twenty years, the presumption of payment acquires an artificial force, so that it stands in the place of belief, and an admission that the payment has not in fact been made, cannot of itself destroy the effect which considerations of policy have given to a certain period of time whether the payment has or has not been made. Stover and Barnes v. Duren, 3 Strob., 451, [51 Am. Dec. 634], quoted and approved in Willingham v. Chick, 14 S. C., 102. In Riddlehoover v. Kinard, 1 Hill Eq., 378, Chancellor Harper said: "The lapse of twenty years is sufficient to raise a presumption of a grant from the state, of the satisfaction of a bond, mortgage, or judgment, of the grant of a franchise, or the payment of a legacy, or almost anything else that is necessary to quiet title of property." The doctrine upon this subject, laid down in these cases, is strongly approved in the case of Boyce v. Lake, 17 S. C., 481 [43 Am. Rep. 618].

I must decide that the claim is barred, and presumed paid, by the lapse of more than twenty years since the decree in Epting v. Epting and Rutherford, or since the time the petitioner says she received the $180 note from Thomas B. Rutherford. Neither the passage of the order of 1868, nor the execution of the deed in 1870, can be regarded as circumstances to rebut the presumption under the cases cited above. Rutherford had doubtless seen the necessity of taking up the judgment in Hentz v. Epting, in order to preserve the property to this petitioner; and the investment in this judgment was equivalent

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to an investment in the land, as *it was the oldest and only lien against the land. Perhaps he considered the decree of September 23, 1857, sufficient to give the petitioner the possession of the land, and the right to the rents and profits; and if there was any difference between the amount of the legacy, and the amount paid for the judgment, it may have been adjusted by the payment of the $180 note, in 1858, which the petitioner says she received; and, besides this, it was ordered that the costs in Epting v. Epting & Rutherford, should be paid out of the legacy. At any rate, after the lapse of time, if there was any difference, it seems it must be presumed adjusted. The order of 1868 was perhaps considered necessary to have the judgment in Hentz v. Epting cancelled, as it had not been done in the life-time of Thomas B. Rutherford, and the deed of 1870 was simply in obedience to this order.

I recommend that the petition be dismissed with costs.

Mr. Joseph L. Keitt, for appellant.
Mr. George S. Mower, for respondent.

March 23, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. William Rutherford, late of Newberry County, died, in 1845, testate. Dr. Thomas B. Rutherford qualified as executor of the will. The testator bequeathed to the appellant a legacy which, in some proceeding before the ordinary of said county had in 1849, was ascertained to amount at that date to $1,920.38. In May, 1856, the petitioner, then the wife of Henry Epting, filed a bill in equity, praying that her legacy, in the hands of Thomas B. Rutherford, be invested in a tract of land to be settled to her separate use upon certain terms. The interest on the legacy up to that time seems to have been paid. Henry Epting and Dr. Rutherford were made parties to this bill, who answered, consenting to the prayer. An order was accordingly made directing the investment, and referring it to the commissioner to report a suitable tract. The commissioner, in 1857, reported, and recommended a tract of land containing one hundred and twenty acres, belonging to the said Henry Epting for the investment. In

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September, *1857, the court confirmed this report, and ordered the investment at the price of $1,634, and directing Dr. Rutherford to hold the land subject to the terms of the trust, and that the costs be paid out of the legacy. In the meantime Dr. Rutherford had obtained a large judgment on Henry Epting, amounting to $1,290.35, February 9, 1855. No deed was ever executed from Henry Epting to Dr. Rutherford, but Mrs. Epting and her husband were in possession, and have so continued since.

Dr. Rutherford died in 1865, intestate, and in May, 1866, the bill in which this petition is a matter in re was filed by R. V. Gist and wife et al. to partition his real estate; but it being ascertained that this real estate would be necessary to be used in aid of the personalty to pay debts, the bill was converted into a bill to marshal assets, and creditors were called in and enjoined from suing elsewhere. The claim of the petitioner was presented, but before the commissioner reported on claims, Chancellor Lesesne, in 1868, passed an order in this bill, directing that the tract of land aforesaid be vested in the trustee of the petitioner, under the terms and limitations of the trust, and that the judgment which Dr. Rutherford held against Henry Epting be marked satisfied, and the debt and interest represented by said judgment be

credited upon the claim of Harriet Epting against the estate of Dr. Rutherford. In April, 1870, Thomas V. Wicker having been appointed trustee of Mrs. Epting after the death of Dr. Rutherford, a deed of one hundred and twenty acres (the land above referred to) was executed by Henry Epting to the said trustee, Wicker, in consideration of $2,502.07. It appeared in evidence before the commissioner that Dr. Rutherford had paid to Mrs. Epting, in 1858, $180 by note on Wicker, besides several other payments before that date, and that Mrs. Epting had been in the possession of the land since the filing of her bill praying the investment in 1856.

No report was made on the claims of creditors until 1874, when the former commissioner was made special referee and made a report, in which he stated that the decree in the case of Epting v. Epting & Rutherford, had been satisfied, except as to certain items of costs. This report was confirmed in 1877.

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and *there was no further reference to the claim of the petitioner among the debts established or rejected.

Thus matters stood until May, 1882, when the petition below was filed in re, in the same case of Gist and wife v. A. O. Rutherford, which seems to be still pending. The petition asked leave to present the claim of Harriet Epting for her legacy under the will of William Rutherford against the estate of Dr. Rutherford, executor, amounting to $1,920.38, on July 29, 1849, acknowledging a credit of $400, and ignoring the settlement of the land in trust upon her altogether. This petition was referred to C. D. Barksdale, master for Laurens County, with a limitation that it should not be regarded as opening any matter already adjudicated, or as an acknowledgment in any way of the claim of Mrs. Epting, or of the fact that it had not been settled and adjudicated. The master, after full investigation, made a careful and well-considered report, both upon the law and the facts, in January, 1884, in which he found, first, that the claim of the petitioner was res adjudicata; second, that it had been satisfied and was barred by the lapse of time. And he recommended that the petition be dismissed with costs.

The petitioner excepted to this report, upon the following grounds: "1. That the master erred in not finding, as requested, that Thomas B. Rutherford did not invest the legacy of the petitioner in the land of John H. Epting, under the decree in Epting v. Epting & Rutherford. 2. That he erred in not finding, as requested, that the excess of the claim of the separate estate over the consideration of the deed has not been paid. 3. That he erred in his conclusions of law that the petitioner's claim has been heretofore adjudicated and rejected. 4. That he erred in his conclusion of law that the petitioner's claim is barred by the statute of limitations." The case, upon these exceptions, was heard by his honor, Judge Aldrich, who, in a short order, overruled the exceptions and confirmed the report, dismissing the petition as recommended by the master. The petitioner has now appealed to this court upon the exceptions filed to the report of the master, claiming that his honor should have sustained said exceptions.

The objection that this petition could not

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be heard because of *the fact that this party had already had her day in court under the call for creditors, with the report of the commissioner substantially against her claim, confirmed by the court, was not interposed when the motion for reference was made without prejudice. No objection, however, of this kind has since been made, and we must regard the petition, therefore, as properly before the court, and must consider the exceptions upon their merits.

The first two exceptions complain that the master did not find that the legacy of plaintiff had neither been paid nor had been invested in the tract of land mentioned. We do not see how the master could have found either of these facts as requested. It appears that at the time the petitioner filed her bill to have the fund invested—i. e., in May, 1856—the interest had been paid up. The corpus amounted to $1,895. Previous to that time—i. e., in February, 1855—there was a judgment in the office against Henry Epting, amounting to $1,290. This passed into the hands of Dr. Rutherford. It appears, too, that in 1858 Dr. Rutherford paid the petitioner, in a note on Wicker, $180, and he was directed to pay the costs of the bill out of the legacy, amounting to some $190. These amounts with the judgment would be near $1,700. The interest on the legacy up to May, 1856, when the bill was filed, had been paid; since then the petitioner has been enjoying the rents and profits of the land, and therefore no interest could be charged. So that the payments above, with the judgment, are nearly the amount of the legacy, which, according to the finding of the master, was $1,815. Now give the estate credit for the other payments which the report states had been made, though the amounts are not stated, and it might well be supposed that the legacy was understood by the parties to be paid in full, especially as the petitioner did not press before the commissioner for any excess, but submitted to the report, in which no additional amount was allowed her.

It appears clearly enough that this legacy had been substantially invested by Dr. Rutherford in the land. It is true the deed from Henry Epting to the trustee was not executed until after the death of Dr. Rutherford. But the petitioner had gone into the possession of the land previous to his death, in

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pursu*ance of the order directing the investment, and the subsequent order of Chancellor Lesesne merely consummated the previous arrangement.

Had this claim been previously adjudicated? It was certainly before the commissioner, because he reported that the decree directing the investment had been satisfied except the costs. Whether the petitioner made any claim for an excess over the investment does not appear; but she had the opportunity, and according to the authorities cited by the master, she must be concluded—certainly until the report of the special referee is reversed. That report was confirmed in 1877, and then became the judgment of the court. There has been no appeal, and it has settled the rights of the parties for the time being at least. Whether it can be reversed as an interlocutory judgment, at some future stage of the case, is not before us.

We concur in the judgment of the court that the claim is barred by the lapse of time. Dr. Rutherford put the plaintiff into possession of her legacy through the land in 1856, he paid her $180 in 1858, and this is the last connection which he seems to have had with the matter. The petitioner has not claimed from any one any further payment until the filing of this petition in 1882, twenty-four years, and some seventeen years since the death of Dr. Rutherford. We adopt the reasoning of Master Barksdale on this subject and the authorities to which he refers.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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22 S. C. 407

LIPSCOMB v. SEEGERS.

(November Term, 1884.)

[1. *Bonds* ⟸130.]

In action to recover the damages stipulated in a bond, which was given under the requirements of a statute, conditioned that the defendant would safely keep the convicts leased to him from the State Penitentiary, and if they escaped through negligence of any kind, then to pay the state therefor $50 per annum, &c., the burden of proof is upon the plaintiff to show that the escape of the convicts was through the negligence of defendant.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 223; Dec. Dig. ⟸130.]

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[2. *Evidence* ⟸91.]

*Under the terms of the contract the plaintiff's right of action was grounded upon a negative allegation, hence he must prove it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 113; Dec. Dig. ⟸91.]

[3. *Convicts* ⟸10.]

The convicts having been leased under the contract required by the state, the contractor's liability is fixed by such contract, and cannot, therefore, be measured by the relations of the parties, or a supposed public policy.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. §§ 19, 20, 22–29, 32; Dec. Dig. ⟸10.]

[4. *Convicts* ⟸11.]

The act of 1882 declaring the escape of leased convicts to be prima facie evidence of negligence on the part of the lessee, cannot affect this case, as the contract was made and the convicts escaped prior to the passage of that act.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. § 31; Dec. Dig. ⟸11.]

[5. *Convicts* ⟸10.]

The Circuit judge ruled that he would receive evidence to show negligence by defendant during the time the convicts were in his possession, but not at other times. *Held*, that in this there was no error.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. §§ 19, 20, 22–29, 32; Dec. Dig. ⟸10.]

Before Fraser, J., Richland, April, 1884.

The case is sufficiently stated in the opinion of this court.

Messrs. Pope & Haskell, for appellant.

Messrs. Clark & Muller, contra.

March 26, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. This case was once before in this court, and is reported 19 S. C., 426. It will there be seen that the action was brought by the Superintendent of the State Penitentiary against John C. Seegers for a sum of money alleged to be due the state by him for the escape of certain convicts hired to him in the year 1879. The claim originally was for the escape of five convicts by name. The former case disposed of that of Spry, but ordered a new trial as to the claim for the escape of four, Williams, Robinson, Talbert, and Blakely.

There was no question as to the fact of escape while in the service of Seegers—that was admitted in the answer—but whether they had been allowed to escape negligently, and as to the burden of proof upon that point. The plaintiff, Lipscomb, was examined as a witness, and being asked "if he knew anything of the general management of the convicts on the Seegers farm," the defendant objected, and the judge sustained the objection, ruling that he would permit any question going to show negligence between the

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dates of receiving these convicts and *their escapes, but not questions going to show negligence at other times. (Plaintiff excepted.) After other evidence was offered upon the point of negligence, the case was submitted to the jury. The plaintiff made several requests to charge which were refused. Under the charge of the judge the jury found for the defendant, and the plaintiff gave notice of appeal to this court "on account of the rulings of the presiding judge during the trial, and from his refusals to charge as requested at the trial."

The first and second requests to charge were substantially the same: "That this action is upon a contract; that the damage for

its infraction is fixed and liquidated; that the contract of Seegers was that he would safely keep the convicts, and when plaintiff proved the escape the defendant was at once put to his defence to prove that he had safely kept, or that he could show facts that would excuse the escape." The judge refused to charge this request, but did charge as follows: "That while the mere escape is not prima facie evidence of negligence, the jury have the whole case before them. It is for them to say whether there has been an escape; whether this has been for the want of a proper guard, or from negligence of the guard, which was entrusted with them, or whether there was anything else shown in the case which was a want of due care of the convicts, and from which want of due care, if any, their escape was due."

Was this error? The real question is, Upon whom was the onus of proving negligence? In order to have a clear view, let us go back a little and ascertain the precise condition of things. The former case decided that this was an action on a bond, assumed to have been given by the defendant, Seegers, under the act of 1877, corresponding in its terms to the requirements of that act, that is to say, on a bond conditioned "for the safe-keeping of the convicts named, and if they should escape through negligence of any kind, then to pay the state therefor the sum of $50 per annum," &c. Considering the action upon a bond containing such covenants, upon whom was the onus of proving negligence? The plaintiff alleged that the convicts escaped, and that they were allowed to escape through negligence, and the undoubted rule is, that he who affirms must prove, and as a

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consequence the *plaintiff must prove his allegations or fail. In an ordinary action for the non-performance of covenants the plaintiff must assign breaches and prove them.

But it is suggested that this case should constitute an exception to the general rule for several reasons: and first, that it is against one of the fundamental rules of evidence that a party should be required to prove a negative; that as the defendant held the affirmative of the issue as to due care, and the facts upon the subject were peculiarly within his knowledge, he should have been required to prove it after an escape was shown. Whether the allegation was in its nature affirmative or negative depended very largely upon the form in which it was made. If stated in the words of the act "through negligence," it would seem to have been affirmative in form as well as in substance. But if negative in form, that did not dispense with the necessity resting upon the plaintiff to prove it, as it was one of those cases "in which the plaintiff grounds his right of action upon a negative allegation." 1 Greenl. Evid., § 78. See Latimer v. Latimer, ante, 257, where this court has lately discussed the whole subject. If the words "through negligence" had been omitted, and the action had been simply for a breach of the covenant to safely keep the convicts, the rule of evidence as contended would have been otherwise. But as these words were in the bond, it became part of plaintiff's case to prove them. 1 Whart. Evid. (2d edit.), § 362.

But it is urged that the case should be an exception to the general rule, as to the onus of proof, on account of the peculiar relations of the parties; that the superintendent was the custodian, jailer, of the convicts, and in case he were sued, the fact of escape itself would be taken as prima facie evidence of negligence; and that Seegers, under the contract, simply took the place of the superintendent as to the custody and safe-keeping of the convicts, and the same rule should be applied to him when he is sued. This is ingenious, but it does not seem to us sound. There is little doubt that as to convicts the main purpose of the state is their safe-keeping, and anything outside of that is subsidiary. It is true that this is the primary and controlling duty of the superintendent as the officer and agent of the state. And it may also be true that a contractor, in hiring con-

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victs, takes in *some sense the place of the superintendent. But it must not be overlooked that a voluntary contractor may not be an official, with duties and liabilities definitely prescribed; and, therefore, in allowing convicts to be farmed out, the state undertook to fix the liabilities of a contractor by requiring him to give a bond of a certain character; which, as it seems to us, is the law of the case, and must be interpreted, like all other bonds, according to its terms. The state herself thereby fixed the measure of a contractor's liability, and it is now too late to fall back upon the relations of the parties or a supposed public policy.

It seems that the legislature took this view of the matter, and in 1882 thought it necessary and wise to amend the law by declaring that "the fact of escape shall be taken as prima facie evidence of negligence on the part of the contractor," &c. This amendment of the law, however, was not passed until after 1879, when the transactions under consideration took place, and we cannot think that it was merely declaratory of a rule of evidence and applicable retrospectively to this case. When a contract is made, the law then in force becomes part of the contract. The court is not inclined to give laws a retroactive effect. The rule is that statutes are not to be construed retrospectively or so as to have a retroactive effect, unless it shall clearly appear that it was so intended by the Legislature. Ex parte Graham, 13 Rich., 277; Nichols v. Briggs, 18 S. C., 473. Such clear intent is not apparent in the amendment of 1882. We see no error in the rulings of the Circuit judge as to the onus of proof.

The only other alleged error was the exclusion of testimony as to the general man-

agement of the convicts on the Seegers farm. The judge ruled that he "would permit any questions going to show negligence between the dates of receiving the convicts and their escapes, but not questions going to show negligence at other times." Was this error? The precise point in issue was whether the convicts, Williams, Robinson, Talbert, and Blakely, escaped from Seegers' farm "through negligence." All evidence directly on the issue, of course, had to relate to the time between their delivery to and their escape from Seegers, and everything not embraced in that time must be considered as collateral. As a general rule, evidence that is collateral is irrele-

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vant, but not *always. The words are not identical in import. There are cases in which collateral facts are properly admitted as having a bearing upon the direct issue. Mr. Wharton says: "Relevancy is that which conduces to the truth of a pertinent hypothesis, which, if sustained, would logically influence the issue." 1 Whart. Evid. (2d edit.), § 20. Whether the collateral facts proposed to be proved have such bearing upon the issue must to a large extent be decided by the judge who tried the case; and the same learned author gives us some general principles as to when collateral matters should or should not be admitted. He says: "A party's habits in doing business cannot ordinarily be put in evidence to show that he did a certain thing in a particular way. Ordinarily when a party is sued for damages flowing from negligence imputed to him, it is irrelevant, for reasons already given, to prove against him other disconnected though similar negligent acts. Thus in an action against a bailor for the loss of property entrusted to him, evidence of independent acts of negligence not connected with the loss is inadmissible," &c. 1 Whart. Evid. (2d edit.), § 40; Parker v. Portland Publishing Company, 69 Me., 178 (31 Am. Rep., 262). We fully appreciate the difficulty of offering direct evidence of negligence as to the particular convicts who escaped, but that arose, in great part at least, from the nature of the issue imposed by the act, and we cannot say that the judge committed error of law in refusing to receive the testimony as to general management on the Seegers farm.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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22 S. C. 412

DELEON v. BARRETT.

(November Term, 1884.)

[1. *Courts* ⇐65.]

On July 11 the Circuit judge ordered that the daily sessions of the court be dispensed with, but the term not to be closed. The clerk of court thereafter opened and adjourned the court every day (Sundays excepted) until September 4, when the judge returned, held court, heard and determined this cause, and then adjourned the term sine die. The next succeeding term of court in this county, and the next succeeding court to be held by this judge were after this

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sine die adjournment. *Held*, that the case was heard within the term. This case distinguished from Ex parte Lilly, 7 S. C., 373.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 230; Dec. Dig. ⇐65.]

[2. *Executors and Administrators* ⇐315.]

A testator left certain property to his children and directed a division of his estate among them twenty years after his death, certain real estate devised to be accounted for by them at a valuation fixed in the will. By a codicil, the division was directed to be made at the end of ten years. All the property so given was to be held by his children during life, with contingent remainders over. At the expiration of ten years the executors sought the instruction of the court as to the proper distribution of the estate, all parties in interest, including all contingent remaindermen in esse, being defendants. These defendants agreed upon a proper distribution among the life-tenants and delivery of possession to them, which arrangement was approved and directed by the decree of the court, and on the appeal of some of the executors, the Circuit decree was affirmed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298–1314; Dec. Dig. ⇐315.]

[3. *Remainders* ⇐17.]

All the contingent remaindermen in esse being before the court, a decree might be made putting the life-tenants into possession of their shares, to be held by them under the limitations of the will; and such decree would be binding upon contingent remaindermen thereafter born.

[Ed. Note.—Cited in Faber v. Faber, 76 S. C. 161, 56 S. E. 677.

For other cases, see Remainders, Cent. Dig. § 15; Dec. Dig. ⇐17.]

4. The case of LeRoy v. City Council of Charleston, 20 S. C., 71, explained.

[5. *Executors and Administrators* ⇐111.]

The executors appealing in this case should be allowed the expenses of their appeal out of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 453; Dec. Dig. ⇐111.]

Before Hudson, J., Charleston, September, 1884.

The opinion states the case. The Circuit judge wrote at the foot of his decree, embodying the arrangement agreed upon by the parties, the following memorandum:

I have signed the foregoing decree for the following reasons: 1. Because it carries out the wishes of all the adult beneficiaries under the will of Jacob Barrett, who have propounded it to the court as a family settlement agreed upon among themselves after much consideration. It is pronounced by the executors (who have testified in the cause) to be judicious and to the best interest of all concerned. The master, after full hearing and careful examination of the whole subject, has recommended it in a very elaborate and able report. All the attorneys representing the various parties concur in pronouncing it a prudent, wise, and beneficial arrange-

ment, if legal. In these views I fully concur and feel well satisfied, that in the decree no

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interest is jeopardized *or sacrificed, and that the terms of the will are in no way violated. The changes in the valuations by the testator of the real estate specifically devised are very slight, and only such as are necessary to be made in fairly and impartially equalizing these shares, and this equality the testator requested should be made.

2. Because, under the authority of Bofil v. Fisher, 3 Rich. Eq., 1 [55 Am. Dec. 627], and cases therein cited, it is clear that the court has the power to sell the residuary real estate in which contingent remaindermen born, and to be born, have or may have an interest —so as to bar them from ever disturbing the title of the purchasers—and in doing this, and in taking charge of the fund arising therefrom, and administering the same under the terms and limitations of the will, and in accordance with its provisions, there is no right on the part of any of these contingent remaindermen ever thereafter to question this exercise of jurisdiction, save by appeal in due time taken—nor is there the shadow of danger that the executors can ever hereafter be made to suffer for obeying the aforesaid judgment. All apprehensions in this regard are groundless and may at once be laid aside.

3. Because it is entirely unnecessary that I should comply with the request of the counsel of the executors and give interpretation to the entire will. All the issues raised in the pleadings have been adjusted by the beneficiaries, and in such a manner as fully to protect infants and all contingent remaindermen.

Such in brief are my reasons for signing the decree, and are thus partly stated because counsel of the executors preferred that such should be done. All exceptions, therefore, at variance with the terms of the decree, are overruled.

Messrs. Simons & Seigling, for appellants.
Messrs. J. N. Nathans, J. B. Cohen, contra.

March 26, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. The late Jacob Barrett, of Charleston, died in November, 1871, leaving a will and codicil, of which the appellants, and one H. H. DeLeon, were the qualified executors. The testator left, surviv-

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ing him, his widow, Hetty J. Bar*rett, and children, Laura L. Levy, Sarah B. Cohen, Eugenia A. Rice, Pauline Dishon, Jacob Barrett, and Mary Beatrice Larendon. His son Isaac did not survive testator, but died before him unmarried, intestate, and without issue.

After specifically devising certain real estate in this state, and also in the states of New York and Georgia, to each of his children, to be charged against them in the final distribution of his estate at valuations fixed in the will, and directing that the executors should set apart a sum sufficient to pay an annuity of $4,000 to his widow, the principal of which, at her death, was to revert to his estate, and be distributable under the provisions of his will respecting the residue of his estate, and also directing that the further sum of $50,000 be set apart to accumulate to be disposed of by his said wife, by her will, to one or more of his children or grandchildren; the testator disposed of the rest and residue of his estate, both real and personal, to his children for life, and from and after their death to their children; providing that if any child or children should die leaving no child or children surviving him or her, or in case any child or children so left surviving should die before attaining the age of twenty-one or marriage, the property so devised to such child or children should revert to his estate; and providing further, that the child or children of either of his children, who may have died previous to the time of distribution fixed in the will, should stand in the place of such deceased parent.

The testator further directed that his residuary estate should be "kept together until twenty years after his death, and then at that time that the final division should take place, according to the tenor and meaning of his will, among his surviving children," &c., which period was changed to ten years by the codicil, in which the testator also directed as follows: "I do further direct that the portion of my estate left to all of my children, shall be subject to the following trusts, to wit: in trust to them for life, and after their death to such children as they may leave surviving; the child or children of any deceased child to take such share as his or her parent would have taken if alive, and in case there shall be no such child or children, grandchild or grandchildren, then

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*the same to revert to my estate, and become devisable as a part of the residue of my estate," &c.

Soon after the testator's death, Jacob Barrett, Laura L. Levy, and his other children, filed a complaint against the executors, who had qualified, the widow, Hetty J. Barrett, and all the children of testator's children who were then in esse, in which various questions were brought before the court, and after long litigation it was adjudged that Mrs. Laura L. Levy was entitled to two shares under testator's will, and that a certain amount of income should be annually paid by the executors for the maintenance of testator's children and grandchildren. See Levy v. Williams, 4 S. C., 515, [Levy v. Barrett], 7 Id., 25, and [Levy v. Williams], 9 Id., 153.

The ten years after his death fixed by the testator for "the final division of his estate" expired November 13, 1881. At that time

Mrs. Sarah B. Cohen, one of the testator's daughters, had died, leaving surviving her children, Octavus Cohen, Jacob Barrett Cohen, Joseph Cohen, Abram Cohen, W. C. Cohen, and Sarah Bell Cohen. The plaintiffs, on January 9, 1882, commenced this action. But certain events having occurred after it was filed, which it was necessary to bring to the attention of the court, particularly in reference to the lands of the testator lying in the State of New York, the executors filed an amended and supplemental complaint on November 26, 1883, stating the condition of the estate, and praying for instructions from the court: "That said estate should be divided and settled, and the same paid over to such persons as are entitled to the same under the direction and order of the court, and that upon such payment and settlement, the said plaintiffs be discharged from any further accountability as executors of the same." They made defendants, by regular and proper service, all the children and grandchildren of the testator, and also the infant, Barrett Foster Cohen, a grandchild of testator's daughter, Sarah B. Cohen, thus including all the issue of the testator now in existence. The numerous defendants, many of them minors, filed answers making various and embarrassing questions.

An order of reference was made to Master Hanckel, submitting, among other things, a proposed scheme of a settlement and decree at the instance of the parties. The mas-

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ter took testi*mony, heard arguments, and made an elaborate and full report, recommending a scheme for the settlement of the estate, the most striking feature of which was a recommendation that the valuations affixed by the testator in the body of the will, at the end of twenty years from the time of his death (which were excessive and arbitrary), should be equalized at the end of ten years, the time for distribution as changed by the codicil. To this report exceptions were filed, but after argument, the report was substantially affirmed and made the judgment of the court on September 5, 1884.

From this decree, the executors, George W. Williams and Charles T. Lowndes (the other qualified executor, H. H. DeLeon, not concurring), appeal to this court upon the following grounds:

I. "That the will of testator, Jacob Barrett is changed thereby (the decree), contrary to his express intention, and new provisions substituted in place of his will and direction.

II. "That in consequence of the changes made thereby in the valuations of the property specifically devised in the will of testator at valuations fixed by his will, the amounts and values of the respective shares in the personal property in the hands of the plaintiffs are correspondingly changed. That while the parties defendant may be bound by a decree of the court, changing the valuations placed by testator on the various pieces of real estate specifically devised by his will, and the corresponding changes in the shares of the personalty consequent thereon, the parties who may be entitled to the respective shares, on the falling in of the respective life estates, cannot now be ascertained, and who they will be, and whether now in existence depends upon the contingency of the state of the respective families of the children of testator parties to this action at the time of their respective deaths, the eventuation of which contingency cannot now be foreseen. By reason of which these plaintiffs would not be protected by the decree in any payments they might make thereunder.

III. "That there is no power in the court to bind the interest and rights of contingent remaindermen not parties to the action, and that whilst the court would have the power to order property sold or converted for change of investment, so as to 'alienate the

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*contingent titles of unborn remaindermen, who, from the nature of things, cannot be made parties or be represented in the proceedings before the court,' there is no power in the court, under such circumstances, virtually to abrogate the provisions of the will by way of family settlement or otherwise, so as to bind unborn contingent remaindermen, and to direct the plaintiffs with safety to pay over the personal estate in their hands.

IV. "That the will of testator should be construed by the court and the rights of the parties and the duties of the plaintiffs ascertained by the decree of the court, in response to the prayer for judgment and complaint in the action.

V. "That the decree should not have directed the respective shares of testator's estate paid over to his children, defendants to this action, the codicil of testator's will specifically directing that they should be subject to the trusts therein prescribed.

VI. "That the decree proposes to adopt the recommendation of the master, and is made thereon, which recommendation is based on agreement of parties by their counsel; whereas plaintiffs claim that the matters involved in this action should be adjudicated by the court without reference to any such agreement to which plaintiffs are and were no parties, especially as parties under age are interested, and it is now impossible to foresee who will be eventually entitled to the respective shares on the falling in of the life estates.

VII. "Because no construction of the will of the testator is made by the decree, but only a scheme of family settlement is adopted; whereas it is submitted that the will of the testator should be construed and the rights of the parties and duties of the plaintiffs ascertained by the decree of the court, &c.

VIII. "Because the decree makes no provision for the payment of the costs and expenses of proceedings on appeal from the

said decree in case the plaintiffs should deem it their duty as executors to appeal.

IX. "Because the said decree should have held that the defendant, Barrett, Foster Cohen, has a contingent interest in the estate of the testator, Jacob Barrett, dependent on the state of affairs at the falling in of the respective life estates.

X. "The plaintiffs further except to the

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said decree because *the court had no power to hear the same for the reason: The Court of Common Pleas was regularly begun to be holden on June 25, 1884, as appears by the journal thereof. On Thursday, July 11, 1884, at the end of the proceedings for that day appears the following entry in the journal: 'By the court: Ordered, that all cases ready for trial having been disposed of, the daily sessions of the court will be dispensed with, the term of the court not being closed. Further ordered, that judgments upon all issues determined by the jury, or by the court, without the intervention of a jury, at this term, may be entered on or after the 16th July inst. (Signed) July 11, 1884, J. H. Hudson, presiding judge.' That the judge thereupon left the Circuit, and, as appears by the journal, the court was opened at 10 o'clock a. m. every day (Sundays excepted), and at 3 p. m. was adjourned to the next day (Sundays excepted), until Thursday, September 4, 1884, when the presiding judge, Hon. J. H. Hudson, returned. And the journal on that day shows that the court was opened at 10 o'clock a. m., his honor, Judge Hudson, presiding. On that day the hearing of this action was commenced, the plaintiffs not consenting to said hearing. That the court was thereupon adjourned until the next day, September 5, 1884, when the hearing was resumed, and the decree now appealed from was made. Whereupon the court was adjourned sine die. That by the terms of the said order of July 11, 1884, the court was in effect adjourned sine die." &c.

The last exception makes the point that the Circuit decree should be set aside, for the reason that it was not rendered in term time; that it was coram non judice. The term for Charleston County began on the fourth Monday of June (18 Stat., 167), and being without limit as to time, unless ended by a regular adjournment sine die, might continue until the next term of the court for the county, which did not begin until the first Monday of October; or it may be that the assignment of the presiding judge to duty elsewhere would necessarily end the term. It appears that the presiding judge (Hudson) was assigned to hold the fall term of the Second Circuit, which began at Beaufort on the second Monday of September

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(8th). 18 Stat., 462. This *cause was heard and decided in Charleston on September 5, and therefore within the term, unless that had been terminated.

The record shows that the Circuit judge certainly did not intend to end the term until September 5, when he regularly adjourned it sine die. It is true that on July 11, having disposed of all cases then ready for trial, and there being no necessity for him to sit in court every day, he filed an order dispensing with the daily sessions, but expressly declaring that the term of the court was not closed. The court was opened at 10 o'clock a. m. and closed at 3 p. m. every day (Sundays excepted) until Thursday, September 4, when the judge took his seat and heard this cause, rendering the decree appealed from on September 5, and then regularly adjourned the court sine die. It is urged, however, that the order of July had the effect of ending the term, even contrary to the intention of the judge. We cannot doubt that the Circuit judge, proprio vigore, may control his own sessions during the term, and we do not think that the order of July was beyond the power of the judge or had effect to terminate the term. We do not consider this case like that of Ex parte Lilly, 7 S. C., 373. In that case the court adjourned for the term and directed the clerk to enter in the journal that the court adjourned from day to day, but without any date being fixed for its reassembling.

All the other exceptions relate to the rights of contingent remaindermen not now before the court, and the duties and liabilities of the executors in that regard. There seems general accord in the view that the Circuit decree is a proper and just settlement of the many and perplexing questions arising under the will. No one seems to doubt that it is the best possible solution of the case that can be made, and the only question is whether it can be enforced. The Circuit decree is certainly binding upon all the parties who were before the court and did not appeal. All the living descendants of the testator were before the court and are bound. No one appeals but two of the executors, and their appeal, although stated in various forms, really goes no further than to question the power of the court to make a decree which will bind unborn contingent remaindermen so as to be a perfect protection to them as executors.

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*If there is anything perfectly plain in the will of the testator, Jacob Barrett, it is that, after making certain specific devises to his children, and providing for the comfortable support of his widow, he desired that the residuum of his estate should be kept together in order to accumulate for a certain period after his death, and then there should be made "a final division" among his children. In this division the children were to be equalized, and in order to facilitate that he placed upon the specific devises before giv-

en particular valuations. The time fixed by the testator himself has arrived, and why should not "the final division" be now made? If from any cause it is not made, that which was manifestly the leading purpose of the testator will be defeated. Besides there are many good reasons why it should not be postponed. It is the policy of the law that estates should be settled, partitioned, and go into the hands of those entitled to them as speedily as possible, consistent with the rights of parties. We have not been able to discover anything in this will, either as to the character of the limitations or in any other respect, which should necessarily stand in the way of the "final division" directed, and the delivery of their respective shares to the children to be held under the terms of the will to them for life and then to their children.

Neither do we see any wrong or injustice in correcting the arbitrary valuations attached to the specific devises. These valuations, admitted to be erroneous and excessive, were fixed in the will proper in the view then entertained, that the time for final division would be twenty years after testator's death; but afterwards the codicil fixed the time at ten years, reducing the period of possession one-half. Construing the will and codicil together we can hardly suppose that the testator intended to make the change as to time and yet to retain unchanged the old valuations. At all events it was a proper case for a judicious "family settlement" which, where "fairly and reasonably made to prevent family disputes and family forfeitures, are upheld with a strong hand; and are binding when in cases between mere strangers the like agreements would not be enforced." 1 Story Eq., § 132, and authorities.

But it is insisted by the executors that

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from the terms of the *limitations in the will contingent remaindermen may be hereafter born, who, not being now before the court, will not be bound by the decree and may at any future time come back upon them as executors. It is undoubtedly true that as a rule a decree or judgment binds none but the parties before the court and their privies, but there are circumstances in which, from the necessity of the case, Courts of Equity act upon the property itself, and in doing so adjudicate questions which in effect must be binding upon those who are not in esse, but may come into existence. "That the Court of Equity has the power to sell the estates, whether vested or contingent, of infant remaindermen who are parties before the court is unquestionable. The court also has the power to bar, by its decree for sale of the property, the interests of unborn contingent remaindermen, and of contingent remaindermen residing abroad whose names and places of residence are unknown and who of course cannot be made parties before the court." Bofil v. Fisher, 3 Rich. Eq. 1 [55 Am. Dec. 627]; Bouknight v. Brown, 16 S. C., 170; Knotts v. Stearns, 91 U. S. 641 [23 L. Ed. 252]; Story Eq. Pl., § 120. See the opinion of Chancellor Dunkin in Van Lew v. Parr, 2 Rich. Eq., 321, and the authorities there cited, especially the case of Giffard v. Hort, 1 Sch. & L., 408.

It will be observed that this case is not as strong as that of Bofil v. Fisher, supra. In that case the application was to sell the property, conveying the fee to the purchaser for the benefit of the first taker. But in this case it is not proposed to sell the property, but only to divide it among the children of the testator and according to the positive directions of his will. This division does not propose "to sell or alienate the contingent titles of unborn remaindermen," but to turn over to each child his or her proper share to be held during his or her life subject to the provisions of the will. It neither sells nor destroys any interest, but simply gives to the parent the share intended by the testator with proper responsibility over to the children as remaindermen. The testator must be supposed to have known the limitations he was creating, and when he directed a final division to be made at a particular time he could not have intended that the possible contingent interest of grandchildren should pre-

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vent that division *among his children; that the interests of the living children should be subordinated to that of unborn grandchildren.

It would indeed be remarkable if the anxious desire of this testator to keep the property in his family to the second generation, should result in preventing its enjoyment in severalty by the first generation, who were manifestly the primary objects of his bounty, to whom it was expressly given with the requirement that it should be finally divided among them at a time indicated. An estate ordered to be divided cannot be kept undivided for an indefinite period only for the reason that, by possibility, contingent interests in parts of it may in the remote future come into existence. As Chancellor Dargan said, in Bofil v. Fisher: "To say that the court could not, under circumstances like these, convey away the fee [not proposed here], would be to assert a doctrine that would render conditional limitations and contingent remainders an intolerable evil to a growing and prosperous community. Thus to shackle estates without the power of relief, unless every person having a contingent and possible interest could be brought before the court, as a party complainant or defendant, according to the several forms and ordinary practices of the court, would be to sacrifice the rights and interests of the present generation to those of posterity and of citizens to aliens."

We do not think that the views here stated

are in conflict with the case of Le Roy v. The City Council, 20 S. C., 71. In that case the contingent remaindermen were in esse and could have been made parties, and the chief justice in delivering the judgment of the court, remarked that the grandchildren should have been made parties. That was obviously correct, according to the familiar equity rule, that all parties in interest should be before the court. But it will be seen that the judgment did not go upon that alone but also on the other ground, that the heirs at law of Dupont, the trustee, should have been made a party. The opinion states the ground: "We think that the grandchildren in this case, at least those whose names and residences are known, should have been made parties. We think, too, that the proceeding was defective in the fact that the heir at law of the trustee was not summoned. The fee of this land was in him during his life and at his death it descended to his heir

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at law. Without their *presence or the presence of a substituted trustee in whom the fee could vest it is not in court, nor has it any representative here. Nor can it, under the circumstances, be conveyed to the purchaser. The title proposed to the appellant is thus defective, wanting a material link."

We have not thought it necessary to advert to the fact, that this very estate has already been twice before this court, and that important questions, involving the rights of all the parties, were adjudicated. It was decided first that the income should be used and apportioned among the children and their families, and not be left to accumulate as directed by the will. And it was also decided that, according to a proper construction of the will, Mrs. Levy took two shares. Levy v. Barrett, supra. These questions were pressing and had to be decided, notwithstanding the unborn remaindermen were not parties. And thus it is necessary that "the final division" should be made, although these same parties in posse are not in esse.

In reference to the expenditures of executors, when they have some personal interest in judicial proceedings instituted in their representative character, the doctrine is "perplexing," as stated by Chancellor Wardlaw in the case of McClellen v. Hetherington, 10 Rich. Eq., 204 [73 Am. Dec. 89]. In that case the rule is stated, "that the representative should be reimbursed from the estate for the expenses he has incurred in litigation, fairly falling upon him in his character of trustee, although he may have some interest in the subject. He should have credit for all expenditures for the preservation and benefit of the estate, as for fees to counsel, for general advice in the administration of the estate, * * * for obtaining the instruction of the court in a proper case for settlement of the estate and for like services." This proceeding was for the instruction of the court, and was certainly "in a proper case." The objects of the executors were probably of a mixed character, to do their whole duty as executors, and at the same time to put their own security beyond doubt. They, as representatives of all parties, had a right to do so, and whilst they might possibly have rested securely upon the Circuit decree, it was not unreasonable that they should desire the judgment of the Supreme Court upon the subject. We cannot

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take this case *out of the operation of the general rule. The executors appealing should be reimbursed the expenses of the appeal.

Subject to this modification, the judgment of this court is that the judgment of the Circuit Court be affirmed.

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22 S. C. 425

FELLERS v. DAVIS.

(November Term, 1884.)

[*Evidence* ⊂⊃580.]

In action against the sureties on an administration bond after decree by the Court of Probate against the administrator, testimony of a witness (since deceased) taken in the Court of Probate on the accounting there had cannot be given in evidence against the sureties in this action, they not having been parties to such accounting.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2413; Dec. Dig. ⊂⊃580.]

Before Fraser, J., Newberry, February, 1884.

The opinion sufficiently states the case.

Messrs. Pope & Packer, for appellants.

Messrs. Suber & Caldwell, Geo. S. Mower, contra.

March 28, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. Raiford C. Swindler died intestate in 1871, and letters of administration upon his estate were granted to his son, John R. Swindler, who, together with Smith L. Davis and Micajah D. Suber, as his sureties, executed to the probate judge of Newberry the usual administration bond. Soon after, in August, 1871, Smith L. Davis died leaving a will, of which his widow, Keziah W. Davis, is the qualified executrix. On June 6, 1883, this action was brought in the name of the probate judge on the administration bond against the sureties, Micajah D .Suber and Keziah W. Davis, as executrix of her deceased husband. The estate of the intestate, R. C. Swindler, proved to be insolvent, and the action was brought at the instance of creditors to recover from the sureties the sum of $886.25, and interest thereon from December 5, 1871, which, as alleged, John R. Swindler, the administrator, had wasted of the estate of

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his *intestate. Suber is understood to be insolvent and did not answer, but Mrs. Davis, as executrix of the other surety, answered, denying that the administrator had committed any devastavit, and, insisting that she had never been made a party to any proceedings for an account against the administrator, who was not a party to this cause, denied all liability to account in the premises.

The following facts, stated in general terms, were made to appear: On November 3, 1871, Micajah D. Suber, and wife, filed in the Probate Court a petition against John R. Swindler, and the other heirs at law of Raiford C. Swindler, for partition of his lands. On the same day (November 3), John R. Swindler answered, and in his answer set up that he was administrator, that there were debts unpaid, and had the creditors called in, turning the petition for partition into a proceeding to marshal assets, sell the lands, &c. A few days after this proceeding, viz., on November 13, 1871, the administrator petitioned the probate judge to sell the balance of the personalty (there had been a sale before). The probate judge made the order, but he directed the sale made by the then sheriff, one Thomas M. Paysinger; who made the sale aggregating $886.25, taking four notes payable to himself as sheriff, amounting to $797.65, on which John R. Swindler was either principal or surety, and the remainder he collected in cash. These assets were never turned over, either to the administrator or to the judge of probate, to be administered in that court in the proceeding then pending to marshal the assets. Paysinger soon after absconded. The lands were sold, and the proceeds of sale apportioned among the creditors in the probate proceedings, leaving still a large amount due.

Matters seemed to have stood in this condition for ten years, until 1881, when the proceedings were revived, and an effort made to charge the administrator, John R. Swindler, with the money lost by the Paysinger sale. It does not clearly appear under what proceeding this was done, but supposed to be the proceedings in the Probate Court, in which the said Swindler, although a defendant, had the creditors called in and the proceeds of the land sold distributed among the creditors, who are still not fully paid. But it is quite clear that the sureties on the administration bond were not before the Pro-

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bate Court in that *proceeding, or any other when the account of the administrator was stated. The probate judge held that the administrator Swindler was not chargeable, in his official capacity, with the loss by the Paysinger sale; but, on appeal, Judge Pressley reversed that ruling, and, as directed, the probate judge then held that Swindler, the administrator, was officially liable for the loss in the Paysinger sale.

Based on this last decree of the probate judge, this action was brought on the administration bond, to make the sureties liable for the Paysinger loss, on the ground that it was occasioned by a breach of the official duty of John R. Swindler as administrator. It seems that no effort was made, under the probate judgment, against the administrator, to make the money out of him, and he is not made a party in this action against the sureties. By consent of parties, the cause was heard by Judge Fraser without a jury. During the trial the plaintiff proposed to read, in evidence, what purported to be taken down in writing, as the testimony of Thomas M. Paysinger, at the accounting of the administrator (J. R. Swindler) in the Probate Court. This was objected to, but the presiding judge allowed the contents of the paper to be read as evidence. He held, among other things, that the decree in the Probate Court, against the administrator, was only prima facie evidence in an action against the sureties; but he decided that the evidence before him was sufficient to establish the claim against them. He ruled that the sureties had a right to have the accounts re-adjusted, if they could be benefited thereby, but he thought it would not be to their advantage to re-open the accounts, and pronounced judgment for the plaintiff to the extent of the Paysinger sale and interest, amounting to $1,652.57.

From this judgment the defendant, Keziah W. Davis, as executrix, appeals upon numerous grounds, which may be condensed into the following: I. That it was error to charge the sureties on the administration bond with the loss of the Paysinger sale. II. That it was error to find, as a fact, that the administrator did not take steps to force the sheriff to transfer the notes and money, in view of the uncontradicted testimony that very soon after the sale Paysinger absconded, and that at that time the unsettled condition of the country practically closed the

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courts. III. That it was *error to hold that the accounting of the administrator before the Probate Court, was binding on the sureties, who were not parties. IV. That it was error to admit the testimony of Thomas M. Paysinger, given before the Probate Court in the proceeding against the administrator for account.

From the view the court takes it will not be necessary to consider any of the grounds, except the last, and as the case has to go back, it will perhaps be better not to discuss them now. In admitting as evidence what Paysinger was taken down as swearing in the proceeding before the probate judge, the ground upon which it was admitted is not stated; but as it was said at the bar that Paysinger is dead, we suppose that must have been the ground. Assuming that it was, and that the fact was regularly proved

as a foundation for allowing the evidence, we do not think it was properly admissible. This case, and that before the Probate Court, cannot be regarded as "between the same parties." The sureties were not parties to that proceeding, and the administrator, who must be taken to have been a party there, is not before this court. In stating the different classes of exceptions to the rule rejecting "hearsay" evidence, Mr. Greenleaf says: "May be included the testimony of deceased witnesses, given in a former action between the same parties." 1 Green. Evid., § 163. Lord Mansfield in Mayor of Doncaster v. Day, 3 Taunt., 262, stated the rule thus: "What a witness, since dead, has sworn upon a trial between the same parties, may be given in evidence either from the judge's notes, or from notes that have been taken by any other person, who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given." See Bishop v. Tucker, 4 Rich., 178; Drayton ads. Wells, 1 Nott & McC., 409 [9 Am. Dec. 718]; State v. Campbell, 1 Rich., 124; Yancey v. Stone, 9 Rich. Eq., 429; Parker v. Leggett, 13 Rich., 171.

But it is urged that, although the parties personally are not the same, the subject matter is the same; that the judgment of the Probate Court against the administrator is prima facie evidence against the sureties, and therefore they must be privies. It is true that the liability of the sureties arises under the same bond as that which binds

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the administrator, and they all might, *and indeed ought to be, sued together (Taylor v. Taylor, 2 Rich. Eq., 128); but it does not seem to us that they are privies in the sense of the rule which makes evidence against one necessarily evidence against the other. The rule admitting the evidence is exceptional, and proceeds upon the view that the parties have had an opportunity to cross-examine the witness, but here the sureties never had such opportunity, and the fact that the administrator had such opportunity should not bind them. We can understand how one administrator might be a privy in estate with another administrator of the same estate, as one succeeds the other as to the same subject matter (Boudereau v. Montgomery, 4 Wash. C. C., 186 [Fed. Cas. No. 1,694]), but we cannot see that the same relation exists between an administrator and his sureties. "In an action on an administration bond against the sureties a decree in the Court of Equity, against the principal is only prima facie evidence, and the surety may impugn the decree." Norton, Ordinary, v. Wallace (in Court of Errors), 1 Rich., 507; Crane, Boylston & Co. v. Moses, 13 S. C., 580. In the case of Norton, Judge Butler said: "The question here suggests itself, upon what principle is it, that the surety has a right to look into the decree at all? Why, upon no other than this, that he was not privy to the former judgment, and as a stranger claims the right to be heard for the purpose of ascertaining his just and legal rights." It is true that afterwards Judge O'Neall said, in the same case (2 Rich., 461), that the remark as to not being privy to the judgment, "must be understood in a qualified sense." But accepting the qualification, we think the fact that the surety may "surcharge and falsify the account," excludes the idea of such identity of interest as to make evidence against one necessarily evidence against the other.

It is said that no importance should be given to the admission of the evidence even if it was error, as the judgment was not rested on it. Of course, we cannot know what influence it had upon the court, but there is one view in which the testimony was important.

The judgment of this court is, that the judgment of the Circuit Court be set aside without prejudice and the cause remanded for a new trial according to the conclusions herein announced.

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22 S. C. *430

*DONNAN v. WATTS.

(November Term, 1884.)

[*Principal and Surety* ⇨102.]

When a debtor to an estate by note for purchases of personalty at the estate sale afterwards becomes administratrix de bonis non, her debt is paid to herself as administratrix, and the sureties on her administration bond cannot call upon the sureties on her note to pay the debt.

[Ed. Note.—Cited in Chick v. Farr, 31 S. C. 475, 10 S. E. 176, 390.

For other cases, see Principal and Surety, Cent. Dig. § 181½; Dec. Dig. ⇨102.]

Before Fraser, J., Laurens, February, 1884.

On the hearing of this appeal Judge Witherspoon, of the Sixth Judicial Circuit, sat in the place of the chief justice, who had been of counsel in the cause.

The opinion states the case. The order of the Circuit judge was as follows: "It seems to me that the sureties on the bond of the administrator de bonis non, and who was the debtor, are the very persons who have put the sureties on the note in a position of very great hardship if they have not been relieved of this liability. It is their fault that Sophia M. Langston is both payor and payee in this case. The case of Jacobs v. Woodside (6 S. C., 490), seems to be conclusive. In that case the action was brought by a succeeding administrator, who might claim an option as representing creditors as to which party he would pursue. The primary liability is certainly on the sureties to the bond as administratrix de bonis non, and these sureties have no rights against the sureties on the note. It is therefor ordered

and adjudged, that the demurrer be sustained and the complaint dismissed with costs."

Mr. James Farrow, for appellant.
Messrs. Holmes & Simpson, contra.

March 31, 1885. The opinion of the court was delivered by

Mr. Justice WITHERSPOON. John M. Langston died intestate in 1862, and D. M. H. Langston was duly appointed administrator of his estate. The administrator, on December 10, 1862, sold the personal property of his intestate. At this sale the defendant, Sophia M. Langston, the widow of
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the intestate, pur*chased a considerable amount of the property, for which she gave the administrator her sealed note, payable at twelve months, with J. F. Dorroh and Samuel J. Craig as sureties. In 1863 the administrator, D. M. H. Langston, died before he had fully administered the estate of John Langston. After the death of D. M. H. Langston, the defendant, Sophia M. Langston, the widow of John Langston, was duly appointed administratrix de bonis non of the estate of John Langston, August 31, 1863, and as such administratrix received her own note as part of the unadministered assets of the estate of John Langston. On November 16, 1879, upon the final settlement of the estate of John Langston by Sophia M. Langston, administratrix, in the Probate Court for Laurens County, a decree was rendered by said Probate Court in favor of creditors against said administratrix for $1,991.64, the administratrix having been charged with her own note as cash in hand.

This action was instituted by plaintiff, one of the sureties upon the bond of Sophia M. Langston, administratrix de bonis non, against the said Sophia M. Langston, and the sureties on her note against the co-surety on the administration bond and creditors, to compel the sureties on the note to pay the amount of the note to the creditors of John Langston. Upon the call of the case and the reading of the complaint, all of the defendants interposed a general oral demurrer, upon the ground that the complaint does not state facts sufficient to constitute a cause of action. His honor, Judge Fraser, sustained the demurrer and dismissed the complaint with costs. The plaintiff appeals upon the ground "that the facts in this case warrant an exception to the general rule which charges executors and administrators with their own notes as cash."

Sophia M. Langston's relation to the debt was changed when she became administratrix. She thereby became both payer and payee of the note. The remedy for the collection of the note was completely suspended by Sophia M. Langston becoming administratrix, and by operation of law the administratrix is regarded as holding the amount of the note as cash in hands the same as the other effects of the intestate, subject to a due course of administration. See Schnell v.
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Schroder, Bail. Eq., 335; *Griffin v. Bonham, 9 Rich. Eq., 71; Jacobs v. Woodside, 6 S. C., 490. The facts in the case of Jacobs v. Woodside are similar to the case under consideration. We see nothing in the facts of this case that should make it an exception to the well-settled principle of law which charges an administrator with his own note as cash in hand to be accounted for in the due course of administration.

It is the judgment of this court that the judgment of the Circuit Court be affirmed, and that the complaint herein be dismissed with costs.

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22 S. C. 432

ARTHUR v. ALLEN.

(November Term, 1884.)

[1. *Process* ⊂⊃163.]

While a summons cannot be amended without leave of the court, an order that a person "be made a party defendant herein," implies that the summons is to be amended and then served on such person.

[Ed. Note.—Cited in Lyles v. Haskell, 35 S. C. 403, 14 S. E. 829.

For other cases, see Process, Cent. Dig. §§ 224–238; Dec. Dig. ⊂⊃163.]

[2. *Parties* ⊂⊃54.]

When a summons is amended by making a new party the better practice is that the amendment should be inserted in the original summons, but where an additional summons incorporating the amendment is issued, there is substantially an amendment of the original summons.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 85; Dec. Dig. ⊂⊃54.]

[3. *Equity* ⊂⊃298.]

Where it becomes necessary since the adoption of the code of procedure to revive, or amend by supplemental pleading, a bill instituted in the Court of Equity prior to 1870, it should be done under the forms of the code. Such a bill in this case was properly revived and amended by supplemental complaint and summons.

[Ed. Note.—Cited in Sparks v. Green, 69 S. C. 229, 48 S. E. 61; Sims v. Davis, 70 S. C. 374, 49 S. E. 872.

For other cases, see Equity, Cent. Dig. § 589; Dec. Dig. ⊂⊃298.]

[4. *Equity* ⊂⊃297.]

Where there is an order granting leave to file supplemental complaint, doubted whether an order to revive was necessary; but, if necessary, it may be granted at the hearing.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 588; Dec. Dig. ⊂⊃297.]

5. The case of Suber v. Allen, 13 S. C., 317, does not decide that this present action was then no longer pending.

Before Fraser, J., Richland, July, 1883.

The Circuit decree in this case was as follows:

This case came before me at the term for July, 1883, on a motion on notice on behalf of James C. F. Sims, Nancy Allen, James Kitch-

ens, and Adelaide Kitchens to set aside the service of certain papers served on them en-

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titled "amendment to supple*mental summons, and complaint making J. C. F. Sims a party defendant." These papers were served on J. C. F. Sims personally, and on Messrs. Pope & Haskell as attorneys of Nancy Allen, James Kitchens, and Adelaide Kitchens. I do not understand that any objection is made on account of this service having been made on the attorneys instead of having been made on these persons personally.

A brief statement is necessary to show how the questions arise which are now presented for the consideration of the court. In May, 1861, John M. Allen died intestate, and in June, 1861, Addison R. Phillips was duly appointed administrator of his estate. On October 5, 1867, Addison R. Phillips, as administrator, filed a bill in the Court of Equity for Richland District (now County) against Nancy Allen, Rebecca Cornwell, and Adelaide Kitchens, heirs and distributees of John M. Allen, James Kitchens, husband of the said Adelaide, and William D. Cornwell, husband of the said Rebecca, and John Caldwell, John Coate, Charles A. Bedell, and Jesse Baxter, creditors of John M. Allen, for an injunction, an accounting by the administrator, sale of the real estate, and marshaling of the assets of the estate of John M. Allen. All the parties named as defendants answered the bill, creditors were called in to establish their claims, and the commissioner in equity was ordered to take the testimony and state the accounts of the administrator, Phillips. On June 9, 1868, some testimony was taken by the commissioner as to the condition of the estate and as to the claims of certain creditors.

After this, but it does not appear when, Addison R. Phillips, the administrator, died, and on August 1, 1878, Daniel B. Miller, who was then clerk of the Court of Common Pleas for Richland County, as was his duty, applied for administration, and was duly appointed administrator de bonis non of the estate of Addison R. Phillips. It is not alleged that any proceedings were taken by Daniel B. Miller, under the said bill in equity. The term of office of Daniel B. Miller as clerk of the Court of Common Pleas has expired, and he has been succeeded in office by E. R. Arthur, who, it is alleged, has also succeeded him as administrator de bonis non of John M. Allen, and as administrator of Addison R. Phillips. John Caldwell has died, leaving

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a will, of which *Thomas J. Robertson has qualified as executor. Charles A. Bedell has died, and E. W. Bancroft has administered on his estate. John Coate has died, and Christian H. Suber has administered on his estate. William D. Cornwell is not now named as a party defendant, perhaps because he has died, and all interest he may have had in the estate has survived to his wife Rebecca, who is a party.

In June, 1882, E. R. Arthur, as clerk of the court, and administrator de bonis non of John M. Allen, without having obtained any order of court for this purpose, filed and served a summons, and with it a supplemental complaint on the said Nancy Allen, Rebecca Cornwell, James Kitchens, and Adelaide, his wife, Jesse Baxter, and the personal representatives of John Caldwell, John Coate, and Charles A. Bedell. In this supplemental complaint, the original bill in equity, and the proceedings under it, were substantially set out, and the facts which rendered a supplemental complaint necessary were stated, and the plaintiff, E. R. Arthur, joined in the prayer of said bill, and demanded such further relief as may be proper. To this complaint answers were filed by the personal representatives of John Caldwell and John Coate, deceased, creditors, and perhaps on behalf of other creditors which have not been brought to my attention. Nancy Allen, James Kitchens, and Adelaide Kitchens demurred to this supplemental complaint. The demurrer was overruled by Judge Hudson, April 24, 1883, and these defendants allowed thirty days to answer.

On April 27, 1883, an order was made by Judge Hudson, allowing the plaintiff to amend the said supplemental complaint. The order provides "that James C. F. Sims be made a party defendant. That the plaintiff have leave, within twenty days from the rising of the court, to amend his complaint by alleging therein that after the commencement of the original action herein, to wit, on or about the month of September, 1883, the said J. C. F. Sims took possession of the lot of land in the city of Columbia described in the complaint," with such other allegations as might be necessary to charge said J. C. F. Sims with the rents and profits of said lot. On May 15, 1883, in pursuance, I suppose, of the order of April 27, 1883, Nancy Allen, James

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*Kitchens, and Adelaide Kitchens filed their answer to said supplemental complaint. On May 17, 1883, and before the amended complaint, provided for by the order of April 27, 1883, was filed or served, another order was made by Judge Kershaw amending the order of April 27, made by Judge Hudson, so as to allow the plaintiff to make additional allegations in reference to the lot of land alleged to be in the possession of J. C. F. Sims. This order seems to have been made at chambers on notice to all the parties interested to oppose it.

Under this state of things, and claiming to proceed under the authority of the said orders of April 27 and May 17, 1883, plaintiff has filed and served on Nancy Allen, James Kitchens, and Adelaide Kitchens, and on the other parties defendant in the supplemental complaint, and on the said James C. F. Sims,

a summons and complaint. On the back of the summons, after the title of the cause, is endorsed "summons for relief and amendment to supplemental summons and complaint, making J. C. F. Sims a party defendant." The title of the cause in the summons and complaint, is the same as in the supplemental summons and complaint, except that the name of James C. F. Sims is added as a party defendant. The summons is otherwise in the usual form. The complaint sets out substantially the matters alleged in the supplemental complaint, with the addition of such allegations as are allowed to be made by the orders of April 27 and May 17, 1883.

The object of the motion now before me is to set aside the service of these papers, this summons and this complaint in the words of the notice, to set aside the service of certain papers herein, styled "amendment to supplemental summons and complaint, making J. C. F. Sims a party defendant." These words seem to be a memorandum of the contents of the summons and complaint, which have each their own endorsement as above stated, and I take it the motion is to set aside the service of both. The motion is made by J. C. F. Sims and by Nancy Allen, James Kitchens, and Adelaide Kitchens, who have appeared for the purposes of this motion only.

The motion is based on the following grounds: 1. That said summons is without authority of law and void. 2. That said

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*complaint is without authority of law and void. 3. That there has been no order allowing the plaintiff to file the "amended supplemental complaint," or to file the original supplemental complaint. 4. That there has been no order allowing the original action (the bill in equity) to be continued against these defendants. 5. That there is no such cause of action pending.

The first two grounds are very general, and depend on the other three, which can best be considered together. There are two sections of the code which apply to supplemental complaints—§ 142, § 198, of the code of 1882. Section 142 provides for those cases in which, under the old practice, a bill of revivor was necessary. Section 198 provides for those cases in which, under the old practice, a supplemental bill was necessary in order to bring in new matter occurring after the commencement of the litigation between the parties. No order of the court is now necessary for leave to file supplemental complaint under section 142, or even is it proper, it being a matter of right. 2 Wait. Pr., 469, ¶ 2 "a"—Vorh. Code, 188, ¶ 121, note "f." An order of the court, however, is necessary for leave to file supplemental complaint under section 198, to be obtained on motion, on notice, or under order to show cause. Vorh. Code, 357, ¶ 177, note "a."

The supplemental complaint, therefore, of June, 1882, was properly filed, without an order for leave to do so, but leave was necessary, and has been obtained, to bring in the supplemental matter, as to which J. C. F. Sims has been made a party under section 198. The provision in reference to existing suits found in the code of 1870, has been left out of the code of 1882—but a supplemental complaint is not a substitute for the original complaint, and it is not merged into it. They are separate but allied actions, to be tried together. While each contributes to the general result of the litigation, neither ever loses its individual existence. As to this supplemental complaint, there has been neither process nor pleading before the code, and it has come into existence since its adoption, though the office of the supplemental complaint may be to get the benefit of proceedings without which it would have been ineffectual. If this supplemental complaint of June, 1882, would have been good be-

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fore May, *1882, it is good now, being, I think, amply provided for by section 449 of code of 1882: "And the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice."

I am inclined to think that the service of the summons and complaint of June, 1882, if not sufficient of itself to operate as a revivor of the bill in equity of 1867, was at least sufficient to entitle the plaintiff to an order of course to revive and continue the action, an order which can be made whenever the parties are all in court and the case ready for a hearing. It seems to me that, whatever may be the true view of the practice, it is now too late for Nancy Allen, James Kitchens, and Adelaide Kitchens to make the question that these proceedings are not pending. They have demurred to this supplemental complaint; their demurrer has been overruled. They have answered; and now two orders, April 27 and May 17, 1883, have been made in the case, allowing this supplemental complaint to be amended by making J. C. F. Sims a party defendant. My predecessors have treated these actions as pending, and until their orders allowing this amendment are set aside on Circuit, as having been made through "inadvertence, surprise, or excusable neglect," or by the judgment of the Supreme Court, I am bound to treat them as valid, and as made in an existing suit.

It is claimed, however, that it has been decided that the original bill in equity is no longer a suit pending, and that as to this it is res adjudicata. In 1878, C. H. Suber, one of the defendants in this action, commenced an action against D. B. Miller, as administrator de bonis non of John M. Allen, and as administrator of Addison R. Phillips, the deceased administrator, on behalf of himself and other creditors, and against the heirs and distributees of John M. Allen, and also against the sureties to the administration bond of Phillips and J. C. F. Sims; amongst

other things, to subject this same lot of land to the payment of the debts, and for other purposes. On demurrer filed by the administrator of one of the deceased sureties on this bond of Phillips, it was held on Circuit by Judge Thomson that the complaint was multifarious, in that it joined improperly several causes of action. One of the causes

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of demurrer assigned was *that there was another action pending as to the same cause of action. Judge Thomson held that this ground was not well taken, as there was no such action now pending as to be a bar to Suber's action.

Judge Thomson may have held that the original bill in equity had abated, and that it could not have been revived at all, or that it had not been revived by Miller, or that, even if it had been revived and was then an existing suit, it was not such a suit as would bar Suber's action, as the latter involved several matters not included in the first. Either view would have been sufficient to sustain his ruling on this point. If, however, Arthur had been the party instead of Miller, and Judge Thomson had made his ruling on the demurrer after a supplemental complaint had been filed and served, it is not clear how a demurrer to a complaint filed by Suber, and which assumes the facts in the complaint to be true for the purpose of the demurrer, can work an adjudication of these facts as to any one else except the plaintiff who alleges such fact in his complaint. Suber alleged certain facts in his complaint, and conclusions of law from these facts are binding only on Suber or on those who are bound by his statement.

This case was appealed to the Supreme Court, and it will be seen (Suber v. Allen, 13 S. C., 317) that the complaint improperly joined various causes of action, only a part of which were involved in the first action—the bill in equity of 1867. In the view I take of Suber v. Allen, there is nothing in it which adjudges the question here, whether there was a suit pending in which the orders of April 27 and May 17, 1883, were made.

I take it, then, that Nancy Allen, James Kitchens, and Adelaide Kitchens are in court, and cannot claim on this motion that there is no such action pending as to authorize a Circuit judge "to make J. C. F. Sims a party defendant." If they are parties to an existing suit, whether by service of summons, by appearance and answer, or by estoppel in such way as to be bound by the orders, it is not easy to see how Sims or any other person called in as a new party can take advantage of irregularities or defects of which for any reason they have failed to avail themselves. "A supplemental pleading is govern-

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ed by all the rules applicable *to an original pleading of a similar character, and its defects are remediable in the same manner as defects in other pleadings." 2 Wait Pr., 474, a. There is no good reason why a supplemental complaint may not be amended by adding new matter occurring after the original action was amended. This new matter as to Sims and his possession of the lot was such as is provided for in Section 198, and orders have been obtained to allow the amendment, and the amended supplemental complaint has been filed in pursuance of them. If an order to revive is necessary after the filing and service of the supplemental complaint, it can be made "at the hearing," even in cases where the answer controverts the right to revive. Dan. Ch. P. & P., 1709.

There is some confusion as to the terms, "commencement of an action." In one sense, an action is commenced when the first defendant is served with process or summons. It is not commenced, however, as to any particular defendant until he is served with summons. By the code all other modes of commencing actions, except by service of a summons, are abolished, unless it be by voluntary appearance. Actions are technically commenced by the service of summons. 1 Wait Pr., 501. Provisional remedies fail unless parties are served with summons in due time after they are allowed. Vorh. Code, 153, notes "a" and "d."

If this is the law, there is no way by which a new party can be brought in by a supplemental complaint except by the service of a summons. In case of the death of one of the heirs at law, after commencement of proceedings in partition, by whose death, as is often the case, the descent is cast upon infants, these infants can never be made parties at all without a summons, and a summons, too, to make them parties to a supplemental complaint. The time of service of summons is time in reference to which the rights of plaintiff and defendant, in the matter of the guardian ad litem, are fixed by the code. They can consent to nothing. It seems to me that process is necessary, as a matter of course, to bring in new parties. The code only substitutes a summons in the place of the old capias and other writs at law and of the subpœnas in equity. 1 Wait Pr., 467; see ibid, 441, 442, 443, 444. Under the old practice, subpœnas issued to make parties to bills of revivor and supplemental

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bills (Dan. Ch. P. & P., *1680 and 1707), and the former chancery practice is now adopted as to making parties. Vorh. Code, note "a," and cases.

I therefore conclude that the summons and complaint, the service of which is sought to be set aside by this motion, are such as have been authorized by the orders of April 27 and May 17, 1883, and have been properly served, and that I have no right, even if I did not concur, to question the right to make them on this motion; they are the law of the case for me. It is therefore ordered and adjudged, that the motion be refused, and

that the said defendants, Nancy Allen, James Kitchens, Adelaide Kitchens, and J. C. F. Sims, have leave to file their answers within thirty days after notice of the filing of this order.

The defendants appealed upon the following exceptions:

1. Because his honor, the Circuit judge, erred in holding "that the summons and complaint, the service of which is sought to be set aside by this motion, are such as have been authorized by the orders of April 27 and May 17, 1883, and have been properly served; and that I have no right now, if I did not concur, to question the right to make them on this motion—they are the law of the case to me."

2. Because his honor, the Circuit judge, erred in holding that "no order of the court is now necessary for leave to file a supplemental complaint under section 142 [of the code], or even is it proper, it being a matter of right."

3. Because his honor, the Circuit judge, erred in holding that "the supplemental complaint of June, 1882, was properly filed without an order for leave to do so; but leave was necessary and had to be obtained in order to bring in the supplemental matter, as to which J. C. F. Sims has been made a party under section 198."

4. Because his honor, the Circuit judge, erred in holding that "the service of the summons and complaint of June, 1882, if not sufficient of itself to operate as a revivor of the bill in equity of 1867, was at least sufficient to entitle the plaintiff to an order of course to revive and continue the action, an order which can be made whenever the parties are all in court and the case ready for a hearing."

5. Because his honor, the Circuit judge,

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erred in holding that *it was not adjudged in the case of Suber, Administrator, v. Allen and others, whether there was another suit pending in which the orders of April 27 and May 17, 1883, were made.

6. Because the Circuit judge erred in holding that J. C. F. Sims, made a new party defendant, could not take advantage of any irregularity or defects of which for any reason the original parties defendant had failed to avail themselves.

7. Because his honor, the Circuit judge, erred in holding that "there was no way by which a new party may be brought in by a supplemental complaint, except by the service of a summons."

8. Because there was no motion made, or leave granted, to amend the summons granted in said cause, and without such authority there could be no amendment of summons, and his honor erred in not so ruling.

9. Because there has been no amendment of the summons in said cause, and until the original summons is amended, no amended copies can be issued; and his honor erred in not so ruling.

10. Because his honor, the Circuit judge, erred in refusing said motion.

Messrs. Pope & Haskell, Clark & Muller, for appellants.

Messrs. Andrew Crawford Bachman & Youmans, contra.

April 6, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. The statement of the facts in the decree of Judge Fraser, from which this appeal is taken, is so full and clear as to supersede the necessity of making any further statement here.

The first point which we propose to consider is that raised by the eighth ground of appeal. It may be conceded that a summons cannot be amended without leave of the court, and the practical inquiry here is, has such leave been granted? The order of Judge Hudson was, "That James C. F. Sims be made a party defendant herein; that the plaintiff have leave within twenty days from the rising of the court to amend his complaint by alleging," &c. Now, if it be true,

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as it undoubtedly is, that the *proper mode of making a party defendant to a case is by the service of a summons upon him, it would seem to follow necessarily that where there is an order requiring a certain person to be made a party defendant, such order implies that the summons in the case is to be amended by inserting his name and serving a copy thereof so amended upon such person. While, therefore, the order in this case did not in words authorize an amendment of the summons by inserting therein the name of Sims as a party defendant, yet as it did require that he should be made a party defendant, it necessarily implied that the summons should be so amended, and then the order proceeded to provide for the amendment of the complaint by inserting certain additional allegations.

The ninth ground of appeal seems to have been taken under a misapprehension of the real facts of the case, though the papers as printed in the "Case," would seem to warrant the assumption upon which that ground rests. The summons as printed did appear to be a copy and not an original, and there was nothing in the "Case" to show that there was any original amended summons; but from the original records introduced at the hearing by consent, it does appear that there was an original amended summons issued and served upon Sims, and the service thereof accepted by the attorneys representing the other appellants. It is true that the amendment of the summons was not made by inserting the name of the additional party authorized in the summons first issued, with an appropriate reference to the order au-

thorizing such an amendment, as perhaps would have been the better practice, inasmuch as the rule seems to be well settled that there can be but one original summons in a case, and that instead thereof a transcript of such original summons was made in which the name of Sims was added as an additonal defendant, and was styled "amendment to supplemental summons and complaint, making J. C. F. Sims a party defendant," and marked "original"; but this departure from what would have been a better practice is merely formal and cannot have the effect of annulling the paper. It appears to us, therefore, that the summons was substantially amended, and that this was done by virtue of an order which necessarily implied leave to make such amendment.

The next position which we shall notice is

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"that there is no *form of proceeding under the code by which Sims can be made a party to this original bill of complaint." If this be so, then certainly there was a very strange and unfortunate omission made in the code. But we do not think any such omission was made. The code, as originally adopted, (section 34,) provided for the transfer of all actions then pending in the Court of Chancery to the Court of Common Pleas, to be there "heard, tried, and determined, with all rights respected and preserved in the same manner as if originally brought there." It also provided (section 465) that the provisions of the code should apply "to future proceedings in actions or suits heretofore commenced, and now pending, as follows: (1) If there have been no pleading therein, to the pleadings and all subsequent proceedings. (2) Where there is an issue of law or of fact, or any other question of fact to be tried, to the trial and all subsequent proceedings." And in section 471, after repealing all statutory provisions inconsistent with the provisions of the code, it proceeded to declare as follows: "And all rights of action given or secured by existing laws may be prosecuted in the manner provided by this act. If a case shall arise in which an action for the enforcement or protection of a right or the redress or prevention of a wrong cannot be had under this act, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice."

These provisions manifestly show that the intention of the legislature was that there should be no obstacle of any kind thrown in the way of parties who had commenced their actions in the Court of Equity to prevent them from proceeding to enforce their rights according to the forms of law, notwithstanding the abolition of the court in which they had originally instituted their actions and the transfer of the same to another court in which the forms of proceeding had been materially altered, and that for this purpose they might, in all subsequent steps, adopt the new forms of proceeding; but if that was impracticable, then, in order to prevent a failure of justice, they might resort to the former practice. We do not see how the legislature could have, in general and comprehensive terms, without descending to innumerable details, better expressed their intention that no such result should follow the

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change in the tribunal and in the *modes of proceeding, as that which appellants contend have followed such change. Here was a proceeding pending in the Court of Equity at the time that court was abolished, which was, by the provisions of the code above referred to, transferred to the docket of the Court of Common Pleas to be there "heard, tried, and determined, with all rights respected and preserved in the same manner as if originally brought there;" but owing to the death of some of the parties it could not be determined without bringing the representatives of such deceased parties before the court. How was this to be done? If there had been no change of the law, it would have been by a bill of revivor, upon the filing of which subpœna ad respondendum would have issued to bring before the court the representatives of the deceased parties, and this of course would have involved the necessity for further pleading. But since the code the action would not abate, and all that was necessary in order that the rights of the parties should be respected and preserved was to continue the action against such representatives, and the mode of doing this is provided for by the code. The parties having the right to proceed with their action notwithstanding the death of some of the necessary parties, that right is "preserved" to them, after the change in the mode of proceeding and the transfer of the case to another court "in the same manner as if originally brought there." Now, if the case had been originally brought in the Court of Common Pleas after the adoption of the code, there can be no doubt that the manner in which they had a right to proceed with their action would have been that prescribed by the code. Two modes are prescribed, one of which by motion, with notice of course to the representatives of the deceased parties, who are thus to be brought in, is applicable within one year after the death of a party, and the other by supplemental complaint if more than a year has elapsed (Code, § 142; old Code, § 144); and no leave is necessary to file such supplemental complaint. Parnell v. Maner, 16 S. C., 348.

But it is said that there was no necessity or authority for issuing a summons with such supplemental complaint. The object was to make the representatives of the deceased persons parties to the action, and as the only mode of effecting that object is by the service of a summons, unless in the case where

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the ap*plication is made by motion within a year from the death of such parties, it would

seem to follow necessarily that a summons must issue, or such representatives never would become parties. It does not appear, therefore, that the objections urged to the validity of the summons of June, 1882, and the supplemental complaint issued thereon, can be sustained. More than a year had elapsed from the death of the several parties, and hence the action could not be continued by motion, and only by supplemental complaint, for the filing of which no leave of the court was necessary, as we have seen. The case being thus properly pending in court, and it becoming necessary to amend by making a new party by reason of circumstances occurring since the commencement of the action, it became necessary to obtain an order for that purpose and for filing an amended supplemental complaint under section 198 of the code (old code, § 200), and hence the propriety of, and necessity for, the order of Judge Hudson of April 27, 1883, as well as the order of Judge Kershaw of May 17, 1883, amending and extending the same.

Again, it is urged that even granting that the summons of June, 1882, and the supplemental complaint issued thereon were regular and proper, yet there was no order to revive, and such an order was necessary before any order to amend could be granted. Whether an order to revive was necessary under the code may, perhaps, be doubted; but even if such order be necessary, we agree with the Circuit judge that such order may be taken at the hearing. See the authority cited by him, 3 Dan. Ch. Pl. & Pr., 1709.

Finally, it is urged that the original action was no longer pending at the time the effort was made to revive it in June, 1882, and there was therefore no suit to be revived. This position, as we understand it, is based solely upon the decision of Judge Thomson in the case of Suber v. Allen, 13 S. C., 317. The full record in that case is not before us, and all that we know of it is what is said in the decree of Judge Fraser, and what appears in the case as reported. It seems that one of the defendants in that case, who does not appear to be a party to this case, demurred to the complaint filed by Mr. Suber in that case upon two grounds: 1st. "That

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there is another action pending between *the same parties for the same cause of action." 2d. "Because different causes of action were improperly joined." Judge Thomson overruled the first ground and sustained the second, and upon appeal his judgment was affirmed. As Judge Fraser very properly says, it does not, by any means, follow from this that Judge Thomson decided that the present action was not then pending. Indeed, there is nothing here to show that the present action was referred to. What allegations were made in Mr. Suber's complaint, all of which would be admitted by the demurrer for the purposes of that case, we are not informed of; but whether such allegations would be admitted by the parties to this case is another matter. The opinion of the Supreme Court in Suber v. Allen was confined solely to the consideration of the second ground of demurrer, and the first is not even mentioned, except in the statement of the case by the reporter. We concur, therefore, with the Circuit judge in holding that this position of appellants cannot be sustained.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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22 S. C. 446

WHITMIRE v. WRIGHT.

(November Term, 1884.)

[1. *Dower* ⇐12.]

A widow is not entitled to dower in lands held by her husband under lease. Thus where a husband during coverture held land under a lease for 999 years, the widow has no dower therein.

[Ed. Note.—Cited in Morgan v. Smith, 25 S. C. 339; Holley v. Glover, 36 S. C. 416, 15 S. E. 605, 16 L. R. A. 776, 31 Am. St. Rep. 883; Ex parte Steen, 59 S. C. 223, 37 S. E. 829.

For other cases, see Dower, Cent. Dig. § 43; Dec. Dig. ⇐12.]

[2. *Dower* ⇐72.]

In action for dower, the defendant, by having accepted a title in fee from the demandant's husband, is not estopped or precluded from showing that his grantor, the husband, had only a leasehold estate of which the widow was not dowable.

[Ed. Note.—Cited in Pruitt v. Pruitt, 57 S. C. 162, 35 S. E. 485.

For other cases, see Dower, Cent. Dig. § 254; Dec. Dig. ⇐72.]

[3. *Evidence* ⇐84.]

Where a party accepts in 1853 a lease for 999 years, and thereafter in 1863, conveys the land in fee simple, no presumption arises that he had meantime acquired the fee simple title.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 106; Dec. Dig. ⇐84.]

Before Aldrich, J., Newberry, June, 1884.

The opinion states the case. The Circuit decree was as follows:

I agree with the judge of probate in his

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conclusion as to the *property being partnership assets. As the probate judge says, the lot was sold long before the dissolution of the partnership. The deed to Smith is dated February, 1863, but the sale was made and possession given more than five years before. This was a withdrawal of the land from the partnership assets. Further, there is no proof that the firm was insolvent then, for they continued to do business for a long period after. It is not to be presumed that creditors would stand idly by and see an insolvent firm dispose of partnership property and make no effort to secure the same for the satisfaction of their claims.

This brings us to the main, and, in my

opinion, the only question in the case. When the decree of the judge of probate was read, I was so impressed with the fact that the deceased husband had only a leasehold estate, and therefore his widow was not dowable, that I came near declining to hear the able argument of Mr. Jones. But the very strong array of authority and searching application of the same to the case presented by Mr. Cromer, on the part of the demandant, forced me to take the papers, and the more I have considered the question, the more satisfied I am that my first impression was error.

There can be no doubt that dower does not attach to lands of the husband held under lease; and if Mrs. Whitmire, the demandant, was claiming her dower in the leasehold estate of her deceased husband, Henry Whitmire, she could not get it, provided there was any one to dispute her claim. But, as Chancellor Johnstone is reported to have said, "Who would be here at the end of 999 years to dispute his title?" But this is not the case presented. She is not demanding her dower against the reversioners of the leasehold estate, but against the tenant in fee, who holds the estate by virtue of his fee simple title derived from her husband. Will he be allowed to say to Mrs. Whitmire, You have no dower in the land, because your husband was not a tenant in fee, but for years; and to the rest of the world, I hold a fee simple in the land, derived from the husband of demandant? He will not be permitted to blow hot and cold in the same breath. If he holds in fee through Henry Whitmire, Whitmire's widow is entitled to dower. If

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he does not derive his fee from Henry *Whitmire, then he has no title, and cannot dispute the demand for dower of the widow.

I do not agree with the learned counsel that, since the adoption of the constitution of 1868, dower is a less favored estate than formerly. The dower is for the widow, the homestead is for the family, and the law guards the one as jealously as it does the other.

The question here is, not what estate did Henry Whitmire have, but what estate did he convey? What estate does Robert Wright, the defendant, claim through Whitmire—a lease for years or an estate in fee? If the latter, he is estopped from denying the demandant's claim for dower. Chancellor Kent (4 Com., 38) says: "When the husband had been in possession for years, using the land as his own, and conveying it in fee, the tenant deriving title under him is concluded from controverting the seizin in the action of dower." And Mr. Scribner, in his treatise on dower (2 vol., 217, ch. X.), holds the same doctrine: "According to the principles of the common law, if a tenant at will, or for years, makes a feoffment in fee, his widow will be entitled to dower as against the feoffee and his heirs; for the feoffee, by accepting the conveyance, admits that the husband was seized in fee and entitled to pass it; and the feoffee and such claimants are estopped from showing that the husband had a less estate."

It is controverted if this doctrine is applicable where a tenant for life makes a feoffment in fee. Mr. Preston maintains there is no dower in such case, and in this he is supported by the textbooks. On the other hand, it is laid down in Fitzherbert that the wife of a tenant for life who makes a feoffment in fee shall have dower as against the feoffee, and Mr. Park and Mr. Roper concur in this statement of the law. And our cases of Gayle v. Price, 5 Rich., 525, and Pledger v. Ellerbe, 6 Rich., 266 [60 Am. Dec. 123], sustain this view.

Let the appeal be dismissed with costs and the demandant have her writ, as directed by the judge of probate.

The defendant's exceptions, omitting those relating to the partnership, were as follows:

4. Because his honor erred in holding that

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the demandant's *dower depended upon the estate which her husband conveyed, and not upon the estate he held.

5. Because his honor erred in not holding that T. & H. Whitmire only had a leasehold estate, and could convey no greater estate than they had, and that the deed in fee simple from T. & H. Whitmire to G. D. Smith, and through him and others down to the defendant, R. H. Wright, cannot transmit any other estate than the leasehold estate.

6. Because his honor erred in deciding that the defendant was estopped from denying that the husband of the demandant was seized of any greater estate than a leasehold estate, by accepting a deed poll in fee simple.

Messrs. Jones & Jones, for appellant.

Messrs. Johnstone & Cromer, contra, on the question of estoppel, cited 4 Kent., 38; 2 Scrib. Dow., 231, 248, 249; 3 Bac. Abr., 209; 5 Rich., 526; Big. Estop., 282, 283, 294; 2 Hill, 440; 32 E. C. L. R., 42; 6 Rich., 270; 5 S. C., 215; Park. Dow., 297. There is a presumption that demandant's husband had acquired a title in fee. 14 S. C., 93.

April 6, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. By this proceeding, originally commenced in the Court of Probate, and carried thence by appeal to the Circuit Court, the petitioner demands her dower, as the widow of Henry Whitmire, deceased, in a certain lot in the town of Newberry. Her claim is resisted by the appellant upon two grounds: 1st. That the said Henry Whitmire never had such an estate in the premises as would entitle his widow to dower, he having merely a leasehold estate there-

in. 2nd. That the premises in question were partnership property, bought with partnership funds for partnership purposes, by the late firm of T. & H. Whitmire, and that the interest of said Henry Whitmire therein was not subject to dower, until all the debts due by said partnership have been paid, which has not yet been done.

The facts, as ascertained by the decree of the judge of probate, are as follows: On December 3, 1849, one John W. Summer conveyed, by way of lease for the term of 999

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years from March *14, 1797, the said lot to a partnership of which said Henry Whitmire was a member, and on February 17, 1853, the other members of said partnership conveyed, in the same way, their interest in the lot to Henry Whitmire and Thomas Whitmire. On February 5, 1863, Thomas Whitmire and Henry Whitmire conveyed the said lot, in fee simple, with full warranty to Geo. D. Smith, and on February 10, 1864, Geo. D. Smith conveyed the same in fee simple, with full warranty, to Bates, Cox & Hammett. On August 4, 1866, Bates, Cox & Hammett, by a like conveyance, upon which the wives of all three of the grantors renounced their dower, conveyed the lot to Robert H. Wright and Emanuel S. Coppock, with full warranty, "except the unrenounced claim of dower of the wife of Henry Whitmire." On January 24, 1882, Coppock conveyed his interest to Robert H. Wright, the defendant, with full warranty. Henry Whitmire died in July, 1882, and this proceeding was commenced on December 2, 1882.

The judge of probate overruled both of the objections urged by the defendant, and sustained the claim of dower, and upon appeal to the Circuit Court his decree was affirmed. The defendant now appeals to this court upon the several grounds set out in the record, but from the view which we take it will not be necessary to state them specifically.

It is conceded that the right of dower does not attach to a leasehold estate, and, therefore, if Henry Whitmire had died before conveying the premises in question, there can be no doubt that his widow would not have been entitled to dower therein, inasmuch as the conveyance under which he held did not purport to convey anything more than a leasehold estate. It is contended, however, by the petitioner, and such was the view taken below, that inasmuch as the deed from Thomas Whitmire and Henry Whitmire to Geo. D. Smith purported to convey the fee simple, and inasmuch as the other intermediate links in the defendant's title purported to convey the fee simple estate, the defendant is estopped from disputing the fact that Henry Whitmire held the fee simple. To simplify the question we will consider it as if Henry Whitmire, holding as he unquestionably did under the deed from his grantors only a leasehold estate in the premises, had conveyed the same in fee simple to the

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defendant. *The inquiry, then, is whether the defendant, by accepting a conveyance of the fee, is estopped from showing that his grantor held only a leasehold estate of which his widow would not be dowable.

As will be seen by an examination of chapter X. of 2 Scribner on Dower, 231–252, there is no little conflict of authority upon this question; but in this state we do not find that the point has ever been distinctly adjudicated. Gayle v. Price (5 Rich., 525) was a case in which the defendant, holding under a deed from the husband, attempted to show in defence to a claim for dower, that the husband never had the legal title, having bought the premises at sheriff's sale, but never having received a deed from the sheriff. This defence was not allowed, the court saying: "He who enters under the title of another is, in general, estopped from denying it. To this general rule there are exceptions, such as where the title of the grantor, or lessor, is determined, as in cases of life estates or leases; or where the allegation does not contest the legal estate, as in the case of a trustee conveying, and his widow claiming dower. There it may be shown that his legal estate was not such an one as of which a widow was dowable. Or where one enters under a title supposed to be good, but subsequently finds it to be bad, and bona fide acquires the paramount title; there he is permitted to show this, as an answer to the prima facie case made against him by his entry; or where a tenant in possession disclaims the title of his landlord, or buys it by a mere parol contract, and holds in his own right for the statutory period, he may show these facts as an answer to his landlord's claim." From this quotation it will be observed that one of the recognized exceptions to the general rule is that where the defendant enters under a title of a trustee, he may, in bar of an action for dower by the widow of such trustee, be permitted, not to dispute the legal title or right of possession of his grantor, but to show that the nature of his title was such as would not support a claim of dower. This doctrine also seems to be conceded in the case of Plantt v. Payne, 2 Bail., 319. Indeed, we do not understand that it is anywhere denied.

Now, if a defendant in dower who holds under a title from the husband, under which he has gone into possession, while not permitted to dispute the fact that his grantor

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had a legal title, and *the right of possession, is permitted to show that the title of the husband is not of such a character as would support a claim of dower, to wit, that though having an absolute legal title and right of possession, yet that he held such title as trustee, to which the right of dower would not attach, we do not see why, upon the same

principle, the defendant in this case may not be permitted to show that though Henry Whitmire had a legal title and right of possession, yet that such title did not confer upon him an estate to which the right of dower would attach. In Gaunt v. Wainman, 3 Bing. N. C., 69 (32 E. C. L. Rep., 42), it was held that a defendant in dower who had taken a title from the assignees of the husband, in which the premises conveyed were described as freehold, was not estopped by that deed from showing in defence to an action for dower that the premises were leasehold. And this case seems to be recognized in Gayle v. Price, supra.

As was said by Tindal, C. J., in Gaunt v. Wainman, "suppose he had bought the premises as leasehold, would the demandant be estopped to say that they were freehold?" It is quite clear that she would not, for no act or declaration of the husband, after the inchoate right of dower has once attached, can be allowed the effect of depriving the wife of the right of dower. Tibbetts v. Langley Manufacturing Co., 12 S. C., 465. This is upon the ground of the want of privity between the husband and wife. She is not a party or privy to any deed he may make, and therefore is not bound or estopped by anything therein contained; and as estoppels must be mutual, it would seem to follow that if she is not estopped from claiming dower in lands held by her husband in fee simple, by reason of a deed from him in which such lands are conveyed as a mere leasehold estate, it would seem that the rule ought to work both ways, and her husband's grantee, to whom lands have been conveyed as freehold, should not be estopped from showing that in fact they were merely leasehold.

Indeed, it seems to us, as has been shown by Marshall, C. J., in Blight's Lessee v. Rochester (7 Wheat., 535 [5 L. Ed. 516]), that it is a mistake to rest the rule, that one who enters under the title of another, conveyed by a deed poll, and not by an indenture, cannot dispute the title under which he enters, upon the doctrine of estoppel, but that the true ground upon which it rests is that it is

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*against "the moral policy of the law." A deed poll is the act of the party making it alone, and concludes him only, while an indenture is the act of both parties, and both are concluded by it. Hence where, as in this case, one accepts a deed poll, and goes into possession under it, he is not estopped by the terms of the deed from disputing the title under which he enters, but having gained the great advantage of possession by accepting the deed and entering under it, it would be against "the moral policy of the law," while retaining such advantage to dispute the title under which he acquired so great an advantage. Hence if one acquires possession under a lease, he cannot dispute the title of his lessor until he surrenders the possession (Wilson ads. Weathersby, 1 Nott & McC., 373, note), or perhaps until he disclaims holding under his lessor's title, and retains the adverse possession for a period long enough after such disclaimer to give him a title under the statute of limitations. Willison v. Watkins, 3 Peters, 43 [7 L. Ed. 596]. Accordingly in the case of Giles v. Pratt, 2 Hill, 439, it was held that one already in possession and accepting a title from another is not thereby precluded from disputing the title of such other.

This being the true ground of the rule by which one who enters under the title of another is precluded from disputing such title, we do not see how it can properly be applied in a case where the widow of the grantor is claiming from his grantee dower in the premises conveyed. His possession acquired by such a title gives him no advantage in such a contest, and there is no room for the operation of the rule. The case of Horde v. Landrum (5 S. C., 213), relied on by respondent, simply decides that where land has been sold under a judgment at law upon a bond given for the purchase money, but not under the mortgage given to secure the payment of such purchase money, the widow may claim dower from the purchaser at such sale. This was upon the plain principle that the deed of the sheriff to the purchaser was in law the deed of the husband, and of course if Horde, the husband, had sold directly to Landrum, there could not be a doubt that the wife's right of dower would attach. We do not think, therefore, that this case is applicable to the point under consideration. Nor do we think

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that the case of *Pledger v. Ellerbe (6 Rich., 266 [60 Am. Dec. 123]), as it is construed in the more recent case of Tibbetts v. Langley Manufacturing Co., supra, affords any support to the position contended for by the respondent.

The position taken by respondent's counsel in his argument, that the facts of the case raise the presumption that Henry Whitmire had acquired the fee which he assumed to convey, cannot be sustained. The record shows that until February 5, 1863, all parties confessedly held the premises as leasehold, and after that date Henry Whitmire certainly could not claim by possession, for he then conveyed to another; and even assuming that he did, as it is claimed he had done some time in 1858, attempt, by an informal deed, to convey in fee simple to George D. Smith, and then put him into possession, that would not help the matter.

We think, therefore, that there was error on the part of the Circuit judge in holding that the defendant, by accepting a deed for the premises in question, purporting to convey the fee simple title, was estopped, or in any way precluded from showing that the husband of the petitioner never had such an estate in the lot as would support her claim for dower.

Under this view of the case the other question as to the effect of the partnership character of the property cannot arise, and need not, therefore, be considered.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to the Court of Probate for such further proceedings as may be necessary to carry out the views herein announced.

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22 S. C. 454

McKEEGAN v. O'NEILL.

(November Term, 1884.)

[1. *Wills* ⟸58.]

A person may bind himself to dispose of property by will in a certain way or to certain parties, and, failing to do so, his agreement, if clearly established, may be enforced after his death against his legal representatives.

[Ed. Note.—Cited in Hunter v. Mills, 29 S. C. 77, 6 S. E. 907; Fogle v. St. Michael Church, 48 S. C. 90, 26 S. E. 99; Bruce v. Moon, 57 S. C. 71, 35 S. E. 415; Wilson v. Gordon, 73 S. C. 159, 53 S. E. 79; Hursey v. Surles, 91 S. C. 288, 74 S. E. 618; Dicks v. Cassels, 100 S. C. 341, 84 S. E. 878.

For other cases, see Wills, Cent. Dig. § 164; Dec. Dig. ⟸58.]

2. Agreements or contracts at law and in equity defined and classified.

[3. *Contracts* ⟸176.]

The intention of parties to a contract, so far as it depends upon the construction of a letter, is a question of law and not of fact.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767–770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. ⟸176.]

[4. *Wills* ⟸58.]

A party in possession of a farm, "Cloney,"

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in Ireland, proposed to his *uncle, the owner in fee, to rent Cloney, and afterwards, learning that his uncle wished to sell, begged to be allowed to purchase, leaving the price to be named by the uncle; in reply, the uncle wrote to his nephew that he would sell to the nephew for "£1400 sterling cash, to any one else it will be £1500, *but you get all I am worth at my death*." *Held*, that the clause italicised was only the expression of an intention on the part of the uncle and not a contract to give his entire estate to this nephew in consideration of the purchase of this land; and the nephew having stamped this letter with an agreement stamp, and completed his purchase at £1400 cash, and after his uncle's death brought action to recover the uncle's entire estate from those to whom it had been given by will, the complaint was dismissed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 164; Dec. Dig. ⟸58.]

[5. *Wills* ⟸58.]

The real value of Cloney, and the effect upon that value of the tenant's rights of the nephew and his mother under the laws of force in Ireland, do not affect this contract, which was nothing more than an offer made and accepted for the sale of Cloney at £1400.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 164, 165; Dec. Dig. ⟸58.]

[This case is also cited in Mullaly v. Smyth, 96 S. C. 16, 79 S. E. 634, without specific application.]

Before Kershaw, J., Charleston, February, 1884.

This was an action by Francis McKeegan against Bernard O'Neill and Daniel J. Quigley, executors of John McKeegan, and against the legatees of John McKeegan, to recover the entire estate of John McKeegan, under an alleged contract contained in the following paper:

(1st page.)

Charleston 22 March 1876

Mr F. McKeegan

Dear Sir

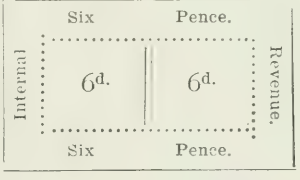
this morning i got a letter from Mr McNeill and one from you Relating to Cloney * * *

I have sent all the Power of aturney to Mr Nelson and title deed and mape of Cloney—yisterday according to Mr McNales Letter of requist—i have other Pappers Parteing to the same whish I will send if wanted — — — May Prise for Clony is 1400 haundred Pounes Cash And to anney one else £1500 haundred Poun Starling — — Mr R. Nelson takes charge of the sale the same As if i ware there what ever he dos in the selling of Cloney is Binding and right — — —

(2d page.)

Why did you not say what Cloney was worth in your letter as i wanted you to dow — — — May Prise to you is all ready sade on the other side £1400 haundre Pounes Starling Cash—to anney one else it will bee £1500 haundre Pounes but you get all i am worth at my death Plese let Nothing happen the Propperty until it is sold — — —

I am sorrey to heare that may frend Mr R. Nelson is sick at Present but i hope he will bee well soon JOHN McKEEGAN.



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*To the statement of facts made in the opinion it will be proper to add the following: John McKeegan purchased Cloney, a farm of twenty-eight acres, two roods, situated in the parish of Layd, barony of Glenarm, county of Antrim, in Ireland, for £1020, in the year 1839. John put his brother Francis (father of plaintiff) in possession, who paid no rent, but was allowed to use and occupy it as an acknowledgment of the care and attention paid his mother. There was an understanding that Francis was to pay the taxes and rates on the land, and also in later years to pay James (an older brother) £10 per annum. About 1860 plaintiff moved with his wife into a house on Cloney, and thereafter helped his father to pay the charges on the land. Francis died November 8, 1875, and two days thereafter the correspondence between plaintiff and John McKeegan commenced, the substance of which is stated in the opinion.

The chief witness for plaintiff was his attorney, W. W. McNeill, of Larne, County Antrim, who was examined by commission. Upon the subject of the value of Cloney, he testified that it was worth to John McKeegan

only £900, and thus explains how it was that Frank was induced to pay £1,400:

I say, on more than one occasion, on my being consulted by the plaintiff with regard to his purchasing said farm, I most distinctly informed him that the farm offered to be sold was not value for the purchase money required, as I considered such an exorbitant price, basing my estimate of the value not only on the nature of the lands themselves, and on their locality with which I was well acquainted (there being no railway within many miles of them or market town of any importance—Cushendall, the nearest town, being merely a village), but also on the government or poor law valuation, and which only estimated the entire lands and premises at the yearly value of forty-two pounds ten shillings, and also on the fact that the plaintiff, as the tenant in occupation, could not have been evicted by the said John McKeegan, as the landlord or owner, without first paying to the plaintiff as the tenant in occupation, at his election, a considerable sum, either for tenant right or for improvements and disturbance under the landlord and tenant (Ireland) act 1870; when the plaintiff met my objections by replying that his paying the £1,400 as the purchase money would be to all intents and purposes merely a temporary payment by him, as his uncle, the said John McKeegan, had given him to under-

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stand and believe, that *the said John McKeegan by his will either had or would bequeath him, the said plaintiff, all his property; and I therefore most distinctly say that from my consultations with the plaintiff prior to the purchase it was only on the grounds and belief of his uncle carrying out such promise that the purchase was completed.

As to how those tenant's rights in Ireland affected the value of Cloney, Mr. McNeill explains:

I say the landlord or owner of the farm would not have obtained the full value upon a sale in open market with a tenant in possession; and I say that to enable him to obtain the full value of the farm he would have had first to evict the tenant in occupation by ejectment proceedings. And I further say that immediately upon the service of such ejectment by the landlord or owner, such tenant in occupation, under the landlord and tenant (Ireland) act 1870, could have served upon the landlord or owner a notice of claim either for tenant right, under section 1 of said act, or for compensation for disturbance and improvements, under sections 3 and 4 of said act, with power to proceed either under section 1 separately or under sections 3 and 4 conjointly, and thereupon obtain from the landlord or owner, or person so evicting him, compensation as before mentioned, and in the manner he should elect.

After a very full statement of the pleadings and evidence, the Circuit decree proceeded as follows:

The preponderance of the evidence satisfies me that the estate was worth, over and above the tenant's claims insisted upon, more than the £1,400 paid and that plaintiff so regarded it. In addition to what has already been referred to as evidence of the value of the place, it is in evidence that Mr. Hugh Bailey, an extensive farmer and an expert in such matters, lent the plaintiff £1,400 on the place, to pay the purchase money. Under the law, if there were any such rights of tenants as claimed, they existed in favor of the estate of Frank McKeegan, the elder, and not in favor of the plaintiff, since the plaintiff was put in possession by his father, and never held under John McKeegan, or by his consent. His occupancy from November, 1875, to March, 1876, was not a tenancy. The loan of the purchase money by Mr. Bailey, on the security of Cloney, was therefore subordinate to the claims of the tenant, if the estate was so encumbered. This is manifest from the letter

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of plaintiff to his *uncle, of 24th January, 1877, after the purchase, where he says: "My mother instructed John Rhea, of Belfast, solicitor, to institute proceedings against me to have a writ marked out of one of the Superior Courts, if I do not give a sufficient offer of money to satisfy her through him."

But that letter, it may be remarked, before leaving it, shows more than this. It shows that Frank McKeegan, when he bought, got the place, or at least considered that he got it, free from any charges or encumbrances of this nature, as will be seen from the following extract. He says: "Now the way that Mr. Nelson arranged that matter was, that I purchased your whole interest in the town land of Cloney, and that I stood in the same position as you did, for £1,400, so that as no one could have any claim against it on account of any existing tenant right now of force in Ireland, and you will please let me know if you sold it to me with any claim against it." It appears to me that this destroys the whole fabric of that portion of plaintiff's cause which rests upon the insufficiency of Cloney as a consideration for the payment of £1,400, by reason of the encumbrance of tenant rights thereon.

If such rights did exist, they have no doubt been covered by the warranty covenants of the deed of John McKeegan, conveying the estate. If there were no such covenants, plaintiff could have shown it by the production of the deed. But the circumstances negative the idea that there were any such encumbrances on the place. This family had not occupied the property as tenants in the sense of the act of parliament referred to. They held gratuitously. The assessed value of the rent was, before 1839, £30, and now £42.10. The taxes were £5, and the rates 42s., and there was paid to James McKeegan £10 per annum by the occupants of the place, but there was no payment after he died, which was some time before the death of Francis McKeegan, Sen., except the rates and taxes.

This shows that the occupancy was a gratuity of considerable value, given for many years to this family. If they had set up a claim for tenants' rights, &c., they would have been charged for the use and occupation, the rental value less the rates and taxes and pay-

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ment to James *McKeegan, and would have been left largely in debt to the landlord.[1]

But upon the theory set up by the plaintiff, that his father was a tenant, and he also a tenant, they both would be shown to have no claim to compensation under the act, because, upon this hypothesis, the father, who it is said was the original tenant, sublet to plaintiff, on his marriage, and divided the holding "without" (so far as appears in the testimony) "the consent of the landlord in writing," which, by the provisions of section 3 of the act, deprives both tenant and sub-tenant of all compensation under this section or section four.

Mr. McNeill, therefore, is mistaken in supposing that the circumstances attending the occupancy of Cloney by Frank McKeegan and family were such as to entitle any of them to tenant rights in the same, and hence his estimate of the value of Cloney, as being depreciated by reason of the existence of such rights, is not entitled to be considered. He must have been misinformed as to the nature of the occupancy. I think it is manifest that he first suggested this claim of tenant rights to plaintiff, as nothing was heard of them until plaintiff had consulted him. In the instructions forwarded by him to plaintiff to be sent to John McKeegan, he proposes, if terms are agreed upon, "an agreement drawn in accordance with the late landlord and tenant Ireland act, 1870."

Efforts were also made to induce John McKeegan to institute proceedings to eject plaintiff's mother, or at least to write her a notice to quit. John McKeegan seems to have done neither. Perhaps, if he had, it might have been construed as a recognition of such a tenancy as would have entitled these parties to their tenant rights. All this may have been done in good faith, but if so, it must have been because plaintiff and McNeill, his attorney, were misinformed or misunderstood the condition of things. It is certain that nothing is heard of such claim in the case, except from plaintiff and McNeill. Mr. McNeill seems to have as-

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sumed *the existence of such a tenancy from evidence which is wholly inadmissible. He says it was from the representations of Mr. Nelson and others. These declarations are certainly not evidence to establish such tenancy.

Plaintiff himself says his father did not consider himself a tenant; he is "sure of that." Plaintiff did not consider himself a tenant, he says, "because he paid no rent." This would make them "tenants at will," for a person who holds rent free, by permission of the owner, "is a tenant at will." Taylor, Land. & Ten., § 60. Tenants at will are not tenants of a holding, within the meaning of the act. 33, 34 Vic. Ch., 46, § 70. Very strong evidence that there were no such encumbrances on the property is to be found in the fact that they have never been enforced or insisted upon. If they had been, there would have been proof of it in this case.

It seems unnecessary to pursue this point further, nor do I consider it necessary to discuss the bearing of the testimony derived from the various wills made by the testator. I cannot see anything in them to aid me in determining whether those words, relied on by the plaintiff as having a contractual efficacy, entitling him to the relief he claims, are to be so construed or not. I conclude that the expression on the part of testator, in his letter to plaintiff, of March 22, 1876, in relation to the sale of Cloney, that "you get all I am worth at my death," is not such an expression of intention as amounts to a contract. It was not made by testator in order to accomplish the sale of Cloney, nor was the purchase of Cloney induced by the representation. Therefore there was no contract—either legal or equitable—created by the representation.

I need not follow the learned counsel in this case through their exhaustive array of authorities upon this subject. The principles, I think, are most satisfactorily stated by Mr. Pomeroy (3 Eq. Jur., 1244, and notes), and in a paper in the Central Law Journal (vol. 15, p. 445). Mr. Pomeroy, in the section referred to, mentions two classes of contracts. First, all ordinary contracts which consist of an intentional offer on one side, and an intentional acceptance on the other, resulting in the meeting of minds upon the same terms. And adds: "There is, however,

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a *form of contract peculiar to equity, which is created by representations made by one party, and acts done by the other upon the faith of such representations. When an absolute unconditional representation of something to be done in the future, is made by one person in order to accomplish a particular purpose, and the person to whom it is made relying upon it, does the acts by which the intended result is obtained and purpose accomplished, a contract is thereby concluded between the parties."

In regard to the first class of contracts, Mr. Waterman, in his work on the performance of contracts, in a passage cited for the plaintiff, laid down the rule in regard to contracts to make a will thus: "A person may

[1] In the Supreme Court, plaintiff contended that his honor had overlooked the first section of this act, which legalized "the usages prevalent in the province of Ulster," to which section Mr. McNeill testified this property was subject.—REPORTER.

make a valid agreement binding himself to dispose of his property in a particular way, by last will and testament, and a Court of Equity will enforce such an agreement, by compelling the heirs at law to convey the property in accordance with the terms of the contract; but such a contract, especially when it is attempted to be established by parol, is regarded with suspicion, and not sustained, except upon the strongest evidence that it was founded upon a valuable consideration, and deliberately entered into by the decedent." According to this authority the relief, when the alleged promise is to make a will, is confined to the first class of contracts: legal contracts—where the minds of the contracting parties meet upon the same terms: "where there is an intentional offer on one side, and an intentional acceptance on the other"—deliberately entered into by the decedent.

There is, however, another class of contracts involving promises to make provision by will, which are doubtless enforced in equity, where there was no intention on the part of the decedent to bind himself, but where he makes a declaration of intention, "in order to accomplish a particular purpose, and secure what he desired by means of such representation." "A will is the free, voluntary, uninfluenced expression of a testator as to the disposition of his property." To say that a person is bound to make a will in a particular way, is to assert a contradictory proposition. A contract to make a particular sort of will, would appear, upon principle, to be a promise to do an act, in

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its nature revocable, *amounting to no more than a promise that the party should continue of the same mind.

If one desired to make a contract whereby he would secure a present benefit, to be paid for by a gift of his estate, to take effect, like a will, after his death, it could be done by deed inter vivos, even in regard to chattels, and without a conveyance to trustees. Jaggers v. Estes, 3 Strob. Eq., 383. At common law that could not have been done in regard to chattels. Where it can be done, there is no necessity for the enforcement of agreements to make a will. Because if there really was an intention so to contract, it could be done without any violation of the legal principles applicable to wills. A will is not only voluntary and revocable, but it is an instrument of great solemnity, required to be executed with extraordinary formalities. It must be in writing by the testator, in presence of three witnesses, who must subscribe the same in his presence, and in the presence of each other, all of which must be proven in the Court of Probate before the instrument can take effect as a will. It would be an extraordinary exercise of power in a court to give effect to a representation by words, or in a letter, of a purpose to make a will of a particular sort, to the extent of conveying the entire estate of a decedent, as if he voluntarily made such a will, thus dispensing with all the statutory requirements in regard thereto. Such contracts have been enforced in some cases, but it is everywhere recognized that the proof must be clear that the representations were made and acted upon as an inducement.

There has been a great diversity of opinion and decisions in cases of this character. Most of those enforcing such contracts have been where the consideration was marriage, or settlements on marriage, or the making of mutual wills, and other acts performed by the other party, irrevocable in their nature, and not capable of compensation otherwise. Rivers v. Rivers, 3 DeSaus., 190 [4 Am. Dec. 609], was a promise to make provision by will by a husband for his wife in consideration of her release of all claim to his estate, executed by her before marriage. Chancellor DeSaussure said he considered "that to make a will in a particular way, on proper consideration, is as much the subject of contract as any other, and he who makes a contract on the subject is as much bound

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*thereby as he would be by any other agreement on any other subject." He adds: "To be sure, the court would be more strict in examining into the nature and circumstances of such agreements than any other, and would require very satisfactory proof of the fairness and justice of the transaction."

In Gary v. James, 4 DeSaus., 188, the daughter of testator, with her mother, had been driven away from his home by him. After many years, during which he lived with another woman as his wife, in order to induce his daughter to leave her mother and live with him, he wrote to her, promising if she would come, that she should be the object of his care, and should enjoy all the care and attention that could be bestowed upon her by a tender father, and adding, "you are the object of my love, and shall be the heir of my property." The daughter came to live with the father for a time, and was finally driven off. He made a will in favor of the woman he lived with and died. The court enforced the contract, Judge James delivering the opinion of the court, saying: "Upon the whole of the reasons above stated, and under the particular circumstances of the case, I am of opinion that the contract entered into by the father with the daughter is binding upon his estate, and claims precedence of the will." The circumstances constituting the consideration for the contract are summed up in the following extract from the opinion: "On the part of the daughter the disadvantages were to quit a tender mother and subject herself, not to the reasonable will alone, but to the caprices of a father governed by a woman who had usurped her mother's place, and who, it

might be expected, was naturally her enemy. Surely such sacrifices should have entitled her, as an only child, to look forward to the remuneration offered her by the letter, of being the heir of her father's property."

The following is not a case of a promise to make a will, but is instructive in this connection. In Caborne v. Godfrey, 3 DeSaus., 514 [5 Am. Dec. 593], the representation was made to a son by his father, who had heard of his intended marriage. He promised to give him, by deed, whether he married or not, eleven or twelve negroes, and half of his stock, and perhaps more. The son married in two months thereafter, and sued for the property in the father's lifetime. The father died without making any provision for the son.

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*Chancellor DeSaussure on Circuit said: "I admit that the promise must be positive in order to be binding. On examining the letter carefully it does appear to me to contain a distinct and positive promise, etc. * * * I feel warranted, therefore, in saying that this was a solemn promise made by a father to a son to induce and promote his marriage." This construction was sustained by the Court of Appeals. It will be observed that this case is decided upon the ground that there was a positive promise, upon the consideration of marriage, induced and promoted thereby, and made upon that promise.

In most of the other cases cited for the plaintiff, the principles laid down in these cases are maintained, and the contracts were formed upon similar considerations. The case under consideration is not founded upon an irrevocable consideration, as in the case of marriage or mutual wills, or the performance of personal services not capable of compensation otherwise. If Cloney had been purchased at a price beyond its value, and the circumstances were such as claimed for the plaintiff, he might have a rescission of the contract and be fully restored to all he may have lost by the contract. He does not ask that. No necessity would exist for the enforcement of the extraordinary powers of the Court of Equity to make a will for John McKeegan, and to enforce it in favor of the plaintiff against his lawful devisees and legatees.

I do not understand that any of the cases, which I regard as authority, require that I should go so far, even had the case gone to the extent claimed by the plaintiff. But, as I have said, I do not find that the representation in this case was intended as a promise, or as an inducement to a contract, nor that it was acted on as such, and therefore it is not necessary to pursue this line of thought further.

I will only add that had this been such a representation as plaintiff would have it declared to be, acted upon by him, I would not have considered it a proper case for a decree for performance, for the reason that I regard Cloney as full value for the amount, and there would be no equity to support the demand of plaintiff for a conveyance, upon the same consideration, of the large estate of his uncle, already otherwise disposed of for laudable and beneficent purposes.

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*I conclude, therefore, that the evidence does not entitle the plaintiff to the relief demanded. It is therefore adjudged and decreed that the complaint be dismissed, and that the plaintiff do pay the costs of this action.

Plaintiff's exceptions to this decree are very lengthy, and consist of extracts from the decree, and then allege error therein. It is not necessary to a full understanding of the case that any of them should be inserted except the 17th, which was as follows:

17. Because his honor erred in that he held as follows: "To say that a person is bound to make a will in a particular way is to assert a contradictory proposition. A contract to make a particular sort of will would appear upon principle to be a promise to do an act in its nature revocable, amounting to no more than a promise that the party should continue of the same mind."

Messrs. McCrady, Sons & Bacot, for appellant.

Messrs. De Saussure & Son, B. H. Rutledge, contra.

April 21, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. John McKeegan, late of Charleston County, departed this life about August 10, 1881, at Charleston, unmarried and without children or lineal descendants. He died possessed of considerable estate, both real and personal, situate in Charleston and elsewhere in the state. He left a will, in which his said estate was disposed of as follows: a house and lot in the city of Charleston was devised to a former slave of his, Robert Morrison, a legacy of $1,000 was given to the "Sisters of our Lady of Mercy," in the city of Charleston, $500 to one Ella O'Neill, $500 to Bella O'Neill, $500 to Mary Janney, and $500 to the Very Reverend Daniel J. Quigley, and the remainder he devised and bequeathed to his executors upon certain trusts therein set forth, nominating Bernard O'Neill and the Very Reverend Daniel J. Quigley as his executors, both of whom qualified.

During the life of the testator he was

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seized and possesed of a *certain estate in the County of Antrim, Ireland, commonly known and called "Cloneymore." This estate it seems he owned as far back as 1839, which, under some arrangement, he permitted his brother, one Francis McKeegan, the father of the plaintiff, to occupy, and, as al-

legal in the complaint, free of rent or charge, except taxes, rates, and assessments, and also an annual allowance of £10 sterling to be paid to another brother, James McKeegan, the said Francis having occupied the same under said terms from 1839 to 1875, when he died.

Shortly after the death of the said Francis, the plaintiff opened a correspondence with his uncle, the said John McKeegan, as to this estate, which resulted in a purchase of Cloneymore by the plaintiff at £1,400 sterling cash, which was paid and titles executed in fee simple. The plaintiff alleges in his complaint that he was induced to make said purchase by a written agreement made by his uncle with him, that if he would purchase Cloneymore at the price of £1,400 sterling, at that time equivalent to $7,700, he, the said John McKeegan, would at his death give and leave him, the plaintiff, all he was worth; that is, all of the property, real and personal, of which he might die possessed; that, acting upon this promise and inducement, and at great inconvenience, sacrifice, and expense to himself, he did raise the said sum and paid the same to the agent of the said John McKeegan, from whom he received title deeds to Cloneymore, in fee simple.

John McKeegan having disposed of his entire estate, as hereinbefore stated, to other parties than the plaintiff, the action below was instituted, in which the plaintiff demands judgment that the executors of the said John McKeegan may be compelled to perform the agreement above, and to pay over, transfer, and deliver all of the property of their testator to him, the plaintiff, in pursuance thereof.

The case was heard by his honor, Judge Kershaw, upon testimony taken by the master and reported to the court, who in an elaborate decree dismissed the complaint with costs.

The exceptions to the decree by plaintiff, appellant, are numerous, but they may be disposed of, we think, in the discussion of the following grounds: 1. What is the law

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applicable to a case of *this kind, and did his honor lay it down correctly? 2. Did the testimony bring the case under this correct principle? And 3. Did his honor reach his conclusion as to the facts by the admission and influence of certain alleged incompetent testimony objected to by the plaintiff?

As to the first question, there is authority for the position that while a man may ordinarily by will dispose of his estate, either in whole or in part, at his pleasure, nay, even at his caprice, yet he may also bind himself to dispose of it in a certain way or to certain parties, and failing to do so, his agreement may be enforced against his legal representatives. This proposition is sustained by the following cases cited from our own reports: Izard v. Middleton, 1 DeSaus., 116; Grimke v. Ex'rs of Grimke, Ibid. 366; Rivers v. Ex'rs of Rivers, 3 Id., 190 [4 Am. Dec. 609]; Gary v. Ex'rs of James, 4 Id., 185; Caborne v. Godfrey, 3 Id., 514 [5 Am. Dec. 593]. Besides, it is supported by numerous English cases cited in appellant's argument.

It is true, however, in all the cases, in view of the fact that a will is the free, voluntary, and uninfluenced expression of a testator as to the disposition of his property, which in fact he may make or not as he chooses, and when made revocable if he desires; that for one to be bound to dispose of his property in a certain way by will, the agreement or contract requiring him to do so must be established by the most satisfactory proof and after the strictest and most thorough examinaion of all circumstances attending it; or, as we said by Chancellor DeSaussure in Rivers v. Ex'rs of Rivers, supra, "To be sure, the court would be more strict in examining into the nature and circumstances of such agreements than any others, and would require very satisfactory proof of the fairness and justness of the transaction."

The above proposition being conceded, we are led next to the inquiry: What is an agreement, and under what circumstances does it become binding on the parties? Agreements may be divided into two classes, distinguished by the mode in which they are made. 1. The ordinary agreement, where an intentional offer is made on the one side founded upon a sufficient consideration, and an intentional acceptance on the other, resulting in the meeting of minds upon the

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same terms. 2. "Where it is created *by representations made by one party and acts done by the other upon the faith of such representations. When an absolute, unconditional representation of something to be done in the future is made by one person in order to accomplish a particular purpose, and the person to whom it is made, relying upon it, does the acts by which the intended result is obtained and purpose accomplished, a contract is thereby concluded between the parties." 3 Pom. Eq. Jur., § 1244.

The first is a contract at law and the second a contract in equity, and a disposition of property by will may be made the subject matter of either as well as any other subject matter. The following proposition laid down in appellant's argument we think is a correct result from all the cases on this subject, i. e.: "That to make a will in a particular way, on proper consideration, is as much a subject of contract as any other, and he who makes a contract on this subject is as much bound thereby as he would be by any other agreement on any other subject." It is said, however, by Mr. Waterman, which is in accordance with the caution already adverted to, that when the subject of the

contract is the disposition of one's property by his will, "such a contract, especially when it is attempted to be established by parol, is regarded with suspicion and not sustained except upon the strongest evidence that it was founded upon a valuable consideration and deliberately entered into by the decedent." Now, no error can be attributed to his honor, the Circuit judge, on the ground that he failed to recognize the possible existence in law of these two classes of contracts. On the contrary, he recognized both, but he failed to find facts sufficient for the application of either, and it was upon this ground that he dismissed the complaint.

We do not think, therefore, that the decree of the judge, when read as a whole, is obnoxious to the seventeenth exception. Was his finding error? Generally, as we have had frequent occasion to say, in appeals in chancery cases, where the facts are found by the Circuit judge upon testimony, this court will not disturb such findings unless the manifest preponderance of the evidence is the other way. And if in this case the findings of fact below rested entirely upon evidence, the rule referred to would be applicable. But the plaintiff here claims under what he styles

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a written con*tract, found in a certain letter of his uncle, the intent of which is a matter of construction; and construction of instruments being a matter of law, the question whether John McKeegan made the agreement relied on by the plaintiff is fully before us, at least so far as it depends upon the construction of the letter in question. The letter referred to is as follows:

"Charleston, 22 March, 1876.

"Mr. F. McKeegan.

"Dear Sir: This morning I got a letter from Mr. McNeill and one from you, relating to Cloney. I have sent all the power of an attorney to Mr. Nelson, and title deed and map of Cloney, yesterday, according to Mr. McNeill's letter of request. I have other papers pertaining to the same which I will send, if wanted. My price for Cloney is 1,400 pounds cash, and to any one else 1,500 pounds sterling. Mr. Nelson takes charge of the sale, the same as if I were there. Whatever he does in the selling of Cloney is binding and right. Why did you not say what Cloney was worth in your letter, as I wanted you to do? My price to you is already said on the other side, 1,400 pounds sterling cash, to any one else it will be 1,500 pounds, but you will get all I am worth at my death. Please let nothing happen the property until it is sold. John McKeegan."

It is proper here to notice with somewhat more particularity than above the facts and circumstances surrounding John McKeegan when this letter was written. As we have already stated, Francis McKeegan, Sr., the father of the plaintiff, went into possession of Cloney in 1839, and remained in possession until 1875, when he died. The plaintiff during this time had grown up and married, and was living upon Cloney and cultivating a portion of it, paying part of the expenses attendant upon the possession. It was understood during all this time in the family of Francis, Sr., that at the death of John McKeegan Cloney would be theirs by will of the said John.

On the death of Francis, Sr., the plaintiff immediately wrote to his uncle John informing him of that event, and also that his elder brother, Alex., would have a place, and, stating his own embarrassed situation, asked as a great favor to him that he might rent one-half of Cloney and half of the house, pro-

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posing to *secure the rent, and saying that the other half would be sufficient for his mother and his brother John. This was November 8, 1875, two days after the death of his father. Receiving no answer, he then on December 30, 1875, addressed a letter to Mr. Bernard O'Neill, of Charleston, informing him that he had heard that his uncle intended to sell Cloney, and imploring him, Mr. O'Neill, to see his uncle and learn from him if he would not let his brother John and himself have the first offer, and to know his price. On February 19, 1876, having received a reply from Mr. O'Neill, he again wrote to him, thanking him for the information, "the manner and terms," and stating that he could raise the funds for the purchase, and further, that he would leave the value of the property to his uncle, and urging him to learn whether his uncle would accept his proposition. The letter above referred to, from Mr. O'Neill to which this was reply, the plaintiff failed to produce. No doubt, however, from the reply, that the "terms" were mentioned.

About this time the plaintiff received a letter from his uncle, but this letter he failed also to produce on the trial. To this letter he replied on March 2, 1876, acknowledging the receipt of his uncle's letter, and saying that he consulted Mr. Robert Nelson, to whom his uncle had referred him, about the present value of Cloney, and stating that if he (his uncle) intended to sell Cloney to him, he would leave the value to him, saying he could get two-thirds of the purchase money from the board of trade; and further, that he could get the other third in some way. He also enclosed a letter from an attorney, Mr. O'Neill, of Larne, conveying instructions as to drawing the papers necessary to the trade. On March 22, 1876, John McKeegan replied in the letter first above mentioned, which is the letter upon which the case turns. In the meantime and before the trade was concluded some correspondence took place between Mr. Nelson and Francis McKeegan as to the value of Cloney, but as the originals of these letters were not pro-

duced, and the copies were objected to, they will for the present be omitted.

Now, looking at this important letter from the standpoint of these surroundings, did his honor, Judge Kershaw, err in holding that there was no contract therein embracing the

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property now *claimed by the plaintiff? There was certainly no contract in express terms in the sense that a proposition was made and accepted for anything besides the estate of "Cloney." The negotiation up to this time between the parties referred to nothing else. The letters of Francis McKeegan indicated an earnest desire to obtain an interest in Cloney. At first he desired to rent one-half, but learning that it was the intention of his uncle to sell, he then became anxious to buy, and was willing for his uncle to fix the price, and distinctly made that proposition, first through Mr. Bernard O'Neill and then in a letter to Mr. John McKeegan himself. Nothing had been said about the estate of John McKeegan in America. Nor does it appear anywhere that John McKeegan was at all anxious to sell Cloney to any one, nor that it would be a difficult matter to make a sale thereof. Nor does it appear in the letter that John McKeegan considered the value of any other property besides Cloney in fixing the price at which he was willing to trade. He thought "Cloney" was worth £1,500, but to his nephew he would let it go at £1,400, and it is manifest that there was no distinct, positive, and absolute contract made as to anything except Cloney, and that Francis McKeegan did not understand it to be a clear and distinct contract for more, is evidenced by the fact that he consulted his attorney, and afterwards, under the hope of fixing it, had the letter stamped, and this, too, without the knowledge of his uncle.

Was there a contract of the second class mentioned above? i. e., "When absolute, unconditional representation of something to be done in the future is made by one person in order to accomplish a particular purpose, and the person to whom it is made, relying upon it, does the acts by which the intended result is attained and purpose accomplished, a contract is thereby concluded between the parties." To bring a case under this principle it must appear that the party sought to be bound desires to bring about a certain result, and that in order to accomplish his purpose he makes an absolute, unconditional representation that he will do something in the future, and that the party to whom it is made, relying upon it, does the act required. Or to make a specific application to the case at bar, it should appear that John McKeegan desired to sell Cloney to Francis McKeegan,

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and in *order to consummate the sale he made an absolute and unconditional representation to him that if he would purchase he would leave him all of his estate, and that relying on this representation Francis closed the trade and took Cloney.

Do these facts appear either in the letter or in the evidence, or in the two combined? In the first place, it does not appear that John McKeegan was at all anxious to part with Cloney to any one, much less to Francis. The anxiety was all on the side of Francis. He wrote to his uncle within two days after the death of his father, and receiving no reply he then wrote to Bernard O'Neill imploring him to intercede in his behalf, proposing to buy upon terms to be fixed by his uncle, and then wrote a second letter to Bernard O'Neill, thanking him for information received as to the "manner and terms," stating that he could raise the necessary funds. These letters were all couched in the most earnest terms, and followed each other in quick succession.

John McKeegan finally replied to these earnest appeals, stating his price, and leaving it to Francis to say whether he would accept. It was in this letter, after stating to Francis that his price to him was £1,400, if to any one else £1,500, he added, "but you will get all I am worth at my death." Was this an unconditional statement that if Francis would take Cloney at the price mentioned, that in consideration thereof he would, in addition thereto, leave him all of his estate at his death? Was it made to induce Francis to take Cloney, and did Francis act upon it with that understanding? Would he have declined the purchase but for that representation? We cannot think so; we cannot think that John McKeegan ever intended the statement in that sense, or that Francis ever so understood it, or so acted upon it.

There is no sufficient and satisfactory evidence in the case showing that "Cloney" was worth less than £1,400, even with the tenancy rights (whatever they might have been) upon the place. The plaintiff's testimony on that subject is very guarded. He says: "At that time the value of Cloneymore to me was not £1,400." The plaintiff makes no offer to rescind. There is no evidence that there was any pressure upon John McKeegan requiring him to sell, or that Francis was likely to be the only purchaser. In fact, Francis dep-

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recated a public sale and urged *that this should not be had, and earnestly requested that he and his brother John should have the first offer. The case is entirely destitute of any fact showing a reason or motive why John McKeegan should hold out such an unusual and extraordinary inducement for such a trade. The only fact indicating that Francis ever conceived the idea that the whole estate of his uncle was embraced is the fact that he consulted his attorney and had the letter stamped. Why did he not consult Mr. John McKeegan? If in his opinion the prom-

ise was so vague and doubtful as to require the opinion of an attorney, why, before acting, did he not have a distinct understanding with his uncle? and why, without any information to him at the time, or ever afterward during his life, did he have the letter impressed with sixpennny stamps?

The natural explanation of the remark in the letter, "But you will get all I am worth at my death," seems to us to be as follows: John McKeegan had acquired a considerable estate in this country; he was an old man, without wife or children. His relatives lived in Ireland; he had been kind to them, especially to the family of his brother Francis; and it was the understanding, no doubt, with the knowledge of John, that at his death his kindness during life would be followed up by leaving to his family his estate here. No doubt he intended to do this, and when he wrote this letter this intention was present to his mind—not as a part of the proposed sale of Cloney, but as a long existing intention, altogether disconnected from Cloney, and this remark was thrown in, not as an inducement for Francis to buy, but as a reason why he was willing to take from him £100 less than from any one else. "I think the place," said he, "is worth £1,500, and if I was dealing with strangers, I should demand that sum, but you are to get my estate at my death anyway, and I will let you have Cloney at an under value." This is far more reasonable than that he was selling not only Cloney, but his whole estate, for £1,400, Cloney to be delivered at once and the estate at his death. At all events, the proof of the contract fails entirely to come up to the requirement of the cases cited.

It is urged, however, that there are numerous cases where the language used in a letter was not stronger than that used here, and yet the court held that a contract was estab-

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lished. And the *following cases are referred to: Gary et ux. v. Executors of James, 4 DeSaus., 185; Caborne v. Godfrey, 3 Id., 514 [5 Am. Dec. 593]; Goilmere v. Battison, 1 Vern., 48; Wankford v. Fotherley, 2 Id., 322; Hammersly v. Baron de Biel, 12 Clk & Fin., 45; Bold v. Hutchinson, 5 DeG., M. & G., 558; Ridley v. Ridley, 34 Beav., 478; Coverdale v. Eastwood, 5 Eng. Rep. (Moak), 755; Sutton v. Hayden, 62 Mo., 101. We have examined each of these cases and find the proposition stated by appellant fully sustained. The language used in each of them is very similar to that employed in the letter of McKeegan. For instance, in the last case referred to it was: "All her property should at her death be her niece's."

There is a marked difference, however, between the case at bar and all of these, a difference which vindicates the judgment in the latter cases, and yet prevents the application to the former of the principle upon which said judgments were founded. In many of the cases cited, the act done by the promisee was founded primarily and entirely upon the promise made. It had no other consideration. To illustrate: In Sutton v. Hayden, supra, an aunt had written to the guardian of her niece promising that if she would come and live with her and nurse and take care of her for the remainder of her days, all her property should at her death be her niece's. The guardian assented to the arrangement, and the ward faithfully carried it out. So in the case of Gary et ux. v. Executors of James, 4 DeSaus., supra. "The father, who had separated from his wife, wrote to his daughter: If you will come and live with me, you shall be the object of my care, and shall enjoy all the attention that can be bestowed by a tender father. You are the object of my love and shall be the heir of my property." In both of these cases the contract was undoubted, and it was properly enforced.

In the other cases the promise was equally apparent, not, however, from the terms used simply, but because founded upon circumstances in the nature of marriage settlements, as in the case of Coverdale v. Eastwood, 5 Eng. Rep., supra, and Caborne v. Godfrey, 3 DeSaus., supra. In the former case, in contemplation of a marriage between a Mr. John Coverdale and a daughter of Eastwood, the mother of Coverdale wrote to

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Mr. Eastwood, *stating that her son was willing to settle £4,000 on Miss Eastwood, and inquiring whether he would make a corresponding settlement. To this Mr. Eastwood replied that his busineses was not in condition to extract £4,000 from it, but that he had some years before made a will, in which he had left his property to trustees for the use of his daughter, and in the event of the marriage taking place, it was his intention to make a will in accordance with the facts of the case, and of course he would settle his property on his daughter in strict settlement, &c., &c. "I will take care that my property, which I suspect will exceed £4,000, shall be properly secured upon her and her children after my death." Held, that the above expression of intention amounted to a contract to settle the whole property upon the daughter in strict settlement. In the cases found in 1 and 2 Vern., and 5 DeG., M. & C., supra, the promise was distinct and positive, and based on an event which was to happen, marriage or otherwise.

The case before the court is destitute of any fact of the kind mentioned in either of the classes of cases above. "Cloney" was the matter about which negotiations between the parties had been going on; nothing else was ever mentioned in any letter of the plaintiff, either to John McKeegan or to any one else. "Cloney" was the primary and, as it appears to the court, the only consideration for the payment of the £1,400. The remark of John McKeegan that the plaintiff "would

get all of his property at his death," was not put upon the event of the purchase of Cloney, or as dependent in any way upon the negotiation in reference to "Cloney," but was a mere statement of what he, John McKeegan, had intended to do long since, voluntarily, and without regard to any consideration moving him thereto.

And it does not appear to the court that the value of Cloney is at all involved, or whether it was encumbered with tenancy rights, thereby reducing its present value to a purchaser. The plaintiff distinctly proposed, as we have already said, to purchase at a valuation to be fixed by the vendor, and this before the letter in question. That valuation was fixed and accepted, and the trade was consummated by the payment of the purchase money and the execution of titles, and in pursuance thereof the plaintiff has

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*been in possession for the last eight or ten years, without one word or whisper having ever been heard from the plaintiff that he had titles also to the estate of his uncle until the death of his uncle, when for the first time the claim is made upon his executors.

It perhaps would have been more in accordance with the promptings of nature that this old man should have left his estate to his relatives, but this estate was the fruit of his own labor and toil. He had earned and made it, and it belonged to him, and under our law, which is one of its boasts, he had the right to dispose of it as to him seemed best: and this, too, whether the disposition was moved by a sufficient and commendable motive, or by caprice: and having done so, although it has defeated the reasonable and natural expectation and hope of the plaintiff, there being no allegation or proof of undue influence, deception, or fraud, it must stand.

From the view which we have taken of the facts of this case, independent of the alleged incompetent testimony, we do not deem it necessary to determine whether the exceptions of the plaintiff in that respect are well founded. Because, even admitting the incompetency of this testimony, we think the decree of his honor is abundantly sustained by that portion about which there is no dispute. Nor is it necessary to say more than we have said above in reference to the encumbrance upon "Cloney" of the tenancy rights referred to in the argument.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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EMORY v. THE HAZARD POWDER COMPANY.

(November Term, 1884.)

1. Causes of action and remedies distinguished.

[2. *Action* ⇨46.]

The insertion of two or more demands for relief in a complaint is not a misjoinder. When therefore a complaint demanded damages for a nuisance, and an injunction to restrain it, the Circuit judge committed no error in refusing to require the plaintiff to elect between these two remedies.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 463; Dec. Dig. ⇨46.]

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[3. *Appeal and Error* ⇨204.]

*The admission of testimony which was introduced without objection cannot be made a ground of exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1258–1272, 1274–1278, 1280, 1569; Dec. Dig. ⇨204.]

[4. *Nuisance* ⇨33.]

Under the allegations of a complaint that the life of plaintiff and her family were in danger from the explosion of defendant's powder magazine near by, evidence in plaintiff's behalf as to the construction and management of the magazine is competent and pertinent.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 84–89; Dec. Dig. ⇨33.]

[5. *Nuisance* ⇨3.]

A matter may be a nuisance although it injuriously affects only one household. The judge therefore properly refused to charge "that if the jury find that the site of the powder magazine is such as to cause danger to the fewest persons, at the same time affording an accessible depot of supply, they must find for the defendant."

[Ed. Note.—Cited in Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co., 63 S. E. 556.

For other cases, see Nuisance, Cent. Dig. § 15; Dec. Dig. ⇨3.]

[6. *Trial* ⇨260.]

There is no error in refusing a request to charge where the matter so requested is substantially stated in the general charge.

[Ed. Note. For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⇨260.]

[7. *Nuisance* ⇨34.]

The complaint made no allegation that defendant's magazine or powder were carelessly kept, but did allege that the magazine endangered the life of plaintiff and her family: *Held*, that the judge did not err in refusing to charge that the jury must consider the case as if the powder was kept with the greatest discretion and security.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 90–92; Dec. Dig. ⇨34.]

[8. *Appeal and Error* ⇨999.]

In a law case questions of fact cannot be reviewed by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912 3921, 3923, 3924; Dec. Dig. ⇨999.]

[9. *Appeal and Error* ⇨232.]

This court declined to declare error in a charge which authorized the jury to find punitive damages where the only objections raised to such charge were that there was no testimony in the case to which it was applicable, and that its tendency was to inflame the minds of the jury against the defendant.

[Ed. Note.—Cited in Hall v. South Carolina Ry. Co., 28 S. C. 267, 5 S. E. 623.

For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1426, 1430, 1431; Dec. Dig. ⇨232.]

Before Kershaw, J., Charleston, February, 1884.

This was an action by Ann H. Emory against the Hazard Powder Company, com-

menced December 13, 1882. The opinion sufficiently states the case. The judge charged the jury as follows:

Gunpowder is a legitimate article of commerce. Therefore the storing and the keeping of gunpowder in a magazine, properly constructed, is a lawful business and not in itself a nuisance. Whether the particular magazine is or is not a nuisance must be determined by the circumstances of the case. When trade in a dangerous article, such as gunpowder, assumes large proportions, storehouses for the proper keeping of such dangerous articles become necessary for the safety of the community. Yet though necessary, the erection of such structures as to the location and manner of construction must be consistent with the rights of person and property of other persons. No one has the

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right, in *pursuit of his own private business, to injure another in his person or property.

If the defendants have erected and maintained a powder magazine and kept explosives therein in such a manner, and in such a location, and of such a character as manifestly to injure the lives of the plaintiff, her family, or her servants, residing on her own premises, then the action would properly lie against the defendants as for a nuisance; as in this case. In order to establish the plaintiff's right of action it is necessary that you should find that either manifest danger or actual injury to the plaintiff, in her person or property, has resulted from the causes alleged in the complaint, and if there be neither apparent danger nor actual damage resulting from such causes, the verdict should be for the defendants. If, however, you find that such manifest danger, or actual damage to person or property has resulted to the plaintiff from the acts of the defendants complained of, your verdict should be for the plaintiff.

If you find for the plaintiff, you should find the actual damage done to her person or property, reasonably attributable to the causes alleged; and also such reasonable damages as you may think proper to compensate her for any mental fear or suffering which naturally and reasonably resulted from the alleged wrongful acts of the defendant. If you find anything in the case that shows a wanton or reckless disregard of the plaintiff's rights, amounting to criminality on the part of the defendants, you might add to your verdict such punitive damages as you think proper, to punish the defendants for such criminal acts, if any. Should you find for the plaintiff, your verdict should be for a given sum of money, expressed in writing, and written upon the complaint, and signed by the foreman. If you find for the defendant, you will simply say: "We find for the defendant."

Messrs. McCrady, Sons & Bacot, for appellants.

Messrs. Lord & Hyde, contra.

April 21, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plain-

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tiff, respondent, in*stituted the proceeding below, alleging, as a cause of action, that defendant, appellant, had erected upon its premises a powder magazine, within two hundred yards of the dwelling of respondent, and within twenty-five feet of the road leading to a ship yard, in which magazine the appellant intended to keep in store large quantities of gunpowder; that said magazine was erected, notwithstanding the respondent had given written notice that she objected to its location so near her dwelling. And in the 6th paragraph of the complaint, she alleged that the erection and maintaining of a powder magazine, on the premises aforesaid, greatly endangered the lives of herself, her family, and servants from explosion, and also the lives and property of the public travelling on said road; and she demanded judgment: 1st. That said nuisance be removed. 2nd. That she recover, of the defendant, five thousand dollars ($5,000) damages caused thereby, and the costs of action. The defendant, answering, denied the allegation of paragraph VI.; and for further defence alleged that said powder magazine was erected with the knowledge and consent of all the adjacent proprietors, save the plaintiff, whose dwelling is much further removed from its site, than that of one who consented to its erection.

The cause came on for trial before his honor, Judge Kershaw, at the February term for Charleston County, when the counsel for the defence moved that the plaintiff be required to elect whether she would sue for damages, or for an injunction against a continuance of the alleged nuisance, which motion, after argument, was refused. The trial then proceeded, ending with a verdict for the plaintiff in the sum of $500. The defendant appealed upon the following nine exceptions:

I. "Because his honor erred, in that he refused the defendant's motion to require the plaintiff to elect whether she would proceed for damages, or for injunction.

II. "Because his honor erred, in that he allowed the plaintiff to introduce testimony as to injury to her health, claimed to have been produced by the proximity of the defendant's powder magazine, when there was no allegation in the complaint charging such injury.

III. "Because his honor erred, in that he

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allowed the plaintiff *to introduce testimony as to the construction of the magazine, and the conduct of the business, when there was no allegation in the complaint that the magazine was improperly constructed, or that the business was improperly conducted.

IV. "Because his honor erred, in that he refused to charge the jury as the defendant requested, 'that if the jury in this case find

that the site of the magazine is such as to cause damage to the fewest persons, at the same time affording an accessible depot of supply, that they must find for the defendant.'

V. "Because there was no proof that the proximity of the magazine was dangerous to the lives of the plaintiff and her family.

VI. "Because his honor erred, in that he refused to charge as the defendant requested, that the fears of the plaintiff, even though they may have been reasonable, will not create a nuisance.

VII. "Because there was no testimony introduced on the trial to show what, if any, were the damages complained of and sustained by the plaintiff, although his honor correctly charged the jury, 'therefore the storing and keeping of gunpowder in a magazine, properly constructed, is a lawful business, and not in itself a nuisance.'

VIII. "Because his honor erred in that he refused to charge the jury as the defendant requested, that there being no allegation in the complaint that the magazine or powder were carelessly kept, the jury must consider the case as if it was kept with the greatest discretion and security.

IX. "Because his honor erred, in that he charged the jury as follows: 'If you find anything in the case that shows a wanton or reckless disregard of the plaintiff's rights, amounting to criminality on the part of the defendant, you might add to your verdict such punitive damages as you think proper to punish the defendants for such criminal acts, if any;' when there was neither prayer for punitive damages, nor proof offered at the trial of any wantonness, recklessness, or criminality, nor any evidence at all introduced on the point."

We will consider these exceptions in their order. The first is as to the form of the action. The prayer of the complaint demands two kinds of relief—one equitable, and the

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other legal; *and it is contended that the plaintiff should have been required to elect between them; i. e., whether she should proceed for the removal of the nuisance, or for the recovery of damages. In other words, in the opinion of the defendant, there was a misjoinder, and on that account the action could not proceed until the plaintiff had elected. No doubt there can be a misjoinder of causes of action, and when this occurs it is objectionable, and may be met, either by demurrer, by motion to make more definite, and perhaps by motion to require the plaintiff to elect; but can there be a misjoinder of remedies demanded, liable to be assailed as on misjoinder of causes of action?

Causes of action are very often confounded with remedies; and being regarded as synonymous, the rules established with reference to the one, are sometimes supposed to be applicable to the other. This, however, is a mistaken view of the subject, as a brief investigation will show. A cause of action may be defined in general terms to be a legal right, invaded without justification or sufficient excuse. Upon such invasion a cause of action arises, which entitles the party injured to some relief, by the application of such remedies as the laws may afford. But the cause of action, and the remedy sought, are entirely different matters. The one precedes and, it is true, gives rise to the other, but they are separate and distinct from each other, and are governed by different rules and principles. It is true, that the motive which prompts the action is a desire for relief, and to obtain this relief is the object of the action, and in this sense the relief sought is the cause of the action; but this is not the legal sense of the phrase "cause of action." On the contrary, that sense is as stated above; i. e., a breach of one's legal rights.

When thus understood, and when the two are kept separate and apart as they should be, it will be seen at once, that while in some cases there may be a misjoinder, by the incorporation of two distinct causes in the same complaint, which would be subject to censure and correction, yet it does not follow, therefore, that the insertion of two or more demands for relief in the same complaint would constitute a like misjoinder, and subject to like censure and correction. On the contrary, inasmuch as oftentimes there springs from one cause of action several remedial rights,

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*entitling the party injured to several kinds of relief, it is not only not improper to unite several demands in such cases for relief, but failing to do so, the plaintiff might fail to secure the full measure of his rights. Hence we find numerous cases in the books, where two or more demands are made in the same complaint, and especially is this so in cases where the party is entitled to both legal and equitable relief, as in the case now before the court. See Pomeroy on Remedies, § 460, in which is given, as an example of this principle, the very form of action adopted below, to wit, an action to remove a nuisance by injunction, and for damages. We think the ruling of the Circuit judge was correct, both upon principle and authority. Simonds v. Haithcock, 18 S. C., 604; Davis v. Lambertson, 56 Barb., 480; Pom. Rem., 460.

The second exception assigns error in that plaintiff was allowed to introduce evidence as to injury to the plaintiff's health caused by the proximity of the magazine. It does not appear that any objection was made to the introduction of this testimony. This exception, therefore, cannot be considered. Burris v. Whitner, 3 S. C., 510; Fripp v. Williams, Birnie & Co., 14 Id., 508; State v. Washington, 13 Id., 453.

The third exception raises a question as to the competency of certain testimony in reference to the construction of the magazine and the conduct of the business. The issue

raised in the pleadings, on plaintiff's allegations and statement of her cause of action, was danger from explosion of the magazine. This being the issue it was certainly competent to show the construction of the magazine, and also the manner in which the business of keeping and storing the powder therein was conducted. Such testimony, as it appears to us, was not only competent, but decidedly pertinent to the issue involved.

The fourth, sixth, and eighth exceptions complain because his honor refused to charge the requests contained therein, as follows:

1. "That if the jury find that the site of the magazine is such as to cause danger to the fewest persons, at the same time affording an accessible depot of supply, that they must find for the defendant." The main question in the case was one of fact, and that was whether the magazine endangered

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the lives of the plain*tiff, her family, and servants, residing on her own premises. The judge charged that if, from the evidence, the jury found that it did, then the action could be maintained as for a nuisance. No objection was made to this portion of the charge, and if this be good law, as no doubt it is, we do not see how the judge could have modified it as requested in this exception. It is not the number of persons affected by a matter that makes it a nuisance, but it is its injurious, offensive, and noxious character; and it is none the less a nuisance because it affects only one or two instead of a multitude. There may be a private as well as a public nuisance, the distinction being dependent upon the number affected, but the fact of nuisance itself does not depend upon number.

2. Because his honor refused to charge as requested, that the fears of the plaintiff, even though they may have been reasonable, will not create a nuisance. The judge charged this in substance, or at least the difference between what he directly charged and this request, if there be a difference, is so slight that it cannot be assigned as error. He said to the jury, "In order to establish the plaintiff's right it is necessary that they should find that either manifest damage or actual injury to the plaintiff in her person or property has resulted from the causes alleged in the complaint, and if there be neither apparent danger, nor actual damage resulting from such cause, the verdict should be for the defendant." This was in substance saying that something more was necessary than the mere fears of the plaintiff.

3. Because his honor erred in that he refused to charge as requested, "that there being no allegation in the complaint that the magazine or powder were carelessly kept, the jury must consider the case as if it were kept with the greatest discretion and security." We do not think that this conclusion followed as a matter of law, because the complaint contained no allegation of the kind suggested, not so much at least as to require the judge to charge the request as a legal proposition, especially in the face of the allegation in the complaint that plaintiff's life and that of her family and servants were in danger from the explosion of the magazine, which allowed her to introduce testimony on that subject though not specially alleged in the complaint.

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*The fifth and seventh exceptions involve questions of fact entirely and are beyond our review.

The ninth objects to that portion of the charge which refers to vindictive or punitive damages; not because there was error in the legal propositions announced, but because, in the opinion of appellant, there was no occasion for the announcement as there was no testimony in the case to which it was applicable; and further, because it had a tendency to inflame the minds of the jury against the defendant. We cannot go into a matter of that kind. Our province is to review the propositions of law laid down in the case. But even if it were proper for us to consider the objection as urged, we do not think that it is well taken.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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THE STATE OF SOUTH CAROLINA v. PINCKNEY.

SAME v. DAVIS.

(November Term, 1884.)

[1. *Appeal and Error* ⊂⊃1050.]

Entries of surveys and sales from the original books of the commissioners of United States tax sales would seem to be admissible to show what was sold, although not to impeach the regularity and validity of the sale; but not having been considered by the Circuit judge, his admission of such testimony cannot be assigned as ground for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. ⊂⊃1050.]

[2. *Public Lands* ⊂⊃169.]

Where information is brought by the State for the recovery of real property from an individual, the State is not required to prove her title; she is the sovereign, the source of title, and upon this prima facie showing she rests until it is removed by a counter showing.

[Ed. Note.—Cited in State v. Evans, 33 S. C. 186, 187, 11 S. E. 697.

For other cases, see Public Lands, Cent. Dig. § 502; Dec. Dig. ⊂⊃169.]

[3. *Limitation of Actions* ⊂⊃6.]

Statutes of limitation, affecting only the remedy, constitute no exception to the general rule that laws operate only upon matters which arise after their passage, unless they otherwise expressly declare.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 16–31; Dec. Dig. ⊂⊃6.]

[4. *Limitation of Actions* ⟸6.]

The limitation of time within which the State will sue, adopted in 1870, cannot affect this action under the facts of the case.

[Ed. Note.—Cited in Heyward v. Farmers' Min. Co., 42 S. C. 148, 149, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702; Busby v. Florida Cent. & P. R. Co., 45 S. C. 318, 23 S. E. 50.

For other cases, see Limitation of Actions, Cent. Dig. § 19; Dec. Dig. ⟸6.]

[5. *Navigable Waters* ⟸46.]

A deed that calls for boundaries on tidal navigable streams conveys the land down to the ordinary high water line only.

[Ed. Note.—Cited in Nathans v. Steinmeyer, 57 S. C. 389, 35 S. E. 733.

For other cases, see Navigable Waters, Cent. Dig. §§ 287, 288; Dec. Dig. ⟸46.]

[6. *Internal Revenue* ⟸28; *Navigable Waters* ⟸37.]

Under a certificate of sale of island lands by United States tax commissioners, the vacant marshes surrounding such island, being property of the State and therefore not taxable un-

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der the act of Congress, *did not pass; and evidence may be introduced to show the State's ownership.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 80; Dec. Dig. ⟸28; Navigable Waters, Cent. Dig. § 219; Dec. Dig. ⟸37.]

[7. *Ejectment* ⟸114.]

A judgment for the recovery of land is not voidable for uncertainty because that it will be necessary to make a location of the property designated.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 352–370, 372, 374–378; Dec. Dig. ⟸114.]

[8. *Appeal and Error* ⟸1008.]

The Circuit judge's ruling that the trespass by defendant was not wilful, not disturbed; and doubted whether this court has the right to review a finding of fact in a case of this character.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955; Dec. Dig. ⟸1008.]

[9. *Internal Revenue* ⟸28.]

[A tax certificate issued by United States direct tax commissioners cannot affect the question of the ownership of lands by including them within its boundaries.]

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 80; Dec. Dig. ⟸28.]

[10. *Deeds* ⟸111.]

[Cited in Stephens v. Long & Bellamy, 92 S. C. 71, 75 S. E. 530, to the point that, if the description of the boundaries is ambiguous, the criterion for determining the location is the intention of the parties.]

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 309–315, 334, 335; Dec. Dig. ⟸111.]

Before Wallace, J., Beaufort, November, 1883.

These were informations filed September 20, 1882, by LeRoy F. Youmans, then attorney general, in the name of the State of South Carolina, one against C. C. Pinckney, jr., and the other against W. B. Davis, for the recovery of certain salt marshes alleged to be the property of the state.

At the trial, plaintiff offered in evidence certified copies of entries of surveys and sales from the original books of A. D. Smith, W. E. Wording, and William Henry Brisbane, of their surveys and sales made as United States tax commissioners during the years 1864 and 1863, under and by virtue of an act entitled "an act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes" Defendant objected to this evidence on the ground that the commissioners' tax sale certificate is prima facie evidence of title to the premises described therein, and that the papers offered are not competent testimony to rebut the same. The judge did not consider this evidence in making his decision, but thought it admissible as throwing light upon the question, what did the commissioners sell?

The case is otherwise fully stated in the Circuit decree and in the opinion of this court. The Circuit decree in the Pinckney case was as follows:

A body of land composed partly of highland and partly of marsh, lies in Beaufort County, and is bounded on the north by Coosaw River and St. Helena Sound, on the east by St. Helena Sound and Morgan River, and west by Parrott Creek and Coosaw River. It is penetrated by two creeks—Safe Harbor Creek, from St. Helena Sound on the

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north, and Bass Creek from Par*rott Creek on the south. These creeks lose themselves in the marsh. The largest piece of highland lies upon the southern side of the body, and is bounded by Morgan River on the south, on the north by Safe Harbor Creek and salt marsh, and on all other sides by salt marsh. The balance of the highland is small islands —some in the eastern and some in the western part of the main body—each of which is surrounded by salt marsh.

On June 4, 1787, a grant was issued by the state to William Fripp of "a plantation or tract of land containing one hundred and twenty acres of salt marsh and eight small islands, situate in the district of Beaufort, in St. Helena parish, bounding south on St. Helena River, commonly called Morgan River, west on Parrott Creek, north on vacant marsh, eastward on marshes from William Fripp's land, commonly called Morgan's Island showing such shape, form, and marks as are represented by a plat hereunto annexed." The plat referred to, dated April 18, 1787, is in evidence. It describes one hundred and twenty acres of salt marsh and eight small islands situate on the southwestern part of the main body.

On July 2, 1787, another grant was issued by the state to William Fripp, conveying to him "a plantation or tract of land containing thirty (being nine small islands) acres, situate in the district of Beaufort, in St. Helena parish; three of the islands bound westwardly on Safe Harbor Creek, the other six islands all sides on marsh lands, having

such shape, form, and marks as are represented by a plat hereunto annexed." This plat, dated April, 1787, is in evidence. It describes nine small islands upon the eastern part of the main body. For the largest body of highland, that bounded on the south by Morgan River, no grant is produced. It is referred to in the grant of June 4, 1787, mentioned above, as "William Fripp's land, commonly called Morgan's Island," and it is conceded that William Fripp had title to this land.

Thus stood the title to this property, as far as appears from the evidence, until March 10, 1863. On that day, under "an act for the collection of direct taxes in the insurrectionary districts within the United States, and for other purposes," the United States commissioners sold and conveyed to

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Edward S. *Philbrick "the tract of land known as Morgan Island, bounded northerly by Coosaw River, southerly by Morgan River, easterly by St. Helena Sound, westerly by Parrott Creek, containing two hundred and fifty-five acres, more or less." This description is taken from the tax sale certificate which is in evidence.

On January 27, 1865, E. S. Philbrick conveyed the same land to Geo. M. Wells. In January, 1867, Geo. M. Wells executed to E. S. Philbrick a mortgage of the same land. In pursuance of a judgment of foreclosure of the above mortgage, the same land was sold and conveyed by Alfred Williams, sheriff of Beaufort County, to Louis A. Phillips on December 22, 1869. On February 4, 1871, Louis A. Phillips conveyed to Theodore G. Eiswald "all that plantation or tract of land * * * known as Morgan Island, bounded on all sides by the waters and marshes of St. Helena Sound and of Coosaw and Morgan Rivers, measuring and containing eight hundred acres, more or less." Eiswald conveyed to W. B. Davis "that piece, &c., * * * known as Morgan's Island, bounded on all sides by waters of Coosaw River, St. Helena Sound, Morgan River, and Parrott Creek, measuring and containing four hundred acres, more or less."

On August 29, 1879, W. B. Davis executed a quit-claim deed to C. C. Pinckney, jr., of all his interest in "all that piece or parcel of land situate, lying, and being in the County of Beaufort and state aforesaid, being the northwestern portion of the island known as Morgan Island; bounded on the north by Coosaw River; on the east and south by a line beginning on Parrott Creek, forty-five chains to the southward of the mouth of Bass's Creek, and running north by forty-five degrees east (N. 45 ° E.) to Coosaw River or St. Helena Sound; and on the west by Parrott Creek, as indicated on the map of the United States Coast Survey of the entrance to Bull and Combahee Rivers, No. 435, A. D. 1871, attached to and made a part of this deed, and containing two thousand acres, more or less."

These deeds, from the tax sale certificate down to and including the deed of Davis to Pinckney, together with the state grants to Fripp, constitute all the paper title put in evidence.

This information was filed by the state to recover the marsh land included within the boundaries of Parrott Creek, Coosaw River,

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*St. Helena Sound, and Morgan River; the state conceding that the highland has been granted and so much of the marsh as is granted in the grant of June 4, 1787, to William Fripp.

To the demand of the state, the defendant opposes three grounds of resistance: 1. That in this action the state, to be entitled to recover, must show title affirmatively, and has failed to do so; 2. That the state is barred by the statute of limitations of actions by the state. 3. That defendant has title under a tax sale certificate issued under the laws of the United States.

It is hardly necessary to say that the state can only be brought into court with her own consent, and when she voluntarily comes into any of her own courts to assert a right of property, she is of course bound by the rules established there for the administration of justice between individuals, and to recover a demand must establish her right by proof. Has she done so in this case? The state at the close of the revolutionary war succeeded to the territorial rights of the British crown, and became the owner in fee of all the lands within her limits vacant at that time. She has no paper title; she acquired her right by the strong hand, and her title has been conceded by the British crown, the former owner by right of discovery and conquest. These are historical facts, of which the court will take judicial notice, and need not be formally proven. As to the right of the state as successor to the British crown, see 3 Kent Com., 377.

That salt marsh has for one hundred years been considered by the general assembly of this state as such land as when vacant was owned by the state, appears from the act of 1784 (4 Stat., 627) to raise supplies. By this act "all lands granted by the state" were classified and rated for taxation. This classification was continued from year to year in the annual acts to raise supplies, until the year 1815. In that year an act to fix the value of lands in the state for taxation, &c. (6 Stat., 7), was passed. In all these acts salt marsh is included as taxable when granted. In addition to this, the state has from ancient times actually exercised the power to grant lands of this description without question. See act of 1787 (5 Stat., 39, § 4); and act of 1836 (7 Stat., 151). See also grant of marsh land to William Fripp in 1787, in evidence in this case. From this it appears that

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*there is nothing in the fact that land is marsh land to affect the nature of the state's tenure of the soil.

It thus appears that the state has title to all the ungranted land within her territorial jurisdiction. How is this to be made to appear when the state undertakes to establish such right? When an individual brings an action to recover the possession of land, the rules of evidence require that he should prove a prima facie title by showing that he has the title of the state. This is done by the production of a grant, or by proving such a possession as raises the presumption of a grant. He is not required to formally prove the title of the state under whom he holds. That is presumed. The rule admits the title of the state, and it is matter for judicial cognizance, without proof. So when the state brings her action to recover land on the strength of her title, she invokes the rule just referred to as obtaining between individuals, and asks that the court take judicial cognizance of the historical facts upon which her title rests. To push the resemblance between what is required as between individuals and the state and individuals a little further, when the individual plaintiff rests upon the right of the state as source of title conveyed to him by grant, the burden of proof is shifted to the defendant, who must then show, to defeat plaintiffs' recovery, that the title of the state is really not in plaintiff. Thus a successful defence, too, must rest upon the presumption of the state's title.

It appears, then, that the presumption of the state's title is a rule of evidence that applies whenever title and jurisdiction are asserted by the pleadings by the state, and where a grant from the state, either actual or presumed, is set up by an individual, and is sufficient in either case to put the defendant upon his defence. In New York a more stringent rule has been adopted. Under their statute of limitations of actions by the state to recover land, it has been held that in addition to the presumption of title in the state to entitle herself to recover, she must prove that the land claimed has been vacant within the statutory period. See People v. Rector of Trinity Church, 22 N. Y., 46, and numerous cases which need not be cited here. While this rule appears to be exacting and

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requiring the overthrow of matter of *defence before it is set up, and against principle, it need not be discussed here, for reasons that will appear hereafter.

From the foregoing, it appears that the same rules that govern the procedure between individuals in actions to recover land are applied to the state as well when in a similar relation; the same presumption applying equally to both. Our cases upon this subject are State v. Arledge, 1 Bail., 551, and 2 Bail., 401 [23 Am. Dec. 145]; Trapier v. Wilson, 2 McC., 191.

The state then having a prima facie case, is she barred by the statute of limitations? It has long been settled that statutes of limitation do not run against rights of the state unless it is expressly provided that they shall. No statute of limitation upon the state's right was ever enacted in this state until 1870. This statute provides that the state will not sue after forty years from the accrual of her right. This was amended in 1873, reducing the time beyond which actions by the state would not be brought to recover land to twenty years. This latter statute has been reenacted in the revised code of 1882. All along, from the first enactment of the statute in 1870 down to the last, a provision has been preserved (see Code of 1870, § 96) to the effect that such limitation shall not extend to actions already commenced, or to cases where the right of action has already accrued.

The defendant went into possession in 1879, and traces title and claims under the United States tax sale certificate of the date of 1863. There is nothing to show adverse possession, or such trespass as indicated a claim and thus gave currency to the statute and right of action to plaintiff upon any part of the disputed territory outside of the grants to William Fripp prior to 1863. This action was commenced in September, 1882. No right of action then accrued until 1863. If either of the statutes of limitation above referred to had been of force in 1863, it is obvious that this action would not be barred by them, the least time (twenty years) not having run out.

If, however, in accordance with the New York rule, the plaintiff should be required to show affirmatively that his right of action accrued within the time limited by the act, the testimony submitted by him, both nega-

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tive and positive, is full to the point. *To show that the right of action of plaintiff accrued within the twenty years, the witnesses, Windsor, Pengelly, and Freland, all testify that the salt marsh was vacant in 1877. White testifies that Davis, defendant's grantor, refused to receive pay for rock dug in the marshes in 1879. The grants to William Fripp are bounded on rivers and vacant marsh, and therefore do not include such marsh as they are bounded on, nor such parts of the shores of the tidal navigable streams as are covered by water at ordinary high tides. There is no proof in rebuttal of this testimony which shows vacant and unoccupied and unclaimed marshes within the statutory period, and brings this action within the scope of the stringent New York rule above referred to.

The defendant sets up as a defence, and claims title to the disputed land under the United States tax sale certificate above referred to. The chain of title from this certificate has already been set out. This certificate, in effect, declares that under "an act

for the collection of direct taxes in insurrectionary districts within the United States, commissioners sold and conveyed to Edward S. Philbrick" the tract of land known as Morgan's Island, bounded northerly by Coosaw River, southerly by Morgan River, easterly by St. Helena Sound, westerly by Parrott Creek, containing two hundred and fifty-five acres, more or less.

In the case of DeTreville v. Smalls, 98 U. S., 522 [25 L. Ed. 174], the Supreme Court of the United States held that such certificate "shall be prima facie evidence, not merely of the regularity of the sale, but also of its validity, and of the title of the purchaser." The same case held further, that "all possible attack upon the prima facies of the certificate is limited by the express provisions of the act, which enacted that it should only be affected as evidence of the regularity and validity of the sale, by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previous to the sale, or that the property had been redeemed." It will not be necessary to quote from the acts of Congress, as this citation from the opinion of the court embraces all that is material to the question under consideration.

The legality of the sales, evidenced by these certificates, having been affirmed by the Supreme Court of the United States (see DeTreville v. Smalls, supra), the only question

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in connection *with this certificate is, what did it convey? It describes the property conveyed as Morgan Island, and bounds it by certain great navigable tide-water streams. It is not described as the property of Fripp. If there is land within the descriptive boundaries that at the time of the sale belonged to the state, that land was not subject to taxes, and was not and could not, therefore, be conveyed by the certificate under the citation from the act of Congress in the quotation from the opinion in DeTreville v. Smalls, supra. According to that case (the lands of the state not being subject to taxes), the title of the state was not affected by the sale and certificate.

In this connection, therefore, the important question is, did the state own any land within the descriptive boundaries mentioned in the certificate? and if so, what were its boundaries? A conveyance which calls for, as boundaries, navigable streams in which the tides ebb and flow, carries the title of the grantee to the line reached by the water at ordinary or daily high tide, as distinct from high spring tides or ordinary spring tides. This rule is distinctly described and established in the case of U. S. v. Pacheco, 2 Wall., 590 [17 L. Ed. 865]. Therefore the marsh land, between low water and ordinary high water, was not conveyed by the certificate. If it has not been conveyed by the state, it is still the property of the state. Any other land within the description, that had not been conveyed by the state, was the property of the state at the date of the certificate, and was not, therefore, conveyed by the certificate. The grant, therefore, of June 4, 1787, to William Fripp, conveys one hundred and twenty acres of salt marsh, and eight small islands, bounded south on St. Helena River, commonly called Morgan River, west on Parrott Creek, north on vacant marsh, eastward on marshes from said William Fripp's land, commonly called Morgan Island.

It will be observed that this grant conveys marsh which is bounded by vacant marsh and by great navigable tide water streams, and also conveys eight small islands as included in the marsh. It is obvious that the word "island," when used in this grant in relation to the small islands, signifies highland, and when in the same paragraph William Fripp's land is spoken of as Morgan's Island, it is impossible to resist the inference

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that there, *too, it was used to signify the same thing, and meant highland. This inference is strengthened by the words, "on marshes from William Fripp's land." If it had been intended to include marshes as part of Morgan's Island, the grant would have called for Morgan Island as a boundary instead of the "marshes from" that island. This grant, by calling for these marshes as a boundary, excludes them from the grant. By calling for Morgan River, Parrott Creek, and St. Helena Sound as boundaries, the ground covered by these rivers at ordinary high tide is excluded from the grant. By calling for vacant marshes on the north while conveying marsh excludes all marsh not included in the one hundred and twenty acres conveyed. This same grant recognizes William Fripp's title to Morgan Island, that is, to the highland called in the grant Morgan's Island, and this is the only evidence that the title to that land had passed out of the state.

The quit claim deed of Davis to defendant, described above, includes much if not all the marsh and highland granted by the grant of June 4, 1787, as well as the marsh described as vacant and lying on the north of the one hundred and twenty acres. As the title to the land conveyed by Davis to Pinckney had never been conveyed by the state, except the one hundred and twenty acres of the grant of 1787 (to all the land except the one hundred and twenty acres), the state now has title and is entitled to recover it.

The title of the state to all the land within the boundaries claimed by defendant is absolute, except to so much of it as is embraced in the grant of 1787 to William Fripp. To ascertain, therefore, the exact physical boundaries of the land of the state, it will be necessary to locate this grant by a survey to be made according to the findings of the decree. For the phosphate rock and phosphatic deposits taken by defendant from land

lying outside of this grant the state would be entitled to recover damages. As the defendant mined the rock under color of title there was no wilful trespass, and the measure of damages would be the value of the rock, less the cost of rendering them marketable. In the present state of the evidence, however, it is impossible to tell what amount of rock has

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been mined upon the land of the state *and how much taken from the one hundred and twenty acres for which the state would not be entitled to damages. These questions can be settled in the further progress of the case.

It is therefore ordered, adjudged, and decreed, that plaintiff is entitled to recover from the defendant all the land within the limits claimed by him, except the one hundred and twenty acres granted by the state in 1787 to William Fripp, and is also entitled to recover damages, according to the principle stated in this opinion upon that subject, for all phosphate rock and phosphatic deposits mined and taken by defendant from the land adjudged herein to be the property of the state. It is further ordered that the parties, or any of them, have leave to apply at the foot of this decree for all necessary orders to carry it into effect.

In the Davis case the Circuit decree was as follows:

A decree in the case of The State of South Carolina against C. C. Pinckney, Jr., has just been signed by me. This case involves precisely the same principles as that, and what is said there need not, therefore, be repeated here. The information there was filed to recover the marsh land upon the western end of the same body upon the eastern end of which the marsh land lies that the information here was filed to recover.

It may be said here, generally, that the state is the owner of all the land in the state that has not been granted by herself, or by former owners, before her title accrued. On the eastern end of the body of land bounded on the north by Coosaw River and St. Helena Sound, and on the south by Morgan River, and on the east by Parrott Creek, there are nine small islands, containing in the aggregate thirty acres, bounded on all sides by marsh. These islands were granted to William Fripp by the state on July 2, 1787, and described in the grant as follows: "A plantation or tract of land containing thirty (being nine small islands) acres, situate in the District of Beaufort, St. Helena Parish; three of the islands bound westwardly on Safe Harbor Creek, the other six islands all sides on marsh land." The plat of the same gives the same description. The title to the state, therefore, to these islands has passed away from her. The grant, however, calling for the surrounding marsh as a boundary of

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the land con*veyed, excludes the marsh from the grant, and there is nothing to show that the title of the state to that has been granted.

The tax sale certificate does not convey this marsh, for the reasons stated in the decree in the case of The State v. Pinckney, Jr., above referred to. It is also in proof that these marshes have not been occupied or held adversely, and were, therefore, vacant prior to 1863. There is no proof that defendant has taken any minerals from the marshes or otherwise injured the property.

It is therefore adjudged that the State of South Carolina is the owner, and is entitled to recover all the marsh land described in paragraph 47 of the information.

Messrs. Hayne & Ficken, and Wm. Elliott, for appellants.

Messrs. Smythe & Lee, contra.

April 21, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. These cases, depending upon the same facts and principles, were heard together and they will be considered together. The attorney general in behalf of the state, filed an information against each of the defendants on September 20, 1882, for intrusion into certain salt marsh lands adjacent to and surrounding Morgan Island, and digging, mining, and removing phosphate rocks and phosphatic deposits from said territory, the property of the state. The defendants each answered, denying that said territory or any part thereof was the property of the state; and pleading "that no right or title in or to the territory described in the information accrued to the state within the space of forty (40) years next before the commencement of this action, and that if any such right or title ever accrued to said state, the same accrued more than forty (40) years before the time of the commencement of this action; and neither the said state nor those from or under whom it claims have received the rents and profits of said territory or of any part thereof within the space of forty (40) years before the commencement of this action." It was referred to Simeon Hyde, jr., to take the testimony which is in the brief. The Circuit judge makes so clear a statement of the

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facts, *we will not undertake to restate them, except so far as to make the opinion intelligible.

Near the point where the waters of the Coosaw River mingle with those of St. Helena Sound, they divide, and while one portion goes direct, the other branches off towards the south, and known at first as Parrott's Creek, lower down assumes the name of Morgan River and flows into the Sound. The small body of land thus isolated is set down in chart No. 435 of the United States coast survey as "Morgan's Island." It is very low and flat as indicated by the fact that its superficial area consists of

about three hundred and fifty acres of highland and about five thousand of salt marsh, for the most part subject to the ebb and flow of the tides, the mean rise and fall being from six to eight feet, and at full spring tides all the surface is under water, except the highlands and the spots called hammocks. What is known as the highlands are made up by a number of islets interspersed through the marsh; but by far the greater part is at one place on the south shore bounding on Morgan River, and contains about two hundred and fifty acres. This is the only part of the whole island capable of cultivation, and, as conceded, was once the private property of William Fripp, who had a settlement there.

On June 4, 1787, a grant was issued by the state to William Fripp of "a plantation or tract of land, containing one hundred and twenty acres of salt marsh and eight small islands situate in the district of Beaufort, in St. Helena parish, bounding south on St. Helena River, commonly called Morgan River, west on Parrott Creek, north on vacant marsh, eastward on marshes from William Fripp's land, commonly called Morgan Island, showing such shape, form, and marks as are represented by a plat herein to be annexed," &c. On July 2, 1787, a few days after the above grant, another was issued by the state to William Fripp, conveying to him "a plantation or tract of land containing thirty acres (being nine small islands), situate in the district of Beaufort, in St. Helena parish; three of the islands bound westwardly on Safe Harbor Creek, the other six on all sides by marsh lands, having such shape, form, and marks as are represented by a plat hereunto annexed," &c. There was no evidence that any other part of the marsh lands of the island had ever been granted,

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or *any thing tending to show that down to 1863 any person other than William Fripp, and those who held under him, ever had or claimed to have private property in any part of the said marshes.

On March 10, 1863, during the late war, under and by virtue of an act of Congress "for the collection of direct taxes in insurrectionary districts within the United States," &c., the commissioners appointed by the general government for that purpose sold and conveyed to one Edward S. Philbrick for the consideration of $255 a tract of land, which in the certificate of the tax sale is described as follows: "the tract of land known as 'Morgan Island,' bounded northerly by Coosaw River, southerly by Morgan River, easterly by St. Helena Sound, and westerly by Parrott Creek, containing two hundred and fifty-five acres, more or less," &c. On January 27, 1865, Edward S. Philbrick sold the land (giving a quit-claim deed) to George Wells for $1,200, who executed a mortgage of the same, in which the land was still described as containing two hundred and fifty acres. The plantation was sold to foreclose the mortgage and purchased for $3,100 by one Lewis A. Phillips, who, on February 4, 1871, sold it without warranty to C. Eiswold for $6,000. For the first time this deed describes the plantation known as Morgan Island as containing eight hundred acres. Eiswold again conveyed it, on December 20, 1871, to William B. Davis, and in this deed the plantation is described as containing "four hundred acres, more or less."

On October 4, 1877, W. B. Davis & Son opened a correspondence with the secretary of state (Hon. R. M. Sims), for a grant of the marsh lands on Morgan Island (4,932 acres), assigning as a reason for desiring the grant, that "parties were trespassing on the marshes, and endangering their stock, and they wished to be entirely certain as owners, before they proceeded to extreme measures." This correspondence terminated July 16, 1879, by the secretary refusing to issue the grant, under the act of 1878, forbidding "the sale or grant of such lands, covered with water and marshes, as may be situated in that portion of the state, in which are phosphate rocks and phosphatic deposits." 16 Stat., 811.

On August 29, 1879, William B. Davis

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sold and conveyed to *Charles C. Pinckney, jr., all his interest in a tract of land, described in the deed as follows: "All that tract of land situate in the County of Beaufort and state aforesaid, being the northwestern portion of the island commonly known as 'Morgan Island'; bounded on the north by Coosaw River, on the east and south by a line beginning on Parrott Creek, forty-five chains to the southward of the mouth of 'Bass Creek,' and running north by forty-five degrees east (N. 45° E.) to Coosaw River or St. Helena Sound, and on the west by Parrott Creek, as indicated on the 'Map of the United States Coast Survey' of 'the entrance to Bull and Combahee Rivers,' No. 435, A. D. 1871, attached to and made a part of this deed, and containing two thousand acres more or less." This is the part of marsh lands adjacent to the Morgan Island plantation, upon which the state charges intrusion by C. C. Pinckney, jr., and the portion on the island not thus conveyed, is that upon which the state charges intrusion by the other defendant, William B. Davis, who claims to be the owner of the whole remainder of the island.

The cause came on for a hearing before Judge Wallace, who held that the state has title to all the ungranted lands within her borders, and that the presumption of her title is a rule of evidence that applies whenever title and jurisdiction are asserted by the pleadings for the state, and when a grant from the state, either actual or presumed, is set up by an individual, and in either case

is sufficient to put the defendant to his defence. He held further, as matter of fact, that, up to 1863, all the marsh lands on Morgan's Island were vacant, never having been granted (except the two small portions which had been granted to Fripp in 1787), and that neither the tax title nor the statute of limitations divested the title of the state in that which was then vacant, and therefore he pronounced judgment for the state plaintiff in both cases for the marsh lands claimed, and damages for the phosphatic deposits taken from the respective parcels; excepting the one hundred and twenty acres granted to Fripp, June 4, 1787, and the little tract containing thirty acres (being nine small islands) granted to Fripp on July 2, 1787. The title to these parcels having passed out of the state, she can, as to them, neither claim the land itself,

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nor damage for the phosphates taken *from the parcels respectively. When they are located, it will appear upon whose part they will fall, and whether any phosphates have been taken from them. Both parties appealed.

Plaintiffs appeal "First. Because his honor erred in holding that the trespass of the defendant (in the Pinckney case) was under an honest but mistaken belief of right, instead of being wilful. Second. Because his honor erred in holding that it was impossible to tell what amount of rock has been mined on land of the state, and how much on the one hundred and twenty acres of defendant; whereas the testimony clearly shows that none was taken from defendant's territory. Third, Because his honor erred in striking out the testimony reported at folios 359, 348 to 354, &c."

Defendant's exceptions. Each defendant appeals, but their exceptions are so nearly identical that we will set out only those of the defendant Pinckney.

I. "Because his honor erred in admitting in evidence the entries of surveys and sales from the original books of A. D. Smith, W. E. Wording, and William H. Brisbane of their surveys and sales, made as United States tax commissioners, during the years 1863 and 1864, under and by virtue of an act of Congress, entitled 'an act for the collection of direct taxes in the insurrectionary districts within the United States, and for other purposes,' &c.

II. "Because his honor erred in holding that because the state has title to all ungranted lands within her territorial limits, she is the presumptive owner of the lands described by the pleadings herein.

III. Because his honor erred in holding that when the state, as plaintiff, brings an action to recover land on the strength of her title, the defendant, to defeat a recovery, must produce a grant, or prove such possession as raises a presumption of a grant.

IV. "Because his honor erred in holding that the presumption of the state's title is a rule of evidence that applies whenever, by the pleadings, title and jurisdiction are asserted by the state; and that, to defeat a recovery, the defendant must rebut such presumption, either by the production of a grant, or by proving such possession as raises the presumption of a grant.

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*V. "Because his honor erred in holding that the assertion of title in the state by the pleadings established a prima facie case for plaintiff and put the defendant upon his defence, there being no allegation either that the land was vacant and ungranted when the state succeeded to the territorial rights of the British crown, or that the state has subsequently acquired title by gift, purchase, escheat, or otherwise, defendant in his answer having denied that the land is the property of the state, and set up title under a United States tax sale certificate.

VI. "Because his honor, having found as a question of fact that defendant traces title and claims under a United States tax sale certificate to Edward S. Philbrick of date 1863, should have held that this was prima facie evidence that the land in question is not the property of the state, and that the burden was then on plaintiff to rebut this evidence by showing that at the date of the sale to Philbrick the land within the descriptive boundaries of the certificate was the property of the state.

VII. "Because his honor should have held that by putting in evidence this certificate the burden of proof was shifted to the plaintiff to show that the land described in the pleadings was the property of the state at the date of the tax sale in 1863, and therefore not subject to taxation.

VIII. "Because his honor should have held that said certificate is prima facie evidence that all the land within the descriptive boundaries mentioned therein was subject to taxation at the date of the execution and delivery of the certificate; and he erred in holding otherwise.

IX. "Because, it not being alleged by the pleadings and there being no evidence whatsoever tending to show that the land in controversy was vacant and ungranted when the state succeeded to the territorial rights of the crown, nor that the state has since acquired title thereto by gift, purchase, escheat, or otherwise, his honor should have held that plaintiff is not entitled to recover the same in this action.

X. "Because the grant to William Fripp June 4, 1787, by calling for St. Helena or Morgan River and Parrott Creek as boundaries, included all the land down to low-water mark of said boundaries; and his honor erred in holding that said grant, by

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*calling for said boundaries, excluded from the grant the ground covered by said streams at ordinary high tide.

XI. "Because the tax sale certificate to Edward S. Philbrick conveyed whatever land is contained within the natural boundaries mentioned therein; and his honor erred in holding that 'the marsh land between low-water and ordinary high-water was not conveyed by the certificate.'

XII. "Because there is no evidence whatsoever tending to show that the state's right or title to the land in question accrued within twenty years before the commencement of this action, or that the state has received the rents and profits thereof within the space of twenty years, and his honor should have so held.

XIII. "Because his honor erred in holding that the statute of limitations of 1870, as amended by the act of 1873, is not applicable to this case; and that the state's right of action against the defendant is not barred thereby.

XIV. "Because, having found that the testimony fails to establish either what portion of the land in controversy is the property of the state or the physical boundaries thereof, the judgment should have been for the defendant.

XV. "Because upon the pleadings and the facts found by his honor, the information should have been dismissed," &c.

We will not attempt to follow the exceptions, but endeavor, in our own order, to consider all the points made. The plaintiff's third exception, as to the exclusion of certain evidence of records, was properly withdrawn at the argument.

The defendant's first exception complains of error in admitting as evidence "the entries of surveys and sales from the original books of the commissioners of tax sales." These records are made "evidence in any court of the truth of the facts therein stated." 12 U. S. Stat., § 14, p. 425. It may be that under the decision in DeTreville v. Smalls, 98 U. S., 517 [25 L. Ed. 174], these records were not admissible in evidence for the purpose of impeaching the regularity and validity of the tax sale, but we can hardly doubt that they were admissible as throwing light upon the question, what did the commissioners actually sell? But the Circuit judge reports that when he came to study the case, the evidence was not considered by him in making up his judgment, and we need

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not therefore *consider the matter further. Susong v. Vaiden, 10 S. C., 247 [30 Am. Rep. 50]; Thompson v. Brannon, 14 S. C. 553.

Several of the defendant's exceptions, in various forms, make the point that the Circuit judge committed error in holding that the presumption of the state's title is a rule of evidence that applies whenever by the pleadings title and jurisdiction are asserted by the state; and that to defeat a recovery the defendant must rebut such presumption either by the production of a grant or by proving such possession as raises the presumption of a grant. As we understand it, this objection does not go against the pleading, but the proofs in the case. When an individual sues for land, his complaint merely asserts title to the locus in quo; it need not set out the sources of his title, as that is matter of proof. So in these cases the information asserted the title of the state to the marshes in question.

But it is said that an individual would have to recover, if at all, upon the strength of his own title, of which he must make proof. That is true, and so it seems to us the state was required to do in these cases. It is said, however, that the state was not required to produce a paper title, but was allowed, contrary to the general rule, to recover upon the same presumption of a title. We do not see how the state could produce any paper title as to lands which, as alleged, had never been granted, unless perhaps she had been required to produce the history of the revolution. Our doctrine is that the state succeeded at the revolution to all the rights of the British crown, one of which, as Lord Coke tells us, was "that all lands are holden mediately or immediately of the king." The state with us is the common source of title, and retains it, indefinitely it may be, until it passes from her in the only manner known to the law, by presumption either express or implied, or hereafter possibly by operation of the new statute of limitations. We do not consider this fundamental doctrine as a mere presumption of fact, which may be overthrown; but as the established unalterable theory of our government as fixed and certain as any provision in the constitution itself. It is as if the people themselves had made a grant to the state, and to facilitate its proof had lodged it in the archives of the state. This is the original grant, so to speak,

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which constitutes the prima facie *title of the state, and as the courts take judicial cognizance of it and regard it in proof, it was, as we conceive, sufficient to put the defendant upon his defence.

We have not been referred to a case in which the precise point was ruled, but the form of proceeding in all of the cases indicates that it was taken for granted. The cases rule that the state, as such, cannot maintain a direct action of ejectment, but must proceed by information filed by the attorney general, for the reason given, that the state being possessed of a theoretical ubiquity cannot be disseized. This indicates very distinctly that the state was seized, originally had the title, and that under the doctrine of nullum tempus it remained in the state until it was in some way transferred. State v. Arledge, 1 Bail., 551; Id., 2 Bailey, 401 [23 Am. Dec. 145]; State v. Stark, 3 Brev., 101; 3 Wash.. Real Prop., 172; 3 Bl. Com., 261. In the very learned argument for the defendants, it was said that in the case of Stark, supra, "that the highest court in

the state, in an action by the state to recover land, declared that a non-suit ought to be granted, because the evidence failed to establish that the title to the land was vested in the state." That is true, but a careful perusal of the case will show that the question arose as to lands which had been granted for the settlers in the old town and township of Saxe Gotha. In the opinion, Judge Brevard said: "It has not been pretended that the locus in quo is vacant or unappropriated land, or that it has lapsed to the state by escheat. The title endeavored to be established, appears to be of a mixed and mongrel character, a legal nondescript, neither a legal nor equitable title, but partaking of the character of both; and the arguments which have been urged to support it, although learned and ingenious, appear of the same cut and character, and marvellously adapted to such a claim." We adhere to what was said by this court in the late case of the State v. The Pacific Guano Company, ante 50: "The state is the sovereign, the source of title, and upon this prima facie showing she rests, at least until it is removed by a counter showing."

But it is earnestly urged that, whilst such may have been the rule of evidence under the operation of the doctrine of nullum tempus occurrit regi, such doctrine no longer prevails in South Carolina; that the code

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adopted in 1870 (Code of 1882, § 95) *enacted what may be considered a statute of limitations against the state as follows: "The state will not sue any person for or in respect to any real property or the issues or profits thereof, by reason of the right or title of the state to the same, unless, 1, such right or title shall have accrued within twenty years before any action or other proceeding for the same shall be commenced; or unless, 2, the state, or those from whom it claims, shall have received the rents and profits of such real property or of some part thereof, within the space of twenty years." The defendants plead this statute, and insist that it shall be interpreted (as a similar provision in the New York code has, as alleged, been construed by the courts of that state) in such manner as to require the state, in order to defeat the bar of the statute, to show affirmatively that her right or title accrued within twenty years before action brought. The Circuit judge held as matter of fact, even according to the requirements of the New York rule, that the state had shown by both positive and negative proof that the right of action had accrued within the time limited by the act, and in that we concur with him.

But we think the facts of this case do not require us to go into that matter, and we prefer to reserve our judgment as to the proper construction of the act. Statutes of limitation, affecting only the remedy, constitute no exception to the general rule, that laws operate only upon matters which arise after their passage, unless they otherwise expressly declare. Nichols v. Briggs, 18 S. C., 481. This section of the code expresses no such intent, and we think it does not operate retrospectively. This action was commenced September 2, 1882, and whether we consider the time of the tax sale (1863), when those under whom the defendants claim, had their first connection with these lands; or the time when the statute was adopted (1870), or that when the proof shows possession was first taken of these marsh lands (1879), the period of twenty years had not expired when the action was brought. It surely cannot be that a requirement as to proof, originating in a statute of limitations and having exclusive reference to that, can be obligatory in a case to which the statute of limitations has no application as an act, somewhat in the nature of a declaratory law. As was said in the case of

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The Pacific Guano Company, *above cited, "Until 1870 the doctrine of nullum tempus prevailed in this state, and since that time twenty years have not elapsed, so that it is not necessary to consider the scope and effect of the new provision in the code as to when and under what circumstances the state will not sue."

This brings us to the main defence made by the defendants—that they have title to the marshes in question under the tax sale certificate of the United States direct tax commissioners. It is as follows:

"United States of America.

"Tax Sale Certificate, No. 28.

"This is to certify, that at a sale of lands for unpaid taxes under and by virtue of an act entitled 'an act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' held pursuant to notice at Beaufort, in the district of Beaufort, in the State of South Carolina, on the 10th day of March, A. D. 1863, the tract or parcel of land hereinafter described, situate in the district of Beaufort and state aforesaid, and described as follows, to wit: the tract of land known as 'Morgan Island,' bounded northerly by Coosaw River, southerly by Morgan River, easterly by St. Helena Sound, and westerly by Parrott Creek, containing two hundred and fifty-five acres, more or less, was sold and struck off to Edward S. Philbrick for the sum of two hundred and fifty-five dollars, he being the highest bidder, and that being the highest sum bidden for the same, the receipt of which said sum in full is hereby acknowledged and confessed.

"Given under our hands at Beaufort, S. C., this tenth day of March, A. D. 1863.

(Signed) "A. D. Smith,
"W. E. Wording,
"Wm. Henry Brisbane,
"Commissioners."

The defendants claim that this certificate is "equi-potent with a deed," and proves itself; that it must be taken as affording evidence, not only that all the land embraced within its extended boundaries, including the marsh as well as the highlands of the whole island, was conveyed to the purchaser,

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but *that the commissioners had the right to sell and make good title to the same. Judge Wallace, following the decision of the Supreme Court of the United States in the case of DeTreville v. Smalls (98 U. S., 522 [25 L. Ed. 174]), held that the certificate was prima facie evidence, not only of the regularity of the sale, but also of its validity and the title of the purchaser; but he held further, that it might be shown that the marsh lands included in the boundaries were vacant lands, and not taxable at the time of the sale in 1863, and if so, they could not be sold and conveyed for taxes.

Was this error of law? In the first place, we are inclined to think that the certificate, considered as a deed and properly construed, did not convey or intend to convey the marshes, or any more than the Fripp highlands. This seems to have been the understanding of the parties themselves at the time of the sale, and long afterwards, as shown by the successive conveyances of the land, and the correspondence of W. B. Davis & Son with the secretary of state, seeking at first a grant for these marshes, and failing in that, to purchase them. This view is strengthened also by the surrounding circumstances at the time of the sale; by the fact that it was avowedly a sale of private property for taxes; by the character of the marshes, being uninhabited, and daily swept by the tides, they were considered worthless; and by the terms of the certificate itself, which carefully read, do not purport to convey Morgan's Island as such, but "the tract of land, known as 'Morgan Island,' containing 255 acres," &c. It is true the boundaries inserted are identical with those of the whole island; but that inaccuracy, or mistake, might and probably did occur by confounding the tract of land naturally called Morgan Island, with the island itself, especially as it was very difficult to give accurate boundaries to the tract of land bearing that name, as it was the only settlement on the island, and had no neighbors with adjacent lands, but rose out of the marshes, and stood in their midst isolated, and as clearly marked, as an island itself. We are aware that natural objects named as boundaries are entitled to much weight in questions of location, but at last the true criterion in such cases is the intention of the parties. Norwood v. Byrd, 1 Rich., 135 [42 Am. Dec. 406]. For many reasons it seems to us difficult, if not impossible, to conceive how commis-

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sioners, making sales *for taxes in arrear, could advertise for sale a tract of land "known as Morgan Island," containing 255 acres, and then not sell the tract of land, so advertised, but the whole of Morgan Island, containing nearly 6,000 acres, nineteen-twentieths of which was at the time regarded utterly worthless, and had never been occupied for agricultural purposes. But as the Circuit judge made no distinct ruling upon the point, we will pass it.

Second. But on the presumption that there was no inaccuracy or mistake in setting out the boundaries, and that the certificate intended to convey everything within its extended boundaries, how would the matter stand? It will be observed that the territory embraced is bounded on all sides by great navigable tidal streams, viz., Coosaw River, Parrott Creek, Morgan River, and St. Helena Sound; and such description, according to the well established common law rule, only carried the title of the riparian proprietor down to ordinary high-water mark, excluding all the marsh lying below that line, and subject to the daily ebb and flow of the tides. United States v. Pacheco, 2 Wall., 587 [17 L. Ed. 865]; 3 Wash. Real Prop., *634; State v. The Pacific Guano Company, supra. Mr. Washburn, at the page indicated, states the common law rule thus: "If the boundary be a navigable stream, that is, one in which the tide ebbs and flows, the land extends only to the water's edge, or to high-water mark. 5 Wend., 423; 3 Scamm., 520; 7 Conn., 186. And the owner of land bounding on such a stream would have no cause of action against one who, in navigating it, should lay his boat or vessel or raft upon the shore fronting his land, if he has not made improvements upon the same, since the title to the shore is in the state. So a conveyance bounding 'westerly by the beach,' excludes the shore or land between low and high water mark. The same is the rule where the land is bounded by the sea, or an arm of the sea. The space between high and low water mark of the border of the sea is called the 'shore,' and belongs by the common law to the sovereign, precluding, of course, the claim of any other person, unless acquired by grant from the sovereign. The state, in such cases, holds the fee in trust for the public," &c.

This being undoubtedly the common law rule, has it been changed in this state? As

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there has been some change effected, *from well-known causes, as to what shall be regarded "navigability," we have looked in vain for some authoritative decision changing the law in relation to riparian rights on tidal navigable streams. We find no such case, but, on the contrary, that as late as 1850 it was declared by the late Law Court of Appeals, in McCullough v. Wall (4 Rich., 80 [53 Am. Dec. 715]), "that no authoritative

decision has yet been made in this state which has changed the common law on the subject;" and that this exact expression was repeated two years after (1852) in Shands v. Triplet (5 Rich. Eq., 79), in the late Equity Court of Appeals, composed of such judges as Chancellors Johnstone, Dunkin, Dargan, and Wardlaw. By his great industry, the counsel for the defendants found and cited the case of Trapier v. Wilson (2 McCord, 191), which he urged had changed the rule. That was a contest between John T. Wilson and Paul Trapier as to whether there was any vacant land on "North Island"—meaning vacant highlands. The case itself states that "the question was whether the grant to Laroche (under which Mr. Trapier claimed) covered the whole of the island except the salt water marsh, or was it to be located according to the courses and distances set forth in the plat?" It was a simple question of location, the only point being whether the grant covered the upland of the whole island. It was held that the whole island was covered by the grant, and from this it is sought to draw an inference that the court held the doctrine that Trapier, as riparian proprietor, had title down to low-water mark. We cannot perceive that any such decision was involved in the case. The doctrine we are considering was not broached, and neither the common law rule nor the words "high" or "low-water" mark were referred to in the opinion. Judge Richardson, in delivering the judgment, again excepts the marshes. He says: "By the description set forth in the grant, the location is plain and unquestionable. The whole island (unless the marsh be so called) is clearly within it." It seems that in those days, before the discovery of phosphates, salt marsh went for nothing.

It is strongly urged upon us that the line of high water, as a limit to the rights of riparian proprietors on navigable tidal streams, will be uncertain, inconvenient, and difficult of enforcement; that it will be against the settled usage of our people and

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*an injustice to such of them as live upon the seaboard. We have heard nothing of the "usage" spoken of through the medium of sworn testimony in the case. If the enforcement of the rule (it is no new law or principle) should produce inconvenience, we would most sincerely regret it. But finding it incumbent upon us to decide the question, seeing clearly the rule of the common law, and failing to find any authoritative decision which changes that rule, we must hold that it is now, as it always has been, the law of the state.

Third. By the laws both of the United States and of this state ungranted vacant land is not taxable, and therefore cannot be sold for taxes. It is contended, however, upon this point, that proof tending to show that the marshes were vacant ungranted land at the time of the sale was inadmissible, for the reason that these marshes were included within the boundaries of the tax certificate, which must be taken as affording evidence of the fact "that all the land within the descriptive boundaries mentioned therein was subject to taxation at the date of the execution and delivery of the certificate." We cannot accept this view. The certificate may be conclusive evidence as to some particulars—as, for instance, the regularity and validity of the sale—but it would be against all principle to allow it to give character to lands by simply including them within its boundaries. As was said in the case of Cooke v. Pennington (15 S. C., 194): "It would be a reproach to the administration of justice if a deed executed under these circumstances should be held to prove itself conclusively and to transfer one man's property to another."

But even if such a prima facies existed, it was surely admissible to rebut it by proof. The act of Congress under which the sale took place has been construed to allow the certificate to be annulled by establishing the fact that the property was not subject to taxes. DeTreville v. Smalls, supra. In that case it is said that "the act of 1863 declares that the commissioners' certificate shall be prima facie evidence not only of the regularity of the sale, but also of its validity and of the title of the purchaser; and it enacts that it shall only be affected as evidence of the regularity and validity of the sale by establishing the fact that the property was not subject to taxes, or

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that the taxes had *been paid previously to the sale, or that the property had been redeemed," &c. Under the act, therefore, proof was allowable tending to show that "the property was not subject to taxes." This could be effected, as was done, by showing that at the time of the sale the marsh lands were vacant lands. The Circuit judge found as matter of fact that the marshes were vacant land at the time of the sale, and we cannot therefore say that he committed error when he held that "as the title to the marshes had never been conveyed by the state (except the one hundred and twenty acres granted to Fripp), the state is now entitled to recover the same."

One of the grounds of appeal complains that the judgment was too uncertain to be enforced and therefore should be set aside. It does not seem to us that there is such uncertainty about it. The judge settled the rights of the parties by declaring that the state, plaintiff, was entitled to recover all the marsh lands except what was included in the grant to Fripp. Of course, that will have to be located, but does not make the judgment uncertain.

The plaintiff complains that the judge

committed error in holding that the trespass of the defendants was under an honest but mistaken belief of right instead of being wilful. We are not sure that we have the right, but if we have, we decline to disturb the finding of the judge in the particular indicated.

The judgment of this court is that the judgment of the Circuit Court, in the case of The State v. C. C. Pinckney, Jr., and also in the case of The State v. William B. Davis, be affirmed.

In these cases there was a petition for a rehearing, upon which the following order was passed:

PER CURIAM. We have carefully considered this petition for a rehearing of the above stated cases. As we understand it, the application is based on two grounds.

First, for the reason as supposed that the court made a mistake in holding that "all the marshes in question are below high-water mark, while the testimony is that a large portion of the marshes are not covered by the ordinary or daily tides." This court did not undertake to decide how much of the marshes lie below high-water mark, but

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simply to announce the common law *rule as to the rights of riparian proprietors bounding on tidal navigable streams, and to hold that so much of the marshes as lie below that line (whatever it may be) could not pass by the certificate of tax sale which called for tidal navigable streams as boundaries; or, as stated in the decree, "excluding all the marsh lying below that line and subject to the daily ebb and flow of the tide," &c.

Second. That it was a mistake in the court to assume that the Circuit judge (Wallace) found, as a matter of fact, that the marshes were "vacant" at the time of the tax sale in 1863. There was no mistake. As we understand, Judge Wallace did hold that the marshes (with the exception of the portion covered by the grants to Fripp) were "vacant" even down to 1877, and in 1879. In the case of The State v. C. C. Pinckney, Jr., he said: "Windsor, Pengelly, and Freland, all testify that the salt marshes were vacant in 1877. White testifies that Davis, defendant's grantor, refused to pay for rock dug in the marshes in 1879." A finding that the marshes were "vacant" in 1877 or 1879 involved necessarily a finding that they were vacant up to that time, including of course 1863. If vacant in 1877, they must have been vacant in 1863. Land is never again vacant after the title has once passed out of the state. In the case of William B. Davis, Judge Wallace says expressly: "The tax sale certificate does not convey this marsh for the reasons stated in the decree in the case of The State v. Pinckney, Jr., above referred to. It is also in proof that the marshes have not been occupied or held adversely, and were therefore 'vacant' prior to 1863. It is therefore adjudged that the State of South Carolina is the owner and is entitled to recover all the marsh land described in paragraph 47 of the information," &c.

The petition is refused.[1]

[1]These cases have been taken under writ of error to the Supreme Court of the United States.—REPORTER.

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*WALKER, EVANS & COGSWELL v. BOLLMANN BROS.

(November Term, 1884.)

[1. *Fraudulent Conveyances* ⟸208.]

A complaint by subsequent creditors attacking as fraudulent a prior mortgage, should not be dismissed as insufficient. A prior deed of a debtor may under some circumstances be assailed by a subsequent creditor with notice.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 631, 633; Dec. Dig. ⟸208.]

[2. *Fraudulent Conveyances* ⟸8.]

Where a deed or other instrument has been executed by one not in debt at the time, and the deed is founded upon a sufficient consideration, it is invulnerable as to subsequent creditors with notice, as well as to all others.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 8; Dec. Dig. ⟸8.]

[3. *Fraudulent Conveyances* ⟸208.]

Before a subsequent creditor can attack a settlement or transfer of a party made when not indebted, he must show that the same was voluntary and was made with reference to future indebtedness, or prove circumstances of fraud other than what arises from its being voluntary.

[Ed. Note.—Cited in Bates & Co. v. Cobb, 29 S. C. 403, 7 S. E. 743, 13 Am. St. Rep. 742; Jackson v. Plyler, 38 S. C. 498, 17 S. E. 255, 37 Am. St. Rep. 782; Gentry v. Lanneau, 54 S. C. 516, 32 S. E. 523, 71 Am. St. Rep. 814.

For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 631, 633; Dec. Dig. ⟸208.]

[4. *Appeal and Error* ⟸991.]

When a Circuit judge in a chancery case has not indicated upon what findings of fact he bases his conclusion of law, this court must pass upon the facts as original questions.

[Ed. Note.—Cited in Guckenheimer v. Libbey, 42 S. C. 167, 19 S. E. 999.

For other cases, see Appeal and Error, Cent. Dig. § 3896; Dec. Dig. ⟸991.]

[5. *Fraudulent Conveyances* ⟸298.]

A bond and mortgage executed between parties closely connected, *held*, not to have been without consideration, or given with a view to future indebtedness, or attended by circumstances showing fraud upon subsequent creditors, notwithstanding some suspicious conduct between the parties at or about the same time. Mr. Justice McGowan dissenting.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 892–895; Dec. Dig. ⟸298.]

[6. *Fraudulent Conveyances* ⟸205.]

The bond and mortgage being good, plaintiffs cannot attack its subsequent assignment

by the mortgagee as collateral security for a debt due by her, or raise any question as to whether the debt so collaterally secured has been paid, both mortgagee and assignee being before the court.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 624–628; Dec. Dig. ⟸205.]

[7. *Appeal and Error* ⟸878.]

Where the plaintiff fails to appeal from a finding of fact in a decree which gives him the relief he asks, he is concluded by such finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3573–3580; Dec. Dig. ⟸878.]

[8. *Fraudulent Conveyances* ⟸269.]

Where plaintiffs allege in their complaint that property of S. has been fraudulently disposed of by mortgage, the question whether such property is in the hands of S., only as agent of H., cannot be considered.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 789–795; Dec. Dig. ⟸269.]

Before Cothran, J., Marion, April, 1884.

This was an action by Walker, Evans & Cogswell, H. K. & F. B. Thurber & Co., and others, judgment creditors of A. Schafer, against Bollmann Bros., H. Sternberger, L. Sternberger, and A. Schafer, trading under the firm name of A. Schafer, E. Iseman, and E. Sternberger. The opinion states the case. The Circuit decree was as follows:

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*The plaintiffs, to maintain the issues on their part, offered in evidence:

1. The judgments obtained by them in the court of trial justice; the transcripts of the same filed in the clerk's office; and the returns of nulla bona, made by the sheriff on the executions.

2. The proceedings before the referee supplementary to the executions, including Judge Hudson's order of February 2, 1884.

3. The certified examination under said order, taken in writing, of A. Schafer, H. Sternberger, B. Bollmann, and E. Iseman, with numerous exhibits, including the mercantile books of A. Schafer, the bond and mortgage of A. Schafer to H. Sternberger, of November 8, 1881; the three notes of Lizzie Sternberger to Bollmann Bros., aggregating $4,500; the accounts current severally of Bollmann Bros. with A. Schafer and Lizzie Sternberger, and the proceedings before trial justice Evans, resulting in judgments in favor of E. W. Percival and Boykin, Carmer & Co. vs. A. Schafer and Lizzie Sternberger sued jointly.

4. The order dated February 23, 1884, made at chambers on the motion to appoint a receiver. The defendants' counsel objected to the introduction of the evidence taken in writing before the referee in supplementary proceedings, upon the grounds: (1) that that is an independent proceeding; and (2) that the parties who testified there being present or procurable, the evidence proposed is not the highest evidence. The objection was sustained. The plaintiffs' counsel were not disposed to risk their case upon the testimony of adverse witnesses and declined to put the defendants upon the stand, but claimed the right, as they are all parties to this suit, to prove by the referee and others, who were present at the examination, the declarations there made by them. I held that this could be done; and to this ruling the defendants by their counsel duly excepted.

A. Q. McDuffie, Esq., the referee, was then sworn, and testified as follows: "I saw H. Sternberger sign this paper" (testimony taken upon the examination). "It was read over to him before he signed it. "Behrend Bollmann also appeared before me and testified as a witness, I took down his testimony, certified it, and believe that" (referring to the written testimony) "to be what he said."

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*X by Mr. Harllee: "A good deal of what he said was not taken down. I tried to take down all the material testimony I exercised great care and took down the answers as nearly in the words of the witness as I could. I don't think I read over Bollmann's testimony to him."

X by Mr. Nettles: "There were two examinations of H. Sternberger. I think I read both over to him; he only signed one."

"The corrections (alteration of words) ran through both examinations of H. Sternberger and were made at his instance as read over to him. I think as I said at first that both were read over to him; one follows the other." Again witness said: "As to A. Schafer and E. Iseman's testimony, I have the same to say as in regard to B. Bollmann's." "Schafer speaks indistinctly broken English."

The testimony is too voluminous to make further extracts from it; with my own notes of evidence, it is all in writing and can be taken up if necessary to do so. It consists, besides my notes taken at the trial and the numerous exhibits and books of account, of nearly ninety pages of legal cap, and from a careful and patient consideration of all of it, I have reached certain conclusions, which I shall now proceed to state:

First. The execution of the bond and mortgage by Schafer to H. Sternberger, and by him assigned to Lizzie Sternberger, and by her to Bollmann Brothers, was fraudulent.

Second. The transfer of the same to Bollmann Bros. was without fraud so far as they are concerned, but the three notes made by Lizzie Sternberger and signed by them as accommodation endorsers, were paid by them with her funds as appears by the account current, and at or about the time of their maturity. They were so marked at the time of payment by Bollmann Bros., who had the unquestionable right if they paid them with their own funds, to have cancelled their own endorsements, and to have held them as subsisting claims against Lizzie Sternberger, the maker. Instead of doing this, however, they have marked them paid, and their true and

only value now is that of vouchers in their hands, showing the disbursement to that extent of her funds.

The question of application of payments, so earnestly urged at the trial by the counsel

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for the Sternbergers, is at rest, when*ever it appears that the application has been actually made by the creditor and acquiesced in, as was done in this case; and notwithstanding the fact that there is a balance still due to Bollmann Bros. on the account with Lizzie Sternberger, such can only appear by striking the same at the foot of the account, and the balance so found cannot be referred to the intermediate items of the notes which had been already paid, and such payment destroyed forever the said mortgage as a security in the hands of Bollmann Bros. "When the brains are out the man must die." B. Bollmann said in his testimony concerning these notes, that when they were endorsed, on March 13, 1882, the several amounts were charged up to Lizzie Sternberger on her account current; that the rule of their house is the same as to endorsements and acceptances.

This does not appear to me to be in conformity with the rule of law upon the subject or with the approved custom of merchants. The relations between the endorser and the endorsee, and between the acceptor and the drawer, are altogether different. In the former it is not the reasonable expectation of the endorser to be compelled to pay. In the latter the acceptor can expect nothing else, for the very fact of accepting implies the possession of funds of the drawer for that purpose, and in such case it is proper to charge up to the drawer the amount of the acceptance—not so, however, in the case of endorsement; and not withstanding the fact that in law the act of endorsement is an acknowledgment of pecuniary liability to the endorsee, and in order to preserve his credit and prevent protest the endorser does pay promptly and punctually, it is not in his original contemplation to do so.

The testimony of B. Bollmann that these notes were paid with the funds of Bollmann Bros. must be regarded as but little, if anything, more than a mere play upon words, for it clearly appears, from their own entries on the account current, that at the maturity of the two notes first due they were in funds of Lizzie Sternberger by remittances of cash for the exact amounts and at the precise times, and as to the third note that they were at its maturity partially in funds of hers, and soon afterwards fully so. It is most probable

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that Pelzer, Rodgers & Co., the *endorsees of said notes, were paid with funds of the bank upon the checks of Bollmann Bros. It is needless, however, to speculate upon this point. It is quite enough that the fact appears that Bollmann Bros. were in funds belonging to the maker of the notes.

Third. It is contended by the plaintiffs that Bollmann Bros. should make up to the creditors of Schafer the difference between the appraised value of the stock of goods and the amount realized at the sale. I do not find in the connection that Bollmann Bros. have had with this matter enough to warrant the allowance of this demand, even if there were any proof upon this point to guide me to a satisfactory conclusion. I have already held that the transfer of the bond and mortgage to Bollmann Bros. was without fraud on their part; this, however, should be limited to the fact of transfer. They have not been blameless in the use which they have allowed to be made of this mortgage in the hands of E. Iseman. It is certainly extraordinary that, holding an unpaid demand of nearly $2,000 against Schafer, they should consent to his financial destruction by seizing and selling his only means of paying their demand for the purpose of applying all the property of their insolvent debtor, thus made more insolvent, to the payment of the debt of another debtor of theirs whose credit with them is good, and whose means of paying her own debts are not questioned. Besides, the sale of the goods was altogether satisfactory as to prices, and was greatly desired by the plaintiffs; and if Schafer and his alleged allies are capable of committing a tithe of the fraud charged, the plaintiffs should be satisfied with the result of the sale, even had it been at a sacrifice, which they do not pretend is the case. Bollmann Bros. therefore cannot be thus charged, and the measure of their liability in this suit will be fixed when the matter of apportioning the costs comes to be made.

Fourth. As to the alleged partnership between Schafer and the Sternbergers. Upon this point there is a great deal of testimony, much of it tending to show that Schafer was a very facile instrument in their hands; the mercantile books were very inartificially kept; the business was loosely and ill conducted; but I am unable to reach the conclusion that there was any partnership after the alleged dissolution between the parties.

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*Fifth. As to the purchase by E. Sternberger of the live-stock and wagons from A. Schafer shortly before the seizure of the stock by E. Iseman. The only direct proof upon this point is to the effect that said sale was bona fide, and there is nothing to the contrary except the suspicious circumstances of (1) proximity of time; (2) the relationship of the parties; and (3) the final catastrophe. These are not enough to warrant more than a presumption of fraud. The law makes no exception even in favor of strong presumption. The rule is inflexible. Fraud must be proved. It cannot be presumed. The proof is insufficient.

I have thus endeavored to dispose of the various issues presented in this case as briefly as I could to be perspicuous; but at much greater length than I desired. There are

very few questions of law in the case, and these are of easy and familiar application when the facts are determined. The counsel for the defendants earnestly insisted that this case should fall within the operation of the principle recently established in this state in the case of Hirshkind v. Israel (18 S. C., 157), as to the retention of possession by the mortgagor of a stock of goods after condition broken. It could not have been the intention of the court in that case to make of such mortgages a favored class. On the contrary, the retention of possession was held in express terms to be a badge of fraud —a presumption against the validity of the mortgage; but it was as far from the purpose of the court to hold that such a transaction was sacred as that it was per se fraudulent. In short, the rule deducible from that case is, that in order to determine whether the mortgage is fraudulent or not, all of the circumstances must be taken into consideration. I have endeavored to do so in this case, and have attained the conclusions above set forth.

It would not be proper, however, to conclude this decree without adverting to the supplementary proceedings hereinbefore referred to. This matter has not been presented to me in such shape as to enable me to pass intelligently upon it. The order of February 23, 1884, under which this suit was instituted, has been already enlarged beyond the scope of said order, which was meant to make up and try the issues as to the validity of the bond and mortgage of

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November 8, 1881. At the trial, a ques*tion was suggested as to Schafer's right to a personal exemption of $500 in the personal property sold, in the event that the conclusions herein expressed should be attained. Under an intimation from the court that this, with possibly other matters pertaining to the supplementary proceedings, should be more appropriately determined when the said proceedings come up for consideration, counsel desisted, and it is but fair and just that any interest that Schafer may have therein should not be prejudiced by this decree.

In the multitude of matters involved in this case, and the wide range which it has taken, I omitted to state at the proper place in the decree that during the trial a motion was made in behalf of Lizzie Sternberger to amend her answer so as to set up a claim to the assigned bond and mortgage, if it should appear that the notes to Bollmann Bros., had been paid off by her. The motion was refused for obvious reasons, which I will not here repeat, and her counsel duly excepted. Reference may be made to the sections of the code upon the subjects, especially section 194, and to Dunsford v. Brown, 19 S. C., 565.

Wherefore it is ordered, adjudged, and decreed as follows:

1. That the transaction of November 8, 1881, between A. Schafer and H. Sternberger, and the assignment of the latter of the bond and mortgage of Schafer to Lizzie Sternberger, and by her of the same to Bollmann Bros., was fraudulent, and that said bond and mortgage are null and void, and must be delivered up to the clerk of this court, to be by him cancelled.

2. That the three notes of Lizzie Sternberger, bearing date March 1, 1882, payable to the order of Bollmann Bros., at seven, eight, and nine months after date respectively, and aggregating $4,500, have been paid and satisfied with funds of the said Lizzie Sternberger.

3. That the proceeds of the sale of the stock of goods in the store at Little Rock, now in the hands of the sheriff, be disbursed pro rata amongst the plaintiffs and such other creditors of A. Schafer as may present and prove their demands before A. Q. McDuffie, master, to whom a reference for that purpose is hereby ordered.

4. That the costs herein be taxed by the

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clerk of this court *according to law, and when ascertained, that judgments for the same be entered against the defendants, Herman Sternberger, Lizzie Sternberger, and Bollmann Bros.; such judgments against Bollmann Bros. to be enforced only in the event that said costs cannot be made out of the said Sternbergers, or either of them. That in said taxation, costs be allowed to the defendant, E. Sternberger, but not to the defendant, E. Iseman, who must pay his own costs.

The defendants appealed upon the following exceptions:

1. Because his honor erred in permitting to be read and used in evidence in the case, on the ground that the same could be regarded as admissions, certain notes of testimony taken by the master in a supplementary proceeding, in which neither the parties nor the issues were the same as in this action; which notes included the testimony of witnesses not parties to this action, and of parties not so connected as to make the admission of one evidence against the others, consisted solely and entirely of narratives of matters and things past and gone, and were permitted to be introduced and read upon the master saying upon oath "that the testimony taken by him and certified to contained, he believed, what was said by the witness at the time; that his memory was poor, and he could not testify from his recollection what was said, but could say that he took down at the time what was said, or the most of what was said, and the notes contained what he took down."

2. Because his honor erred in entertaining this action, and in holding that plaintiffs had the right to assail "the transactions of November 8, 1881 (to wit: the bond and mortgage of A. Schafer and the bill of sale of H. Sternberger of that date, and recorded November 10, 1881), they not being creditors

of either A. Schafer or H. Sternberger at the time, and their claims in this action being against A. Schafer alone, and not dating back further than the summer or fall of 1883.

3. Because his honor erred in holding as matter of law that the defendants, Bollman Bros., when they paid the three notes of L. Sternberger, of date March 1, 1882, upon which they were accommodation endorsers,

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and marked the same paid, thereby *deprived themselves of all right to continue to hold the bond and mortgage in question in this action as collateral security.

4. Because his honor erred in holding that said three notes were paid by L. Sternberger with her own funds, and that under the testimony Bollmann Bros. could not be permitted to claim that they had applied the money sent them by L. Sternberger to their unsecured open account against her.

5. Because his honor erred in refusing to allow defendants to introduce evidence to show that subsequent to the assignment of the bond and mortgage in question to Bollmann Bros., there was an understanding and agreement whereby the said bond and mortgage were to be held by Bollmann Bros. as collateral to secure, not only the said three notes, but all advances made, or that might be made, by them to said L. Sternberger.

6. Because his honor having refused to permit the introduction of said testimony on the ground that the same would not be responsive to any allegation in the answer, erred in refusing to allow defendants so to amend their answer as to lay the ground required by his honor for the introduction of said testimony.

7. Because his honor erred in holding the bond and mortgage in question to be fraudulent and void ab initio; such conclusion being not only not supported by the evidence, but contrary to the same.

8. Because his honor erred in holding as a conclusion of fact that the assignment of the bond and mortgage in question to L. Sternberger by H. Sternberger was fraudulent and void.

9. Because his honor erred in entertaining the question as to the validity of the said assignment in this action, the plaintiffs not being creditors of either H. or L. Sternberger, and having no right to ask for an adjudication as to the validity of said assignment.

10. Because his honor erred in refusing to permit L. Sternberger to so amend her answer as to claim as her own absolutely the bond and mortgage in question, in case it should be held that Bollmann Bros. had lost their right to hold the same as collateral security, it having been held by his honor that she could not make such claim her answer as it stood.

11. Because his honor erred in adjudging

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that the bond and *mortgage in question should be delivered up and cancelled; the same being, under the testimony in the case and the law applicable to the same, even if no longer collaterals in the hands of Bollmann Bros., a valid and subsisting claim against A. Schafer, and the property of either L. Sternberger or H. Sternberger, and because it was error not so to hold and adjudge.

Messrs. Boyd & Nettles and W. W. Harllee, for appellants, cited 1 Story Eq. Jur., §§ 199, 200, 203; 9 Ala., 662; 44 Am. Dec., 452; 14 Ga., 207; 58 Am. Dec., 559; Adams' Eq., 176, note; Pom. Eq. Jur., § 968; 13 S. C., 253; 16 Id., 360; 20 Id., 46; Pom. Rem., §§ 566, 670–2; 13 S. C., 23, 401; Greenl. Evid., §§ 111, 178; 9 Rich. Eq., 431; 8 Rich., 292; 11 Id., 52; 2 Hill, Ch., 617; 1 Id., 121; Jones Ch. Mort., §§ 345, 346, 503, 638; 19 S. C., 385; 17 Id., 499.

Messrs. Johnson & Johnson and C. A. Woods, contra, cited Code, § 312, ¶ 5, 315, 316, 319; Riddle Supp. Proc., 7–9, 52–55, 102, 134, 162, 177, 238; 19 S. C., 565.

April 22, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The prominent features of this proceeding, taken from the voluminous "Case," and the statements in the decree of his honor, the Circuit judge, may be presented as follows:

The defendant, A. Schafer, sometime previous to November 8, 1881, was doing business as a merchant at Little Rock, Marion County, under the name, A. Schafer & Co., the defendant, Lizzie Sternberger, and one Wieselthier being his partners. Sometime in 1878, the two last named retired from the business, and the defendant, H. Sternberger, the husband of Lizzie, took their place, the business still continuing under the name of A. Schafer & Co. On November 8, 1881, it appears from the papers then executed, and hereinafter mentioned, that H. Sternberger sold out to Schafer for $2,785, payable in two equal annual installments, the first on November 8, 1882, and the second November 8, 1883, with interest from the date of sale, payable annually until the whole amount is paid. Upon this sale Schafer executed a

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bond *in the sum of five thousand dollars, and a mortgage of the stock of goods then on hand, with such other supplies and additions as he might from time to time make thereto in the course of his business, to secure the payment of the purchase money, one of the conditions expressed in the mortgage being that, until default be made, the said Schafer was to remain in possession, with power to sell, renew, and recruit the same, unless the said H. Sternberger, his executors, administrators, or assigns, shall sooner choose to demand the same, and, until such demand, the possession of the said Schafer to be deemed

the possession of an agent for the sole benefit of the said H. Sternberger, his duty being to sell, renew, and to recruit the said stock of goods and merchandise, as may be required by, and appertain to, the business of a country merchant, applying the profit of the same to the mortgage debt. This mortgage, after probate, was duly recorded in R. M. C., Marion County, on November 16, 1881. At the time that Schafer executed the bond and mortgage aforesaid, which are the papers now in controversy, Schafer had no other creditor, or at least none other has presented himself. On January 3, 1882, H. Sternberger assigned the said bond and mortgage to his wife, Lizzie Sternberger, at its full value as it is alleged, less 12 per cent., who afterwards, in March, 1882, assigned them to the defendants, Bollmann Bros., as collateral to secure the payment of three notes of hers to the said Bollmann Bros., one for $1,000, one for $1,500, and the other for $2,000. After the execution of these papers, Schafer continued in business at the old stand under the name of A. Schafer, until about the commencement of this suit, and during this time he contracted the debts claimed by the plaintiffs.

In January, 1884, some two months after default of the mortgagor to pay the last instalment of purchase money secured by bond and mortgage, Bollmann Bros., who then held the mortgage as assignees of Lizzie Sternberger, sent up their chief clerk, the defendant, E. Iseman, to seize the stock of goods, who immediately took possession and advertised them for sale, after taking stock. The plaintiffs, becoming alarmed at this state of things, instituted suit before a trial justice, and having shown sufficient grounds for apprehending the loss of their debts, if judg-

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ments *were delayed the usual time, the trial justice rendered judgments at a short ened period—all of which was resisted strenuously by the defendant Schafer.

These plaintiffs, immediately after obtaining judgments, made application, based on affidavits, for supplementary proceedings before Judge Hudson, who granted an order requiring the said A. Schafer, Bollmann Bros., E. Iseman, and H. Sternberger, to appear before A. Q. McDuffie, Esq., master for said county, on a certain day therein named, for examination as to the property of the said Schafer & Co., at the same time granting an injunction restraining the said A. Schafer, Bollmann Bros., and E. Iseman from assigning, or in any way disposing of, said property until the further order of the court, upon condition, however, that plaintiffs should give the bond ordered within ten days. Upon the report of Mr. McDuffie, with affidavits, the plaintiffs then made a motion, after notice, before Judge Cothran, for the appointment of a receiver, until such time as plaintiffs could commence action, who, hearing the motion on February 23, 1884, passed an order directing the sheriff of Marion County to take possession of the property and proceed to sell, for cash, on the 26th inst., at the store in Little Rock, at which time and place they had already been advertised to be sold by Bollmann Bros., under the mortgage, and that he hold the proceeds subject to the further order of the court. And he further ordered that the judgment creditors of A. Schafer, for their own benefit, and of all creditors who may come in and contribute to the expenses, have leave to commence their action against A. Schafer, H. Sternberger, L. Sternberger, Bollmann Bros., and E. Sternberger, or any of them, or others as they may be advised, for the purpose of testing the validity of the mortgage given by Schafer to H. Sternberger, and the assignments thereof; and also for the recovery of certain other property alleged to have been placed in the hands of E. Sternberger by Schafer. Whereupon the action below was commenced.

The complaint alleges in substance: 1. That the plaintiffs are judgment creditors of Schafer, with executions returned unsatisfied. 2. That after November 8, 1881, the mercantile business at Little Rock, though carried on in the name of A. Schafer, was

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*really the business of H. Sternberger, L. Sternberger, and the said A. Schafer, as copartners, and that the debts due the plaintiffs were contracted under the firm name of A. Schafer, for the firm, with many other debts. 3. The execution of the bond and mortgage in question is admitted, but it is alleged that they were pretensive, and the incipient steps of a scheme of fraud. Further, that the assignment thereof by H. Sternberger to his wife was without consideration, and for the purpose of fraud. But if the assignment was valid, the same has been paid so far as Bollmann Bros., are concerned, the three notes of L. Sternberger having been fully paid by Mrs. Sternberger. That Bollmann Bros. knew this when they attempted to foreclose the mortgage by seizing the goods, which therefore was aiding the fraud. 4. That the defendants conspired to foreclose the mortgage when a full stock of goods had just been brought in, at the expense of plaintiffs and other creditors who furnished the goods. 5. That just before the seizure of the goods, A. Schafer had turned over to E. Sternberger certain property of the value of $300, not covered by the mortgage, by way of preparation and consummation of the fraud intended.

Upon this complaint judgment was demanded: 1. That the bond and mortgage, together with the assignments thereof, be declared invalid, fraudulent, and void. 2. If not invalid and void ab initio, that they be adjudged paid and satisfied. 3. That the net proceeds of the sale be paid over to the

creditors hereto. 4. That defendants, Bollmann Bros., be required to make up the difference between the net proceeds of sale and the value of the goods as inventoried. 5. That it be adjudged that H. Sternberger, L. Sternberger, and A. Schafer are, and have been, partners under the name of A. Schafer, and that plaintiffs' judgments be decreed to have lien against them as such. 6. That the defendant, E. Sternberger, be ordered to surrender the property turned over to him, or to account for its value. And lastly for costs and disbursements.

All of the defendants answered—some with demurrer, and others by answer alone. The demurrers, however, were withdrawn, and the case went to trial upon the issues

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raised in the *pleadings, all of the defendants having emphatically denied the charges of fraud.

As to the alleged partnership between Schafer and the Sternbergers, to use the language of the decree, the judge "was unable to reach the conclusion that there was any partnership after the alleged dissolution between the parties," November 8, 1881. As to the purchase, by E. Sternberger, of the live-stock and other property, said to have been turned over to him by Schafer just before the seizure of the stock of goods, he held that the proof was insufficient to impeach its bona fides. As to the validity of the bond and mortgage, he found: "That the execution of these papers by Schafer to H. Sternberger, and by him assigned to Lizzie Sternberger, and by her to Bollmann Bros., was fraudulent." That the transfer of the same to Bollmann Bros. was without fraud, so far as they are concerned, but the three notes made by Lizzie Sternberger, and signed by them as accommodation endorsers, were paid by them with her funds, &c.; and that this payment having been made by the application of such funds by the creditors, any further application was at rest. As to the demand that Bollmann Bros. should make up to the creditors the difference between the appraised value of the stock of goods, and the amount realized at the sale, he held that while Bollmann Bros. were not blameless in the use of the mortgage in the hands of Iseman, yet they were without fraud in the transfer, and therefore this claim could not be allowed.

The appeal of the defendants raises several questions: 1. As to the competency of certain testimony, which will be considered if necessary, as we get further along. 2. That his honor erred in entertaining this action, in which parties who were not creditors of Schafer until some year or more after the execution and recording of the bond and mortgage in question are attempting to impeach them for fraud. 3. In holding said papers fraudulent and void ab initio. 4. That he erred in entertaining the question of the validity of the assignment by H. Sternberger to his wife, raised by parties who were not creditors of either, and in holding that said assignment was fraudulent and void. 5. That he erred in holding that Bollmann Bros., even if the three notes mentioned have been paid, could not still continue

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to claim the *mortgage as collateral to other debts of L. Sternberger, and in refusing to allow defendants to introduce evidence to show that such was the understanding of the parties, and in refusing to permit defendants to amend their answers so as to make such evidence competent. 6. That he erred in ordering the bond and mortgage to be delivered up and cancelled, instead of allowing L. Sternberger to claim under it, if Bollmann Bros. had lost the right to do so.

The main question in the case, and the one around which all the others cluster, is as to the validity of the bond and mortgage. This meets us at the threshold and will be first considered in connection with the subsidiary question, whether these plaintiffs being subsequent creditors with notice can impeach these instruments. We do not think that the complaint should have been dismissed upon this latter ground. We mean to say that there is no authority for the position that a subsequent creditor with notice can, under no circumstances, assail a prior deed of his debtor. On the contrary, we think that this might be done under certain circumstances (Iley and Wife v. Niswanger, 1 McCord Eq. 518; Henderson v. Dodd, Bail. Eq., 139, to be more particularly referred to hereafter); and therefore that the Circuit judge was not in error in refusing to dismiss the complaint solely on that ground.

The question, however, now arises, when and under what circumstances can such attack be made by a creditor occupying such a position towards his debtor? This perhaps will be better understood by considering when and under what circumstances an existing creditor or a subsequent creditor without notice can resort to equity for such purpose. Deeds and mortgages or other conveyances may be executed by one in debt without consideration and therefore voluntary, and yet be bona fide. Or they may be executed without consideration, with the view to hinder and delay creditors, by putting the property beyond the reach of creditors. Or, again, they may be executed upon a sufficient and valuable consideration and yet be not bona fide, being induced by some benefit obtained by the debtor as the price of the preference given to the special creditor.

Those of the first class are not void ab

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initio, but they may be *avoided afterwards by existing creditors, if, after establishing their debt and exhausting their legal remedies, they find it necessary to resort to the property conveyed on the ground that all of a

debtor's property being liable for his debts he must be just before he is generous. It is a misnomer, however, to attach the term fraudulent to such a deed, as such deeds are often made upon the highest and most praiseworthy motives and as absolutely free from fraud as any deed, though based upon the most valuable consideration. But while this is so as to existing creditors, subsequent creditors with notice can certainly have no such right. The property having passed to the donee before the creditor has become a creditor, he can have no claim upon it either in law or morals.

Those of the second class are void ab initio as to subsisting creditors with or without notice; but if there be no subsisting creditors, such a case could not arise, as the condition suggested is that the deed be voluntary and made to hinder and delay creditors, which could not take place if there were no creditors to be delayed or hindered. The same may be said as to the last class, because, if there be no voluntary creditors, such a deed and for such purpose could not be made. There is still another principle which applies to all deeds and instruments which are required to be recorded, and this brings in subsequent creditors, the law holding such deeds, if unrecorded, void as to subsequent creditors without notice.

The case at bar does not belong to either of these classes. It does not fall under the first for the reason that the plaintiffs were not existing creditors at the time of the execution of the bond and mortgage, a fact which is not denied. It does not fall under the second or third because there were no existing creditors to be hindered or delayed, and therefore these papers could not have been executed for that purpose. Nor does it fall under the last, because the mortgage was duly recorded, and therefore the plaintiffs had legal notice.

It would seem, then, that where a deed or other instrument has been executed by one not in debt at the time and the deed is founded upon a sufficient consideration, it is invulnerable as to subsequent creditors with

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notice as well as to all others. Nor as *a general rule can a voluntary conveyance, made under such circumstances, be avoided by subsequent creditors with notice. Lord Hardwicke said in the case of Russel v. Hammond (1 Atk., 19), "that a voluntary settlement is not fraudulent where the person making is not indebted at the time, nor will subsequent debts shake such settlement." This court, through Nott, J., said the same in the case of Iley and Wife v. Niswanger, supra, and such no doubt is the law for obvious reasons. Judge O'Neall, in the case of Eigleberger v. Kibler (1 Hill Eq., 121 [26 Am. Dec. 192]), said: "If he is a creditor at all, he is a subsequent one with notice, and as such he can have no ground upon which he can say that the gift is a fraud upon him, upon the conclusive ground that all the right of the debtor to the property has passed to his donee long anterior to the debt, and therefore that the creditor could have no ground, either legal or equitable, on which he could found a claim for relief."

This, beyond doubt, is the established general rule, but as with most general rules there are exceptions. Lord Hardwicke, in the case of Stileman v. Ashdown (2 Atk., 481), said: "It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent; for if a man does it with a view to his being indebted at a future time, it is equally fraudulent and ought to be set aside." Judge Nott, in the case of Iley and Wife v. Niswanger, supra, speaking of voluntary settlements, said: "Such a settlement or transfer, I take it, cannot be impeached by a subsequent creditor unless made with a view of future indebtedness or attended with some circumstance of fraud other than what arises from its being voluntary." See, also, the case of Henderson v. Dodd, Bail. Eq., 140, to the same point. Before, then, subsequent creditors can attack a settlement or transfer of a party made when not indebted, he must show that the same was voluntary and was made with reference to future indebtedness or prove circumstances of fraud other than what arises from its being voluntary.

Now, the question arises, did the plaintiffs here bring themselves under this principle? We do not know upon what precise grounds the Circuit judge declared the mortgage in question void. He said in general terms

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that he had reached the conclu*sion that it was fraudulent, null, and void, and he ordered it on that account to be delivered up and cancelled. But whether upon the ground that it was voluntary, and had been executed with a view to future indebtedness, or was accompanied with other insignia of fraud than such as would arise from its being voluntary merely, does not appear. Now, waiving the question whether these plaintiffs, coming in as acknowledged subsequent creditors to attack a deed of their debtor made when he was free from debt, and on that account occupying an exceptional position, should not have made charges in their complaint of a specific character warranting such an attack, we are disposed to look at the case as we now find it and to consider it as if the necessary averments were in the complaint, applying the principles laid down above. First, then, is there any sufficient evidence that the bond and mortgage were without consideration and therefore voluntary? Second, if so, were they executed by Schafer with the view of future indebted-

ness? Or was their execution attended with circumstances of fraud other than what arises from their being voluntary?

In the examination of the testimony bearing upon these questions we do not feel ourselves governed by the usual rule, when a finding of fact by the Circuit judge is brought up for review, for the reason stated above, that we are unable to determine what precise questions of fact were found by the Circuit judge, as involved in the general finding of fraud. In other words, we do not know, from the decree, whether or not his honor considered this case as one by subsequent creditors, attacking a voluntary deed of their debtor made when he was not in debt, and therefore bound to prove that the deed was voluntary, and that it was made with a view to future indebtedness, or was attended with other circumstances, showing a fraud upon such subsequent creditors; or whether he interpreted the testimony, under the principles of law applicable to a deed executed with existing creditors at the time above referred to. Had the Circuit judge found upon these questions distinctly, then the rule referred to would be applicable; but in the absence of such distinct finding, the questions are open, and we must neces-

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sarily draw our conclu*sions from the entire testimony as original questions. To what conclusions does this testimony lead us?

1st. Was the bond and mortgage without consideration, and therefore voluntary? It seems to be conceded that, early in 1878, A. Schafer commenced merchandising at Little Rock, with L. Sternberger and one Wieselthier as his partners, under the firm name of A. Schafer & Co. This concern continued in business but a short time, a few months only, when L. Sternberger and Wieselthier retired, and H. Sternberger took their place. Wieselthier had put in no capital, but Schafer and L. Sternberger had invested something over $900 each. H. Sternberger bought out the share of his wife at $977.93, as he testifies, just what she put in, when the business continued under the same name until November 8, 1881, when a notice was put up at the door of a dissolution, and the papers in question were executed, and Schafer continued thereafter in his own name. Judge Cothran has found that there was no partnership after that date.

Now, in the face of these facts, of which there is positive testimony without contradiction, can it be said that the bond and mortgage had no consideration? Before the dissolution H. Sternberger had an interest as partner; after the dissolution A. Schafer retained possession of the entire stock, and executed the bond and mortgage, H. Sternberger having executed to him a bill of sale of his interest in the goods, &c. There is no intimation from any quarter that, before November 8, 1881, Schafer was sole owner. He was sole owner, however, immediately afterwards. How did he become so, except in the transaction referred to? For what other reason could these papers have been executed? They certainly on their face consummated a sale of H. Sternberger's interest, if he had any, and in the absence of all testimony showing that he had no interest, we must conclude that there was a purchase by Schafer, which constituted the consideration of the bond and mortgage. It is true the sum agreed to be given was not clearly explained. There was some confusion as to the mode of ascertaining this amount; but whether it was too much or too little, how could parties, who were not creditors of either at the time, complain?

These papers, then, having been founded

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upon a considera*tion, and there being no existing creditors interested, is not that an end of the case? Is there any law which allows subsequent creditors with notice, to attack, and set aside for fraud, a conveyance founded upon a consideration satisfactory to the parties, and made at a time when the grantor was free from debt? We know of none. The ground upon which such conveyances are subject to attack, either at common law or under the statute of Elizabeth, or under the recent assignment act, is that some unlawful preference has been given to some creditor; but how can there be a preference when there are no creditors?

Assuming, however, that we are mistaken in the conclusion that the bond and mortgage were based upon a consideration, does the testimony show that they were executed with a view to future indebtedness by Schafer, or was the execution attended by any other circumstance showing fraud? We do not well see how there could have been any view of future indebtedness by Schafer. The mortgage was immediately put upon record in the proper office, and the proper county. There was no evidence of any concealment. An advertisement was posted on the door of the store, that a dissolution had taken place. There is nothing whatever, in the testimony, showing that Schafer was preparing to enlarge his credit, by contracting new debts in the future. On the contrary, by the terms of the mortgage, which covered not only the stock on hand but all subsequent accretions, and which was published to the world by its record, it would rather seem that he could not have expected to buy in the future on a credit, with no property himself, except that covered by mortgage, and with a statement put upon a public record that all he might acquire afterwards would also go under this mortgage, and be first liable for its payment. If he was preparing for future indebtedness, and fixing a trap for his future creditors, he certainly neither screened its entrance, nor enticed them by any device to walk in; and

if any have been deceived and caught, they can hardly lay the blame on the mortgage.

Were there any circumstances attendant on the execution of the mortgage showing fraud? We have found nothing unusual in connection with this execution. It was properly attested, and was probated on the same day, and recorded within a few days

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*thereafter. There was a good deal of testimony as to Schafer's conduct about the time, and a short time before the seizure of the goods by Bollmann Bros., in reference to the house being built on the store lot, the paints and other materials for this house; but all this was a year or more after the execution of these papers, and while they reflect upon Schafer and the Sternbergers, with reference to these matters, they have no reference to the question now under discussion. And there is some suspicion, too, growing out of the rapid and frequent change of partnerships, transmissions of goods and books and accounts from Darlington to Little Rock, back and forth, varied with the assignment of these important papers, first from H. Sternberger to his wife, Lizzie, and from her to Bollmann Bros. But when all this is fully analyzed, we have not been able to find sufficient evidence upon which to say that the bond and mortgage were executed without consideration, or with the view to future indebtedness, or with attending circumstances showing fraud upon these plaintiffs, who were not then in existence as creditors. Therefore we think there was error in the finding of his honor below, that they were fraudulent and null and void.

As to the assignment of these papers by H. Sternberger to his wife, and by her to Bollmann Bros. Since we have reached the conclusion that the evidence is not sufficient to invalidate said original papers, as between Schafer and H. Sternberger, we cannot see how the plaintiffs, who are neither creditors of the Sternbergers nor of Bollmann Bros., can have any interest in the question. The creditors of H. Sternberger existing at the time of the assignment to his wife, if any, might be interested, but how the creditors of Schafer could call in question the transaction is not apparent.

Nor, in that view, does it make any difference whether the notes of Lizzie Sternberger given to Bollmann Bros., and which were secured by her assignment of the bond and mortgage as collateral, had been paid by her funds, or the funds of Bollmann Bros.; because, whether paid by the one or the other, the mortgage would still exist. Nor can the plaintiffs complain that Bollmann Bros. have attempted to enforce it. They are in possession, and whether thus in possession as a security for the money

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*which they claim to have paid to Pelzer, Rodgers & Co. on the notes, or as security for the accounts against Lizzie Sternberger on their books, might be a question for Lizzie Sternberger, but she is before the court and does not deny the right of Bollmann Bros.

The Circuit judge found that there was no partnership existing between any of these parties after November 8, 1881. This finding has not been appealed from by the plaintiffs; therefore the question urged in argument, that the claims of plaintiffs should be established against Schafer, H. Sternberger, and Lizzie Sternberger, is not before us. Nor can the more serious question, whether under the terms of the mortgage Schafer was not in possession simply as agent of H. Sternberger, and therefore all debts contracted by him in filling up the store were Sternberger's debts, be properly considered by us.

The plaintiffs taking the other view that these debts were Schafer's debts, and that the property embraced in the mortgage was Schafer's property, have sought to brush aside the mortgage and to enforce their claims established against Schafer through the property which they claim to be his; and it is too late now in this proceeding to change front and make a new attack.

If there was any undue haste, or any suspicious delay on the part of Bollmann Bros. in seizing the property, or any purpose to sacrifice it at an inauspicious sale so as not to reach beyond the mortgage to plaintiffs' claims, such object has been met and thwarted by the order of the Circuit Court putting the property in the hands of an officer of the court and ordering the sale to be made by him. This, under the circumstances, seems to have been proper, and should not now be disturbed. The proceeds of sale are now in the hands of the court, and should be paid out—first, in satisfaction of the mortgage; and then, if any over, to be distributed pro rata amongst the plaintiffs and such other creditors of A. Schafer as may present and prove their demands under the reference ordered. And to this end the judgment below in conflict with this should be reversed.

It is not necessary to discuss the question as to the competency of certain testimony admitted by the Circuit judge or any other than those already passed upon.

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*It is the judgment of this court that the judgment below be reversed, except as to the reference ordered, and that the case be remanded to be carried out in accordance with the opinion herein above.

Mr. Justice McIVER concurred.

Mr. Justice McGOWAN. I cannot concur in this judgment. As the facts impress me, the Circuit judge reached the equities of the case. I consider that the firm which did business at Little Rock as A. Schafer & Co. was never actually dissolved, but in reality continued to be the firm of A. Schafer and H.

Sternberger, and that the bond and mortgage to Sternberger for his alleged interest in the concern were pretensive, fraudulent, and void as to subsequent as well as subsisting creditors. Indeed, in the view that there never was in fact any dissolution, there could not be in the proper sense of the term any subsequent creditors. The property covered by the alleged mortgage was "a stock of goods," which, by the express authority of Sternberger, the alleged mortgagee, was being changed every day by contracting new debts for new goods. I cannot agree that these new goods so purchased shall go to the old claim of Sternberger, to the exclusion of the very debts contracted in their purchase.

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22 S. C. 534

OLIVER v. FOWLER.

(November Term, 1884.)

1. In proceedings for the enforcement of a mechanic's lien, the findings of fact by the Circuit judge approved.

[2. *Appearance* ⟸20.]

The right to enforce a mechanic's lien may be prosecuted either by service of summons and petition (in which case no order of court is necessary) or else by filing the petition and obtaining from the court an order of notice to the owner.

[Ed. Note.—Cited in Tenney v. Anderson Water, Light & Power Co., 67 S. C. 15, 45 S. E. 111.

For other cases, see Appearance, Cent. Dig. § 92; Dec. Dig. ⟸20.]

[3. *Mechanics' Liens* ⟸260.]

When a petition to enforce a mechanic's lien is filed, the action is commenced; and if filed within the time limited, the proceedings cannot be dismissed upon the ground that it was not commenced in time, even though the summons only was served.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 465; Dec. Dig. ⟸260.]

[4. *Process* ⟸167.]

If an order of court was necessary to make the service, answering to the merits waived such a requirement, and the defendant thereby sub-

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*mitted himself to the jurisdiction of the court, even though in his answer he reserved the right to move to dismiss the proceeding for want of proper service.

[Ed. Note.—Cited in Meinhard Bros. v. Youngblood, 37 S. C. 236, 15 S. E. 950, 16 S. E. 771; Ex parte Keeler, 45 S. C. 559, 23 S. E. 865, 31 L. R. A. 678, 55 Am. St. Rep. 785; Willoughby v. Northeastern R. R. Co., 46 S. C. 322, 24 S. E. 308.

For other cases, see Process, Cent. Dig. § 256; Dec. Dig. ⟸167.]

[5. *Mechanics' Liens* ⟸202.]

The assignee of a mechanic's claim for labor and material has the right to enforce the lien given by the statute to the assignor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 375; Dec. Dig. ⟸202.]

Before Pressley, J., Spartanburg, October, 1884.

The opinion states the case. The order of the Circuit judge was as follows:

This is an action by summons and petition to enforce a mechanic's lien. The case was heard in 1880 by Judge Fraser, and he, without a final decision, directed advertisement by the clerk for other lien creditors, none of whom have filed any claims. Plaintiff proved work done by her husband on defendant's house, for which he had agreed to pay $262. The work was done according to contract, and was accepted by his architect and by himself. Before the work was done, plaintiff advanced to her husband the sum of $275 of her own money, and to secure the same she afterwards took an assignment of said lien, which had been entered in the clerk's office according to law. Defendant insists that said assignment was collusive and fraudulent, but there is no proof of that before me.

He also alleges and proves that plaintiff's petition was not filed in the clerk's office as a commencement of this action; also that the service of plaintiff's summons was not lawfully made with the petition. No motion was made to set aside said service before the filing of defendant's answer. It was also claimed by defendant that said work was neither an erection, alteration, or repair, and further that a just and true account of the amount due had not been filed with the lien. I ruled that defendant, after answering, had thereby waived all defects in the manner of service of the summons and petition and the return thereon. I also overruled the other points raised by the defendant. The work done is clearly an alteration of the building, and the account filed with the lien is sufficient.

It is therefore ordered and adjudged that plaintiff have judgment against defendant for the sum of $262, with the proper costs of this action, and to enforce payment of

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the same, that F. *M. Trimmier, clerk of this court, after due and legal notice, do proceed to sell at public outcry, on sales-day in December next, the property of defendant on which said lien exists, to wit, &c.

Mr. J. S. R. Thomson, for appellant.

Messrs. A. Blythe and S. T. McCravy, contra.

April 21, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. On June 16, 1880, George Oliver filed in the office of the clerk of the court for Spartanburg County "a statement" as the foundation of a claim for mechanic's lien against the defendant, W. D. Fowler, for furnishing material and work and labor in making, erecting, and setting up four flights of balusters and railings and two newel posts in the dwelling-house of the defendant, known as "the rock house," in

the city of Spartanburg, as per verbal agreement, to the amount of $260. On the next day the claimant, Oliver, for value received, assigned the amount and lien to his wife, E. P. Oliver, the plaintiff.

On June 28, 1880, the plaintiff instituted proceedings by a petition inserted in a summons stating the work done by her husband, the filing of the statement for a lien upon the said building, the assignment to her, &c., and prayed judgment for the amount due and the sale of the house and lot in discharge of said lien. The sheriff's return stated that he had served "the summons in the action," but there can be little doubt that it was the summons with the petition inserted, as they were attached together by mucilage, and they both appear on the sheriff's book as "summons" and "complaint." On July 16, 1880, the defendant, Fowler (saving the right to move to dismiss the proceedings upon the ground that the court had never ordered him to appear and answer and that he had not been served "with any attested copy of the petition with the order of court thereon"), answered fully to the merits that George Oliver, who did the work, was indebted to him more than the account for work, which demand was in suit against him, and that the assignment to his wife was pretensive, null, and void, and for the purpose of evading the payment of his just debts, &c.

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*The cause came before Judge Fraser at the July term of 1881, and he refused to dismiss the proceeding, but ordered that notice "by copy of the petition" be given "the owner of the building" and also to all other creditors "having liens" of the same kind. Accordingly notice was given as directed. There were no other lien creditors, and the defendant (reserving rights as before) answered a second time to the merits, setting up the same defence as before. The case finally came before Judge Pressley, who refused the motion to dismiss the proceedings, holding "that defendant, after answering, thereby waived all defects in the manner of service of the summons and petition and the return thereon;" also overruling the other points raised by the defendant; that "the work done was clearly an alteration of the building, and the account filed was sufficient," &c. And on the merits of the case he gave judgment for the plaintiff, with order to sell the house and lot in payment of the same.

The defendant appeals on the following grounds:

1. That his honor erred in ruling that the service and answer in the first proceedings in which the amended petition was ordered to be served was a waiver of all preliminaries at that time, and waived everything except the matter of the plaintiff having no cause of action, or something of that sort.

2. In refusing to grant defendant's motion to dismiss the proceedings herein and set aside the service of the summons.

3. In refusing to hold that the filing of the petition in the clerk's office is the commencement of the action herein, and that said action was not barred by being brought too late.

4. In refusing to hold that there was no debt proved as due to George Oliver upon which to base a mechanic's lien, and in holding that there was such debt.

5. Because the onus of proof was on the plaintiff to show that a lien had been taken for a debt due George Oliver, whereas in the testimony no such debt was proved.

6. In holding that the alleged work done was an "alteration" of defendant's building, such as would sustain a mechanic's lien.

7. Because the alleged assignment to the petitioner was collusive and fraudulent.

8. Because the alleged mechanic's lien filed

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in the clerk's office *is fatally defective in that— 1. It claims a lien by reason of "repairing" and improving defendant's house. 2. There is no such certificate and oath filed with the clerk of the facts which are requisite to make a lien. 3. There was no sufficient account filed.

9. Because this action was never lawfully commenced, if at all, against the defendant until October 3, 1881.

10. Because there was no right in George Oliver to transfer the alleged lien to the petitioner.

11. In ruling that answers such as were put in in this action waived all defects in the manner of service of the summons and petition and the return thereon.

12. In ordering a sale of all of defendant's property upon which it is alleged the mechanic's lien exists.

13. In ordering such sale for cash.

14. Because the court should have dismissed the proceedings herein.

The defendant did not deny that the work was done according to contract, was received by him, and the account just. All his objections went to the nature of the work as not being "in the erection, alteration, or repair of any building," or against the right of the wife to institute the proceedings, and the manner in which he was served with process. The Circuit judge found as matter of fact (and we see nothing in the "Brief" which authorizes us to dissent from his findings) that the work was done according to contract; that it was done by George Oliver, the mechanic, who transferred the claim and statement for a lien to his wife, bona fide and for full value; and that the work was of such a character as to authorize the establishment of a mechanic's lien on the rock house of the defendant. These points being settled, the only remaining matter is whether the whole proceeding should have been dismissed for the reason that the ac-

tion was not commenced within the time prescribed, and the defendant brought into court in the manner by law directed, which seems to be really the principal defence in the case.

The defendant was served with process in the case on June 30, 1880, and on July 16, 1880, he answered to the merits, but in his answer he announced that he reserved the

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right to have the *whole proceeding dismissed, upon the ground that he was never made a party in the manner directed by law. The right of a mechanic to set up a lien for the value of his work upon a building which he has "erected, altered, or repaired," as well as the proceeding by which it may be done, are purely statutory. The provisions of the law fixing the right are reasonably plain, at least as to the essentials. For example, the mechanic must file "a statement," on oath, in the clerk's office, within "ninety days" after ceasing to labor on the building, and suit must be brought to enforce it within "six months" after the same lien. But it is not so clear as to the precise manner in which that suit should be commenced and conducted.

The general statutes provide as follows: "Section 2357. The lien may be enforced by petition to the Court of Common Pleas, &c.; * * * may be filed in term or in the clerk's office in vacation, and the date of the filing shall be deemed the commencement of the suit." "Section 2359. The petition may be served with the summons or filed with the clerk, and shall be entered and returned as other civil cases." And "Section 2363. The court in which the petition is entered shall order notice to be given to the owner of the building, &c., by serving him with an attested copy of the petition, with the order of the court thereon," &c. While these sections do not undertake to set forth all the details of the proper practice, it is obvious that they provide two ways in which the right may be judicially established, intended probably to apply to different classes of cases. First, where the person who contracted the debt is the owner of the building, the mechanic, having made his preliminary statement as required, may, under sections 2357 and 2359, within six months, bring his action by serving summons and petition which may "be returned and entered as other civil cases." When the circumstances make this course proper, we do not understand that any special order from the court is necessary to make the defendant (owner of the building) a party, but he may be regularly served with summons and petition as in other cases with summons and complaint. Or, second, he may simply file his petition in the clerk's office of the county without summons, but, as a substitute therefor, obtain

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an *order from the court giving notice to the owner of the building that he may appear and answer.

This construction seems to be warranted by the terms of the law, and is clearly indicated in the case of Johnson v. Frazee, 20 S. C., 502. That was a case precisely the converse of this. There the defendant (the owner of the building) had been brought into court "by an order based upon the petition of the creditors," and he complained that a summons was necessary: that he was not served in the manner in which the defendant here complains that he was served, viz., by summons and petition as in other civil cases. In that case it was held that the defendant was regularly in court, and, in delivering the judgment of the court, the chief justice said: "No doubt, had section 2359 been followed, and accordingly had the petition been served with a summons, instead of being filed in the clerk's office and an order of notice obtained as was done in this case, the proceeding would have been valid and unobjectionable; but this mode is not imperative or exclusive."

The defendant having been served with a summons and petition attached within the time prescribed, there was therefore no irregularity in the case. But if, as contended, the defendant was not served with the petition, but simply with the bare summons, that could not authorize the dismissal of the proceedings, for, in any view that can be taken, the action was commenced on June 28, 1880, when the petition attached to the summons was filed. When the clerk, on that day, marked the petition and summons filed, and put upon it the seal of the court, the action had been commenced, and the defendant could be served at any time thereafter. The statute declares that "the date of the filing of the petition shall be deemed the commencement of the suit."

Besides, if it had been necessary to have an order of court before service, we think by answering to the merits the defendant waived the objection and submitted himself properly to the jurisdiction of the court, and the matter stands as if he had accepted service or authorized his attorney to do so. Graveley v. Graveley, 20 S. C., 104.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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22 S. C. *541

***POLSON v. INGRAM.**

(November Term, 1884.)

[1. *Deeds* ⇐96.]

The recitals in a deed are only binding upon such persons as are shown to be parties and privies.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 257; Dec. Dig. ⇐96.]

[2. *Easements* ⇐36.]

The law is jealous of a claim to an easement, and the party asserting such a claim

must prove his right to it clearly; it cannot be established by intendment or presumption.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88 93; Dec. Dig. ⇐36.]

[3. *Trial* ⇐194.]

Requests to charge upon the force and effect of testimony properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439–441, 446–454, 456–466; Dec. Dig. ⇐194.]

[4. *Easements* ⇐37.]

Upon a disputed question of easement, the judge could not properly grant a request to charge that ignored the possibility of a right obtained by grant.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 94; Dec. Dig. ⇐37.]

[5. *Easements* ⇐30, 37.]

While an acquired easement may be defeated by express grant or by prescription, the law will not presume its abandonment from twenty years' non-user; the abandonment of an easement is a question of intention to be determined by the jury.

[Ed. Note.—Cited in Du Pont v. Charleston Bridge Co., 65 S. C. 532, 44 S. E. 86; Lorick & Lowrance v. Southern Ry., 87 S. C. 73, 68 S. E. 931.

For other cases, see Easements, Cent. Dig. §§ 77, 94; Dec. Dig. ⇐30, 37.]

[6. *Easements* ⇐32.]

Getting timber by the owner of the soil from the land covered by defendant's back-water would not extinguish defendant's easement, if such acts were not inconsistent with the easement claimed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 84; Dec. Dig. ⇐32.]

[7. *Adverse Possession* ⇐85.]

What constitutes color of title is a question of law, but whether the matter showing color exists is a question for the jury.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 498–503, 656, 657, 665, 668, 688–690; Dec. Dig. ⇐85.]

[8. *Evidence* ⇐372.]

A deed, probated and recorded, and proved to have been in the possession of the party producing it, and of those under whom he claims, for more than thirty years, properly received in evidence as an ancient deed.

[Ed. Note.—Cited in Moseley v. Hankinson, 25 S. C. 521.

For other cases, see Evidence, Cent. Dig. § 1618; Dec. Dig. ⇐372.]

Before Cothran, J., Chesterfield, February, 1884.

The opinion of this court states the nature of this action, and some of the facts proved at the trial. Other matters necessary to a full understanding of the case are as follows:

A survey under order of the court showed that forty acres of land were covered with back-water from defendant's dam, of which twenty acres belonged to the plaintiffs. There was testimony to show that this land was swamp, and covered in wet weather by high water independently of the dam, but fit for pasturage at other times; and also the back-water destroyed juniper trees of value. Defendant's mill and dam were built about twelve years before the trial, but there had been a mill-dam there many years ago, and a part of the old dam remained. Ainsley Polson cleared some of the land now covered by back-water, and the plaintiffs have since cut hoop-poles from the land.

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*The deed from Parker to Ratcliff was dated May 14, 1804. The probate was in proper form and appeared to be regular. The signature of the probating officer was not proved. There was also a certificate of registry upon the deed, and proof that the public records of the county had all been destroyed. Alexander McQueen, witness, testified that this deed had been in his father's possession and his own for over thirty years; that his father held possession under it until his death in 1828, and then his father's heirs until the sale to Ingram in 1870.

The exceptions correctly state the requests to charge, and so much of the charge as appears in the brief.

Messrs. Hough & Kennedy, for appellants.
Mr. C. P. Townsend, contra.

April 21, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The action below was commenced September 5, 1881, and was brought to recover damages for overflowing the plaintiffs' land (as alleged) with a pond of water, by the defendant Ingram. Evander Polson was made a defendant, because he did not consent to join as plaintiff. The defendant Ingram interposed as defences: 1st, a general denial; 2nd, a right to overflow; and 3rd, that he was the owner of the land as purchaser from his co-defendant, Evander Polson.

On the question of title, the plaintiffs claimed as heirs at law of one Ainsley Polson, deceased. And to support title in Ainsley Polson, their father, they introduced, first, a certified copy of a grant and plat of one thousand acres, to one Gutheridge Lyons, dated November 6, 1787, conveying the land; next, an ancient deed from Wallace, E. A. Ellerbe, and M. A. Ellerbe, to the said Ainsley Polson, dated January 6, 1848, of five hundred acres, being a part of the Lyons grant lying north of Juniper Creek, the land described in the complaint. They then proved the death of Ainsley on March 3, 1858, and that the plaintiffs and Evander were his children and heirs at law. They also proved the possession of Ainsley from two years before the deed of January 6, 1848, until his

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death, March 3, 1858. The de*fendant overflowed the land in 1875 or in 1874. The youngest child of Ainsley was 30 years old at the time of the trial. No partition had ever taken place.

It was admitted that the land upon which the defendant Ingram built the dam, which caused the overflow, was also granted to

Gutheridge Lyons, but of junior date to the other grant. The defendant produced an ancient deed from Parker to Ratcliff, dated May 14, 1804, purporting to convey the land upon which his mill had been erected. This deed contained recitals that the land granted to Lyons, had by him been conveyed to one Joseph Booth, and by Booth to Parker (but there was no other evidence of the truth of these recitals). It also contained the following recital: "Also it is understood, and is an express part of this contract, that the said John Ratcliff is to have the entire and exclusive privilege of drowning, or covering with water, as much of the lands of said Parker above this tract, now intended to be conveyed, as the said Ratcliff may think proper to do, by building a mill or mills on their land, and the said land so covered with water, or to be covered, is considered by the parties part of this agreement." The defendant also introduced a deed from Ratcliff to Alexander McQueen, embracing the same land, and containing in substance the same words as above, with the same recitals. Alexander McQueen died, leaving a widow, three sons, and two daughters, one of whom, to wit, Alexander McQueen, had executed a quit claim deed of this tract, to the defendant Ingram, November 23, 1870. The defendant also held a deed from Evander Polson dated May 3, 1879, and some evidence was offered to show that Evander Polson had acquired title by adverse possession.

The jury found for the defendant. The plaintiffs have appealed upon exceptions as to the charge, and refusals to charge, as follows:

1. "Because his honor, after request, refused to charge the jury, 'that the deed made by Elisha Parker to John Ratcliff, bearing date May 14, 1804, did not convey to the said John Ratcliff the right to overflow the one thousand acres granted to Gutheridge Lyons, dated November, 1787, and now claimed by the plaintiffs, as it nowhere appeared

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in evidence that Elisha *Parker had title to the tract claimed by the plaintiffs, or to such an easement thereon when he made said deed.'

2. "Because his honor, after request, refused to charge, 'that the mere recitals in the deeds made by Elisha Parker to Ratcliff, and also the recitals in the deed from Ratcliff to McQueen, sr., are no evidence that they had the right to overflow or cover said land with a pond of water.'

3. "Because his honor refused to charge, 'that if it has not been proven that either Elisha Parker or John Ratcliff or Alexander McQueen, sr., overflowed and covered the land claimed by the plaintiffs with a pond of water for the full period of twenty years; or that they together covered said land with water for the full period of twenty years, then there is no evidence that either the said Elisha Parker, John Ratcliff, or Alexander McQueen, sr., ever had a right to any such easement.'

4. "Because his honor refused to charge, 'that twenty years non-user will presume the abandonment of an easement.'

5. "Because his honor refused to charge, 'that if Ainsley Polson, and his heirs, held and possessed so much of the grant of land to Gutheridge Lyons as lies north of Juniper Creek, and is described in the deed made by Clement D. Wallace, E. A. Ellerbe, and M. A. Ellerbe, for the full period of twenty years, and during that time Ainsley Polson and his heirs had actual possession of a part of said land, and used the remainder of it for the purpose of getting timber and other purposes, and during all that time said land was not overflowed or covered with a pond of water, then all right to the easement is extinguished and gone, if it ever existed.'

6. "Because his honor refused to charge, 'that even if Evander Polson can hold by adverse possession, he must be confined to the land under his fence, as it has not been shown that Evander had any plat, deed, or anything else that constitutes color of title, and defines his boundary.'

7. "Because his honor erred in charging, 'that non-user would not presume the abandonment of an easement, and that it depended on what the owners of the dominant estate intended by the non-user, and that it was for the jury to say whether the owners of the dominant estate, by the non-user from

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the time the *old pond was discontinued until Ingram built, intended to abandon the easement.'

8. "Because his honor refused to charge, 'that if the other heirs at law of Ainsley Polson have had possession of the tract of land described in the deed of Clement D. Wallace, E. A. Ellerbe, and M. A. Ellerbe, ever since Ainsley Polson's death, and there has been no division or partition of the same between Evander and the other heirs, then Evander cannot hold by adverse possession, as the possession of the other heirs protects their rights.' It is submitted that his honor erred in charging, 'that this was true, unless you find from the evidence that his father, in his life-time, put him in open, notorious, and actual possession of his part of the land,' when there was no evidence upon which to base such a finding, and the youngest one of the heirs of Ainsley Polson was only thirty years old at the trial.

9. "Because his honor erred in charging, that it was a question of fact for them to determine whether it had been shown that Evander Polson had anything that would constitute color of title, so as to enable him to claim beyond his fence, or his pedis possessio, when there was no evidence that Evander had anything that constituted color of title.

10. "Because his honor erred in admitting the deed of Elisha Parker to John Ratcliff

as an ancient deed, because the proof was not sufficient to allow it to go to the jury as an ancient deed.

11. "Because his honor erred in refusing a motion for a new trial, as there was no evidence to support the verdict."

These exceptions will be taken up seriatim. His honor declined to charge as requested in the two first exceptions, and, instead thereof, charged, "that the recitals in a deed are only binding upon the parties and privies; that the relation of a party and privy must first be established before the recitals are binding. One claiming an easement on the lands of another, must prove his right to it clearly. The law is jealous of such claim, and the right cannot be established by intendment or presumption." We see no error of law in this. The request called substantially for a charge upon the force and effect of the testimony introduced, which is always a matter entirely for the jury. Instead of thus charging,

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his honor laid down a general propo*sition covering the effect of recitals in deeds, when and as to whom they are binding, and also the necessity of clear proof of easements, leaving it to the jury to determine from the testimony the facts of the case under the principles which he announced. This, it appears to us, is as far as he could have gone without invading the province of the jury. The first request was based upon the assumption of a fact, which was beyond the province of the judge to make; and the second requested a charge as to the effect of the recitals in the deeds from Parker to Ratcliff, and from Ratcliff to McQueen, without regard to any testimony which might or not connect the plaintiffs therewith, which would have been misleading.

The third request was properly refused. The question at issue between the parties, was the existence of an easement, or a right on the part of the defendant Ingram to overflow the land. What constitutes an easement, or a right thereto, is a question of law, upon which a judge may charge; but whether the facts, necessary to the existence of the easement or the right, have been proved, is for the jury. This request did not ask the judge to charge as to the legal requirements of an easement, or under what circumstances it becomes a right; but it asked a charge, that supposing there was no proof of overflow by Parker, Ratcliff, or McQueen, for the full period of twenty years, then there was no evidence that either of these parties ever had such right. In other words, that these parties could only acquire the easement by an overflow of twenty years, and if there was no proof of such overflow, then there was no easement. Such a charge would have ignored easements by grant, which would have been an error of law, and would have taken from the jury the question of fact, whether there had been a grant, as this depended not simply upon the construction of the Parker, Ratcliff, and McQueen deeds, but also upon the question of fact as to the relation of the plaintiffs therewith, as charged by his honor, in answer to the two first requests.

4. His honor refused to charge, "that twenty years non-user will presume the abandonment of an easement," holding that this was a question of intention, to be determined by the jury. No doubt it requires twenty

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years adverse use to acquire an ease*ment, where said easement is claimed simply from use and occupation. A grant will not be presumed from a use shorter than twenty years. An easement, however, may be created by express grant executed at the beginning of the use. And when once it has been created, and has become vested in the grantee, either by an express grant, or by prescription which presumes a grant, it then becomes a permanent right, according to the terms of the grant, which cannot be defeated or divested except by another acquiring a right in opposition thereto in one of the modes above mentioned, i. e., by express grant or prescription.

True, a party in the enjoyment of an easement may abandon it, but whether an abandonment has taken place in a special case, depends upon the intention of the party claiming, which is a question of fact for the jury. This was held distinctly in the case of Parkins v. Dunham (3 Strobh., 224), where the court said: "Whether a party has abandoned his right to an easement, is a question of fact and intention for the determination of the jury." It will be observed that the question of abandonment is a very different question from having the easement defeated and divested by the adverse use of another. This last question is to be determined by the character of the adverse use, and how long continued, while the former depends upon the intention of the party in possession, without regard to the claims of others. Such being the law, it would have been error for the judge to have charged, as a direct and positive proposition, "that twenty years non-user will presume the abandonment of an easement."

5. As to the fifth exception, his honor charged that whether the acts of plaintiffs in getting timber from the land would extinguish the easement, would depend upon the fact whether such acts were inconsistent with the easement; that defendant's right to the easement did not deprive the plaintiffs of such rights as were not inconsistent with the enjoyment of the easement. This was in accordance with the principles above stated.

6. The sixth exception involves a question of fact which was for the jury. There was some evidence intended to show that Evander Polson had acquired title to the land by adverse possession, and the whole question was properly left to the jury.

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*7. The seventh exception has already been disposed of in the discussion of the fourth.

8. The modification given by his honor to the eighth request seems unobjectionable. He sustained the request, provided there were no other principle in the case which would prevent its application, and the plaintiffs can have no just cause of complaint on account of this qualification.

9. There certainly was no error in submitting to the jury as a question of fact whether it had been shown that Evander Polson had anything constituting color of title. What constitutes color of title may be a question of law, but whether the matter showing color exists is a question of fact, and this was submitted to the jury.

10. It is claimed that it was error to admit the deed of Parker to Ratcliff as an ancient deed. This deed was more than thirty years old, was probated, and no doubt recorded; it was in the possession of the McQueens as a link in their chain of titles, and had been for over thirty years. Its admission as an ancient deed under these circumstances is sustained by abundant authority. 1 Greenl. Evid., § 144, and note; Thompson v. Brannon, 14 S. C., 551; Swygart v. Taylor, 1 Rich., 54.

The refusal of the motion for a new trial has not been shown to be error of law.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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22 S. C. 548

DUNLAP v. GOODING & ELLIOTT.

(November Term, 1884.)

[*Estoppel* ⟸75.]

Where a mother allows her son to hold a mare out to the world as his property, and he sells it as his own to a stranger, who, in payment, drew an order on defendants, and they give to the son therefor a due bill payable to himself which was declared to be not transferrible, the defendants are affected by the conduct of the mother, and in action by her on the due bill, she is estopped from denying the son's ownership, and the defendants may interpose as defences discounts against the payee and payments to him.

[Ed. Note.—Cited in Jennings v. Harrison, 33 S. C. 209, 11 S. E. 695; Chambers v. Bookman, 67 S. C. 453, 46 S. E. 39; Pollock v. Pegues, 72 S. C. 70, 51 S. E. 514; Sullivan v. Moore, 84 S. C. 430, 65 S. E. 108, 66 S. E. 561.

For other cases, see Estoppel, Cent. Dig. § 192; Dec. Dig. ⟸75.]

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*Before Aldrich, J., Fairfield, February, 1884.

The opinion of the court fully states the case.

Mr. E. B. Ragsdale, for appellant.

Mr. C. A. Douglass, contra.

April 21, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action by Charlotte T. Dunlap against Gooding & Elliott on a due bill in the following terms: "Due Thomas R. Dunlap on demand $100. This D. B. not transferrible. January 16, 1883. (Signed) Gooding & Elliott." This due bill was given under the following circumstances: Thomas R. Dunlap, a young man 23 years of age, lived with his mother, the plaintiff, and, she being a widow, transacted most of her business. He had in his possession a mare, and sold her to one Moss for the sum of $100, who, upon delivery of the animal, paid for her by giving to the said Thomas R., in his own name, an order for the amount on Gooding & Elliott. The said Thomas R. presented the order to Gooding & Elliott, who accepted the order and gave him in payment the due bill sued on. When payment was demanded by the said Thomas R., the defendants claimed that they had an account against him for $48.07, and that they should have a discount for that sum. This method of payment not being satisfactory, they applied to the account enough to pay it, and paid the remainder, $51.93, on a judgment against the said Thomas R., in favor of W. R. Doty & Co., and produced the sheriff's receipt therefor.

The plaintiff, mother of Thomas R., then sued Gooding & Elliott on the aforesaid due bill, alleging that, although given to Thomas R., and in his name and not transferrible, it was her property, having been given in payment for the mare, which belonged to her, and was sold by the said Thomas R. as her agent. The defendants denied her right to recover on the due bill, which was the property of Thomas R., and had been paid as above stated. The evidence was somewhat contradictory as to whether the mother or

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son was the owner of the mare. But *if the jury took the view that the mare belonged to the mother, the judge refused to charge as requested, "that if the jury find that the plaintiff had allowed Thomas R. Dunlap to hold out to the world this mare as his own property, still if Gooding & Elliott had not been affected by such conduct, they could not urge this in bar of her recovery;" but, on the contrary, charged "that if the plaintiff, C. T. Dunlap, in this case had allowed Thomas R. Dunlap to hold this mare out to the world as his own property, she would be estopped from denying that fact." The jury found for the defendants, and the plaintiff appeals, alleging error both in the charge and the refusal to charge.

We assume that the appellant is right when he insists that, in order to estop a party by conduct, that conduct must be shown to have affected others. But what seems to be the difficulty in this case appears to us to be more apparent than real, growing out of the fact that Moss, the purchaser

of the animal, is not a party before the court. If the plaintiff, acting in the view that the animal sold was her property, had sued Moss, the purchaser, either for the mare or the purchase money, there could be no question of the correctness of the proposition charged by the judge, "that if Mrs. Dunlap allowed her son to hold himself out to the world as the owner of the mare, she would be estopped from denying the fact." Moss, the purchaser, was certainly affected by such conduct. He was an innocent third party. He found the animal in the possession of Thomas R. Dunlap, who made no disclosure of any agency, but, on the contrary, claimed the animal as his own, and not only as such sold her, but accepted in payment an order payable to himself, and presented that order and received therefor a due bill payable to himself and made not transferrible. So far as concerns Moss, there could be no question that he was affected by the conduct of the plaintiff in allowing her son to hold himself out as the owner of the animal, and as to him she was estopped. "It is now a well-established principle that when the true owner of property holds out another, or allows him to appear, as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected.

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Their rights in such cases do not depend *upon the actual title or authority of the party with whom they have directly dealt, but they are derived from the act of the real owner, which precludes him from disputing, as against such third party, the existence of the right or power which he caused or allowed to appear to be vested in the party making the sale." Big. Estop., 434.

It is ingeniously urged, however, that while this would be sound as to Moss, the purchaser, the benefit of it cannot be extended to the defendants, Gooding & Elliott, who had nothing to do with the horse trade, but simply accepted an order upon them by Moss in favor of Thomas R. Dunlap, without even knowing, it may be, out of what transaction the order arose, and therefore they were not affected by the aforesaid conduct of the plaintiff. If this were the correct view, then the plaintiff should not have been allowed to offer any evidence as to the ownership of the animal or the trade at all, but should have been required to stand on the due bill, according to its terms, which was not transferrible; such was the extent of the defendants' contract by its own terms. But it was necessary to connect the due bill sued on with the sale of the animal as claimed belonging to her, in order to give her a status in court. Both sides seem to have taken it for granted that the sale of the mare to Moss and the giving of the due bill by the defendants were parts of the same transaction; and in that view the judge could not charge, as requested, that Gooding & Elliott had not been affected by the conduct of plaintiff, and could not urge that in bar of her recovery. The plaintiff herself made the execution of the due bill for the price of the mare part and parcel of the sale transaction, and therefore it must be considered that her conduct in its effects reached to the defendants who executed the due bill for the purchase money. We do not think the plaintiff could connect the defendants with the horse trade and at the same time isolate them and cut them off from a defence legitimately arising out of that transaction.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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22 S. C. *552

*CARROLL CO. SAVINGS BANK OF UNIONTOWN v. STROTHER.

(November Term, 1884.)

[1. *Guaranty* ⟸1.]

Generally a guaranty is a collateral undertaking, and it is essential to its existence that there should be some one liable as principal; and if there be no valid claim against the principal, there is no existing contract of guaranty.

[Ed. Note.—Cited in Ruberg v. Brown, 71 S. C. 293, 51 S. E. 96; J. L. Mott Iron Works v. Clark, 87 S. C. 203, 69 S. E. 227.

For other cases, see Guaranty, Cent. Dig. § 1; Dec. Dig. ⟸1.]

[2. *Appeal and Error* ⟸1012.]

Judgment rendered by the judge without a jury, against persons alleged to be guarantors, without proof of demand against the principal, upon an instrument never proved, nor fully before the court in pleadings or evidence, set aside, the answers being held to have sufficiently raised issues requiring proof.

[Ed. Note.—Cited in Hall v. Woodward, 30 S. C. 564, 577, 9 S. E. 684.

For other cases, see Appeal and Error, Cent. Dig. §§ 3990 3992; Dec. Dig. ⟸1012.]

[3. *Pleading* ⟸376.]

An admission that defendants "signed an instrument of writing supposed to be the paper sued on, but cannot be positive without an inspection of said paper, and cannot say whether the endorsement was before or after due or contained a guaranty"—was not such an admission as would justify a judgment without proof of the instrument.

[Ed. Note.—Cited in American Button-Hole, Overseaming & Sewing Mach. Co. v. Hill, 27 S. C. 166, 3 S. E. 82.

For other cases, see Pleading, Cent. Dig. § 1226; Dec. Dig. ⟸376.]

Before Aldrich, J., Edgefield, October, 1883.

The opinion sufficiently states the case.

[For subsequent opinion, see 28 S. C. 504, 6 S. E. 313.]

Messrs. Jones & Jones, R. W. Shand, for appellants.

Messrs. W. H. Lyles, B. W. Bettis, Jr., contra.

April 21, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. John C. Strother executed a paper, of which the following is a copy:

"Saluda Old Town, S. C., March 30, 1878.

"$656. Eighteen months after date I promise to pay to the order of the Taylor Manufacturing Company of Westminster six hundred and fifty-six dollars, payable at Central National Bank of Columbia, S. C., for value received, with exchange on New York, and if not paid when due, bear interest from maturity at the rate of ten per cent. per annum, as agreed for negotiating and carrying this loan, so long as it remains unpaid, and also all counsel fees and expenses in collecting this note if it is sued or placed in the hands of counsel for collection; hereby waiving all homestead and personal exemptions without any relief whatever, or from valuation or appraisement laws. The express

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*conditions of the sale and purchase of the engine and saw-mill for which this note is given is such that the title, ownership, or possession does not pass from the said Taylor Manufacturing Company until this note, with interest, is paid in full. The said company have full power of declaring this note due and take possession of said engine and saw-mill at any time they deem this note insecure, even before maturity of same.

"Witness, Ira P. Culbreath. (Signed) John C. Strother."

On this paper appeared the following endorsement: "For value received we hereby guarantee the payment of within note when due, and hereby waive the demand and notice of non-payment thereof." (Without date.) "(Signed) Taylor Manufacturing Company. P. H. Irwin, Treas., J. E. Taylor, David Fowble, Edward Lynch, and H. Haines."

On March 17, 1883, this action was brought by the Carroll County Savings Bank of Uniontown, the plaintiffs, against John C. Strother as maker of a promissory note, and David Fowble and Edward Lynch as endorsers thereof before due to the plaintiffs; but no copy of the paper was attached to the complaint. Strother answered, stating that the note was one of four, aggregating $2,126, given for a steam engine, saw-mill, and appurtenances, and alleging failure of consideration, fraudulent concealment, usury, &c., and pleading that more money had been paid than the property was worth. The attorney of Fowble and Lynch asked for a copy of the paper upon which they were alleged to be guarantors, but it was declined. They then answered, repeating the defence set up by Strother, and denying that they were liable as guarantors, "the requirements of the law not having been complied with." They stated that they "did endorse and deliver to the plaintiffs an instrument of writing supposed to be the paper sued on, but cannot be positive of this without an inspection of said instrument. Whether said endorsement was made before or after due, or contained a guaranty, they cannot now answer without an inspection of the instrument."

Again, complaining that no copy of the paper sued on was filed, the defendants gave notice of a motion to amend their answer by stating that the alleged guaranty was signed by several persons jointly, some of whom had

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not been sued, and also de*murred to the complaint upon the ground that several causes of action were improperly united, one being against John C. Strother as maker, and the other against them as guarantors.

On this state of the pleadings the cause came on for trial. The demurrer as to the misjoinder of actions was overruled. A jury was empanneled and the case opened. The counsel for the plaintiffs and defendants do not agree as to what occurred at the trial, and upon application to the Circuit judge to settle the case he was unable to remember the particulars in which they differed. But we will take the statement of the respondent, which was as follows: "At the hearing of the cause, after the complaint was read, the defendants, David Fowble and Edward Lynch, moved, upon the notice before referred to, for leave to amend their answer, which motion was refused by the court. After the reading of the pleadings, and before any evidence was introduced, plaintiff moved the court for judgment against David Fowble and Edward Lynch, and for leave to discontinue the case against John C. Strother, and thereupon the court passed the following order: 'The case having come on for a hearing and the claim for counsel fee having been withdrawn, after argument by counsel, it is ordered that plaintiff have judgment against David Fowble and Edward Lynch for the sum of $840.50, and for costs and disbursements. It is further ordered that the suit be discontinued as to the defendant, John C. Strother, and that said John C. Strother have judgment for his costs and disbursements.'"

The alleged guarantors appeal from this judgment upon the following grounds:

I. "Because his honor erred in giving judgment against the said Fowble and Lynch for the debt sued on and seven per cent. interest instead of the principal alone without interest or costs, as the instrument sued on stipulates for ten per cent. per annum, which was usury by the law of the state when it was executed.

II. "Because his honor erred in giving judgment against the said Fowble and Lynch for principal and interest, when it is submitted that the stipulation for the payment of all costs and fees for collecting the same also made it usurious.

III. "Because his honor erred in not ruling that when an instrument stipulates for

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usurious interest or for any other sum *besides principal and legal interest, such as costs and fees for collection, the plaintiff could not avoid the usurious effect by withdrawing them or by not claiming them in his complaint.

IV. "Because his honor erred in allowing the plaintiff to discontinue this action as to John C. Strother, the maker and principal of the instrument sued on, and holder of the engine for which it was given, and to continue it against David Fowble and Edward Lynch, only two of the alleged guarantors of said instrument, and that, too, when the said John C. Strother was in court with his witnesses prepared to prove that the consideration of said instrument had failed, and insisting upon trial and protesting against said discontinuance.

V. "Because his honor erred in not holding that the said David Fowble and Edward Lynch were in no event liable to pay more than was legally due, and in not allowing them to introduce evidence to show that the consideration of the said instrument had failed, and especially when this evidence could have been introduced in behalf of all the defendants if the action had not been discontinued as to Strother.

VI. "Because his honor erred in not allowing the alleged guarantors to interpose at the trial, by way of amended answer, the objection that the alleged guaranty was joint and some of the signers not made parties, when it was admitted by plaintiffs' attorney that no copy of the instrument sued on with the guaranty and names of alleged guarantors endorsed thereon was served with the complaint and that he was written to for a copy and did not send it.

VII. "Because the order passed by his honor, that said John C. Strother have judgment for his costs and disbursements, releases him from all liability on the instrument sued on, and thereby the defendants, David Fowble and Edward Lynch, alleged guarantors, are also released."

From the view the court takes it will not be necessary to consider all the exceptions, but, as the case must go back, we think it better not to discuss now the various questions involved in the case. It is certainly true, as a general proposition, that a guaranty is a collateral undertaking, and it is essential to its existence that there should be

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some one liable as principal, and *if there is no valid claim against the principal, there is no existing contract of guaranty. It seems that a judgment was rendered against persons alleged to be guarantors, not only without proof of any valid demand against the principal, but upon an instrument which was never proved, and, indeed, in its entirety, was never before the Court, either in the pleadings or evidence. There was no proof of the execution of the note by Strother, or of the alleged guaranty by the defendants; but it is claimed that the allegations were admitted by the answers. It was not a case of judgment "by default," for all the defendants answered and made vigorous defense, and particularly Strother, the principal, who had purchased the engine, and was better able to make the defence than the alleged guarantors. But they sued with him—made common cause with him in resisting a recovery. At the last moment the cause was discontinued as to Strother, the principal, against his consent, and the other defendants being thus isolated, it was claimed that their answers, standing by themselves, made no denial of the plaintiffs' cause of action against them, and that the judge, without the assistance of the jury, could hear the cause and pronounce judgment.

We cannot take this view. Even after the motion of defendants to amend their answer was refused, and the case, as to Strother, was discontinued, we think there was, in the original answers, enough to make issues of fact upon several points which the judge could not properly decide, and they should have been left to the jury after hearing the evidence in the case. The answers not only denied generally the right of the plaintiffs to recover against them as guarantors, on account of failure of consideration, usury, &c., in the original contract (which at least receives color from their discontinuance as to the principal), but substantially put in issue the execution of the alleged guaranty sued on, its date, character, &c. The plaintiffs sued on an instrument of writing, but did not make exhibit of it, stating in their complaint only parts of it, omitting any reference to the interest stipulated, the names of all the alleged guarantors, the right reserved to the payees to take possession of the engine in payment on the debt, &c., &c. The defendants did not admit that they executed the

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alleged guaranty on the instrument, but *on an instrument supposed to be the paper sued on, "but could not be positive without an inspection of the instrument, nor as to whether said endorsement was made before or after due, or contained a guaranty."

We do not think that, in the absence of the instrument itself, this was such an admission as dispensed with further proof, and authorized the judge to pronounce judgment, without the knowledge even of the other stipulations in the instrument. It was saying in substance "that they had not sufficient knowledge to form a belief" as to the particular instrument sued on, which made it necessary that the plaintiffs should prove their case, and of that proof the jury were the only proper judges. Tharin v. Seabrook, 6 S. C., 118; Kennedy v. Moore, 17 S. C., 464; McConnell v. Kitchens, 20 Ib., 433 [47 Am. Dec. 845]. A party is entitled to an inspection of the

original to enable him to answer, and is not presumed to recollect the date or contents of a written instrument, not in his possession or control, and as to date may deny knowledge. Kellogg v. Baker, 15 Abb., 287; Wait. Anno. Code, 244.

The judgment of this court is that the judgment of the Circuit Court be set aside, and the cause remanded for a new trial, or for such further proceedings as the parties may be advised.

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22 S. C. 557

COUCH v. CHARLOTTE, COLUMBIA & AUGUSTA R. R. CO.

(November Term, 1884.)

[1. *Dismissal and Nonsuit* ⇐65.]

A Circuit judge, having refused defendant's motion for non-suit, may afterwards, during the trial with the facts unchanged, order a non-suit of his own motion.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 160; Dec. Dig. ⇐65.]

[2. *Trial* ⇐68.]

Where the judge, in his discretion, refuses to allow the plaintiff to introduce further testimony after closing, upon motion made both before and after an order of non-suit, he commits no error of law for which the verdict may be set aside.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 160; Dec. Dig. ⇐68.]

[3. *Master and Servant* ⇐270.]

In action by a laborer, against a railroad company, to recover damages for injuries received by reason of the negligence of a section master of the road, the position, duties, and powers of such section master having been proved, it was irrelevant and unnecessary to show what was the custom of other section masters in such matters.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913–927, 932; Dec. Dig. ⇐270.]

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[4. *Evidence* ⇐519.]

*Witnesses who know the position and character of an open water-way across a railroad track, are not therefore competent to state their opinion of the dangerous character of the place, and of the requirement of prudence that notice should be given to one pushing a hand-car over it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2328; Dec. Dig. ⇐519.]

[5. *Negligence* ⇐136.]

On the question of negligence, it is the right of the trial judge to determine whether there is any evidence to make a prima facie case, and, if not, he may grant a non-suit.

[Ed. Note.—Cited in Kaminitsky v. Northeastern R. Co., 25 S. C. 59; Coleman v. Wilmington, C. & A. R. Co., 25 S. C. 452, 60 Am. Rep. 516; Hall v. South Carolina R. Co., 25 S. C. 570; Madden v. Port Royal & W. C. Ry. Co., 35 S. C. 383, 14 S. E. 713, 28 Am. St. Rep. 855; Cope v. Hampton County, 42 S. C. 21, 19 S. E. 1018.

For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. ⇐136.]

[6. *Master and Servant* ⇐214.]

An employee assumes the risks of his employment; therefore a railroad company is not answerable in damages for the injuries received by one of its section hands, from falling into an open water-way, properly constructed, while pushing a push-car over his section of the road.

[Ed. Note.—Cited in Simms v. South Carolina Ry. Co., 26 S. C. 496, 2 S. E. 486.

For other cases, see Master and Servant, Cent. Dig. § 565; Dec. Dig. ⇐214.]

[7. *Master and Servant* ⇐219.]

Nor for the failure of the section master to give to this laborer, working on the road under him, special notice of the approach of the push-car to this water-way.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610–624; Dec. Dig. ⇐219.]

[8. *Master and Servant* ⇐189.]

It seems that a section master is a representative of the company, to the extent to which he discharges the duties of his master, the company, and not a fellow-laborer with the hands working under his orders.

[Ed. Note.—Cited in Calvo v. Charlotte, C. & A. R. Co., 23 S. C. 528, 55 Am. Rep. 28; Boatwright v. Northeastern R. Co., 25 S. C. 133; Coleman v. Wilmington, C. & A. R. Co., 25 S. C. 451, 60 Am. Rep. 516; Richey v. Southern Ry., 69 S. C. 393, 48 S. E. 285; Brabham v. American Telephone & Telegraph Co., 71 S. C. 56, 50 S. E. 716; Martin v. Royster Guano Co., 72 S. C. 243, 51 S. E. 680.

For other cases, see Master and Servant, Cent. Dig. §§ 427–435, 437–448; Dec. Dig. ⇐189.]

Before Witherspoon, J., Aiken, April, 1884.

This was an action, by Watson E. Couch, to recover ten thousand dollars damages for injuries alleged to have been received through the negligence of the defendant company. The opinion sufficiently states the case.

Messrs. Henderson Bros., for appellant.

Messrs. J. H. Rion, Croft & Dunlap, contra.

April 22, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action brought by the plaintiff, an employé of "The Charlotte, Columbia & Augusta Railroad Company," to recover, from the said company, damages for a personal injury received by him in the discharge of his duty as a section hand on said railroad. He complained: "While pushing a hand-car up a grade for said company, and over the track of said railroad, the defendants carelessly, negligently, and without any warning whatever, caused the plaintiff to fall into a ditch, or water-way, not covered, and which was

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negligently con*structed, by the said company, across the road-bed, and carelessly and negligently omitted, while approaching said ditch or water-way, to give any signal or notice whatever to plaintiff, by reason whereof the plaintiff was unaware of the danger. That by reason of the negligence and carelessness of the defendants, and without any fault on the part of the plaintiff, he was precipitated into the ditch or water-way, and by the fall his leg was broken below the knee," &c. The defendant corporation put in a general denial, and pleaded: "That the

injuries alleged to have been received by the plaintiff, were not caused by any negligence on the part of the defendant or its servants, but was owing to the negligence and fault of the plaintiff himself."

The case came on to be heard before Judge Witherspoon. There was much testimony as to the circumstances under which the plaintiff received the injuries complained of, which is in the "Brief," and of course cannot be re-stated here. During the progress of the trial, the plaintiff's attorney asked one of his witnesses whether it was "the custom of section masters on the road to turn off hands when they displeased them." The judge would not allow the question to be answered, and plaintiff excepted. He asked another witness, William Davis, after he had described minutely the water-way where the plaintiff was injured, "to give his opinion as to the danger of the place." The judge also refused to allow this question to be answered, and plaintiff excepted.

When the plaintiff announced that he had closed, the defendant's attorney moved for a non-suit, which the judge refused. The defendant offered no testimony, and, before going to the jury, the plaintiff asked permission to offer further testimony, which had only come to his knowledge, as alleged, during the argument for a non-suit. The judge declined to admit further testimony, and sent the case to the jury. Before the argument closed the court adjourned for the day, and the next morning the judge announced that, after looking through the authorities, he had changed his mind, and thought there ought to be a non-suit. The plaintiff then renewed his request for leave to offer further testimony, which was refused, and the judge granted the following order: "At the close of the

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plaintiff's evidence, a motion for *a non-suit was made by the attorney for the defendant. After hearing argument in support of the motion, and in opposition thereto, the court decided to permit the case to go to the jury. There being no more evidence, after hearing most of the argument to the jury upon the merits of the case, as appears from the evidence, and the law applicable thereto, the court became convinced that the non-suit should have been granted, and, at this stage, arrested the case; and it is therefore ordered that the motion for non-suit be granted, and that the defendant have leave to enter up judgment of non-suit herein, and for the costs of this action."

From this order the plaintiff appeals to this court on various exceptions, which it will be necessary to take up seriatim, as the particular grounds upon which the non-suit was granted are not stated.

First. The plaintiff alleges that the judge committed error in granting the non-suit of his own motion after he had refused it when made by the defendant's counsel. There is nothing in the fact that the order was made without a motion to that effect being before the judge. McCall v. Cohen, 16 S. C. 448 [42 Am. Rep. 641]. Nor do we see that it was beyond the discretion of the judge during the trial of the cause, and while the facts were unchanged, to correct his own rulings and grant a non-suit which he had before refused. He could lawfully make such an order. Chichester & Co. v. Hastie, 9 S. C., 331.

Second. The plaintiff also alleges that the judge committed error in not allowing the plaintiff to introduce the testimony tendered by him, both after he had refused and after he had granted the non-suit. The plaintiff formally announced that his case was closed. After that the Circuit judge, in his discretion, sometimes in the interest of justice admits further testimony; but we do not understand that this is a right of the plaintiff which he may demand, but an indulgence extended in order that all the facts may be considered. When a Circuit judge in his discretion refuses such an application, we cannot say that in doing so he committed error of law, which would be sufficient to set aside the verdict.

Third. The plaintiff also excepts, that it

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was error not to *allow the plaintiff, Couch, when a witness on the stand, to testify as to the custom of section masters, other than Satcher, on the road of the defendants in employing and discharging hands. It appeared that Satcher was the boss of Section No. 3 on defendants' road; that his position, as expressed by one of the witnesses, was as follows: "He was overseer: he hired and discharged, got tools, and ordered the hands what to do, and it was his duty to keep the track in good condition." If there was no other objection to the testimony, after this proof, it was irrelevant and unnecessary to show what was the custom of other section masters in the matter indicated.

Fourth. The plaintiff also complains that the judge erred in not allowing William Davis and other witnesses, after they had stated the condition of the water-way, or heard it described by others, to go on and give their opinion as to the dangerous character of the place, and that prudence required that notice should have been given to one situated as the plaintiff was. The general rule certainly is that the mere opinions of witnesses are not admissible. There are some exceptions to the rule for particular reasons, but we do not think that any of them cover this case. The subject matter was not of such character as to authorize the introduction of opinion from the necessity of the case. See 1 Greenl. Evid., 514; Ward v. Charleston City R. R. Co., 19 S. C., 525 [45 Am. Rep. 794]; Jones v. Fuller, 19 S. C. 66 [45 Am. Rep. 761].

Fifth. The plaintiff finally excepts in general terms "that the Circuit judge erred in

granting the non-suit." This certainly opens a very wide field, embracing all possible objections to the ruling. The order does not state the grounds on which the non-suit was granted, and the exception is as indefinite as the order itself. Under these circumstances we can do no more than consider the specific points made in the argument. It was urged that there were issues of fact involved in the case, and therefore the judge should not have decided it himself and ordered a non-suit, but should have referred it to the jury, the rule being as stated in Davis v. C. & G. R. R. Co. (21 S. C., 93): "When there is any pertinent, competent, and relevant testimony to the facts in dispute, the case passes into the hands of the jury and beyond the judge."

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*The facts necessary to be understood are, briefly: In June, 1881, the plaintiff, Couch, was employed as a section hand to work on the railroad of the defendant corporation. He worked on the section nearest Vaucluse, where he had lived for some time, and in the gang of W. S. Satcher, who was boss or master of that section—No. 3. The second day after his employment the section squad (under their boss) left Vaucluse for their work on a hand-car, which was propelled by four men, one at each corner, sitting on the floor of the car, and putting their feet against the ends of the cross-ties on the track. There were three of the hands, Couch and two others, who were not expert in thus paddling, and on that account were called "dead-heads"; and when they struck an up-grade these were required by the boss to jump out, and walking behind the car, to push it forward with their hands or shoulders. In this way the party went over the road in the morning going to their work. As they were returning in the evening over the same road and came to an up-grade, Satcher ordered Couch and the two other "dead-heads" to get out and push. They did so, and were pushing when they approached the water-way, when the accident occurred. The other two jumped on the car, but Couch, the plaintiff, did not, but remained pushing, and fell into the water-way, and received the injuries of which he complains.

The allegation of the plaintiff was that the injuries he received were caused by the negligence and carelessness of the defendant corporation. That was the essential issue he tendered, and of course it was necessary for him to prove it before he could claim a verdict. In considering such an issue, is it necessary that every case, in which there is any testimony as to facts, should be sent to the jury? As we understand it, negligence is not a simple fact in itself, but is rather an inference from facts. It is defined to be "want of ordinary care," and is generally understood to be a mixed question of law and fact. It is certainly the duty of the judge to define what it is; and it seems that it is also his right to determine as "a preliminary question" whether there is any evidence to make a prima facie case, and if not, he may grant a non-suit. Carter v. Columbia & Greenville R. R. Co., 19 S. C., 23 [45 Am. Rep. 754]. In

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other words, as some one has expressed *it: "It is for the judge to say whether there are any facts in evidence from which negligence may be reasonably and legitimately inferred, and it is for the jury to say whether, from those facts, when submitted to them, negligence ought to be inferred." Hooper v. C. & G. R. R. Co., 21 S. C., 541 [53 Am. Rep. 691]; Pierce R. R., 313; Pleasants v. Fant, 22 Wall., 122 [22 L. Ed. 780].

Now, applying these principles to the facts of this case, can we say that the judge erred in not sending this case to the jury? Were there any facts proved by the plaintiff, and taken to be absolutely true, from which negligence on the part of the defendant corporation could be reasonably and legitimately inferred? The plaintiff's first specification was that the water-way across the track, into which he fell and was injured, was negligently constructed. We have read the testimony carefully and fail to discover any proof of this allegation, unless negligence could be inferred from the fact that it was not covered in, but left open. There was no evidence of a wagon road crossing the track at that point. It was not a place for private travel, and so far as concerned the railroad company itself, as the cars passed over it on stringers, the water-way accomplished its uses as well open as if it had been closed. But was leaving it open negligence in reference to the safety of employés on the road? It is true that a railroad company, like any other master, is under an implied obligation to provide suitable apparatus and appliances for their employés to prosecute their work "with a reasonable degree of safety to life and security against injury." But what are suitable appliances must always, to some extent, be determined by the nature of the business. The employé assumes the natural risks of his employment, and "if the company exercise reasonable or ordinary care in making such provision for the safety of its employés, it is not liable to them for injuries resulting from defects in such appliances. It does not undertake to warrant their completeness in all things." Pierce on Railroads. It seems that something may be left to the sense and volition of persons having intelligence. This water-way was not of recent construction. Other structures somewhat of the same character, such as cattle-guards, from the very purpose of their creation are always left open; and we cannot say that

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the judge committed *error of law in concluding that the fact of the water-way remaining uncovered was not sufficient, as

against employés upon the road, reasonably and legitimately to raise the inference of negligence on the part of the company.

The only other allegation of negligence was in not giving the plaintiff specific notice of the condition of the water-way when he was employed or at the time of the accident. As involved in this question, it was stoutly contested at the bar whether the section master, Satcher, was a middle-man or fellow-servant of the plaintiff within the meaning of the rule upon that subject. As to who are fellow-servants, within the meaning of the common law rule that exempts the master or employer from responsibility for injuries to one from the negligence of the other, there has been much diversity of opinion. The cases are not only not in accord, but are absolutely contradictory. In this confusion, we think we have discovered that there is a manifest tendency in the latest authorities to follow principle and to make the employer responsible wherever the act complained of was done by one placed in authority by the principal to discharge some of the duties of the principal, and in regard to which he is the representative of the company and as such entitled to be obeyed. As we understand it, that is the principle of the rule. As was said by Mr. Justice McIver, in the second opinion of this court in Gunter v. Graniteville Manufacturing Co. (18 S. C., 270 [44 Am. Rep. 573]): "The true test is whether the person in question is employed to do any of the duties of the master; if so, then he cannot be regarded as a fellow-servant or co-laborer with the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him must be regarded as the negligence of the master," &c.

This rule has the recommendation of resting on sound principle, and has been sustained and illustrated by a number of cases very recently decided and reported in 15 American & English Railroad Cases, from page 304 to 330. It is there announced, in reference to section masters and positions of similar character, as the better opinion upon the subject, that "a servant having the exclusive control over other servants under a

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common master, *including the power of hiring and discharging, is, in the exercise of those powers, the representative of the master and not a mere fellow-servant." In the case of Gilmore v. Northern Pacific Ry. Co. (reported as above), a section boss having charge of a squad of hands, but all under a general superintendent, directed a laborer to assist in thawing a quantity of frozen giant powder before an open fire, in which operation the plaintiff was blown up and severely injured. He sued the company for the act of the section master and the court held that the plaintiff was entitled to recover; that "the rule first suggested in Priestley v. Fowler (3 M. & W., 1), that a master who has exercised due care in the employment of his servants is not responsible for an injury sustained by one of them in the course of his employment by the negligence of another, however distinct the grade or different the labor of such servants, or how widely separated the locality of their several employments, is being modified by the course of judicial opinion and decision so as to meet the ends of justice in cases since arising of corporations and others engaged in varied and widely extended operations under one nominal and invisible head, but in reality divided into separate parts or divisions under the direction and control of local bosses, superintendents, or heads of departments, who, to all intents and purposes, represent and stand for the corporation with practically unqualified power to employ, direct, and discharge workmen." &c.

Assuming, then, that, in the control and direction of his squad of hands, Satcher was in the performance of duties of the company and to that extent their representative, did he do or omit to do anything from which negligence, binding on his principal, could be fairly and reasonably inferred? He had been delegated the power to command Couch and if, like the section master on the Northern Pacific R. R., he had ordered him to do something out of the line of his duty, something not within the scope of his employment, and in doing so he had been injured, we incline to think the company would have been liable. But he was hired as a laborer on that section of the road, and we do not see that it was outside of his employment when he was directed to get down and push behind the car. As they approached the open water-gap he was not prevented from jumping on the cars

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as his com*panions did. If Satcher had ordered him to remain on the track and continue pushing, it may be that the company would have been responsible for the consequences. It is laid down as one of the duties of a railroad company to notify servants of peculiar dangers which are not known or obvious to them, but it is also a rule that employees are presumed to take the natural risks of their employment and not arising from its negligence. Pierce R. R., 371. We cannot affirm that the judge committed error of law in considering either that the risk in this case was incident to the employment or that the want of special notice to the plaintiff of the obvious condition of the water-gap was insufficient to raise fairly and reasonably the inference of negligence.

The judgment of this court is that the judgment of the Circuit court be affirmed.

22 S. C. 566

HAIR v. GOLDSMITH.

(November Term, 1884.)

[1. *Wills* ⟸782.]

The right of dower is by operation of law, and beyond the control of the husband; but he may give property to his wife by will upon condition that she surrender her claim of dower, in which case she is put to her election between the legacy or devise and the dower.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018–2033; Dec. Dig. ⟸782.]

[2. *Wills* ⟸782.]

The right of dower is a legal right, and a devise to the widow cannot be held to be in lieu and bar of dower, unless so declared, or unless manifestly repugnant to a claim of dower.

[Ed. Note.—Cited in Callaham v. Robinson, 30 S. C. 253, 9 S. E. 120, 3 L. R. A. 497; Sumerel v. Sumerel, 34 S. C. 89, 12 S. E. 932; Hiers v. Gooding, 43 S. C. 434, 21 S. E. 310; Otts v. Otts, 80 S. C. 19, 61 S. E. 109; Scott v. Vaughn, 83 S. C. 365, 65 S. E. 269.

For other cases, see Wills, Cent. Dig. §§ 2018–2033; Dec. Dig. ⟸782.]

[3. *Wills* ⟸782.]

A testator, seized and possessed of 361 acres of land, bequeathed specifically some goods of little value, $500 in lieu of administrator's commissions, and to his grandchildren C., a note on their father, and devised four-tenths in value of his lands to his widow for life, with remainder to their daughter A., and to his grandchildren B. and C. three-tenths each, and named persons to make such division of his lands. *Held*, that the provision for the widow was intended to be in lieu and bar of dower, Mr. Justice McIver dissenting.

[Ed. Note.—Cited in Callaham v. Robinson, 30 S. C. 254, 9 S. E. 120, 3 L. R. A. 497; Otts v. Otts, 80 S. C. 20, 61 S. E. 109; Scott v. Vaughn, 83 S. C. 365, 65 S. E. 269.

For other cases, see Wills, Cent. Dig. § 2024; Dec. Dig. ⟸782.]

[4. *Wills* ⟸800.]

The widow having, under her hand and seal, elected to take the devise to her under this will, she cannot claim dower in the lands assigned to B. and C., notwithstanding she made such election very soon after her husband's death—there being no imposition, misrepresentation, nor persuasion practiced upon her.

[Ed. Note.—Cited in Bannister v. Bannister, 37 S. C. 534, 16 S. E. 612.

For other cases, see Wills, Cent. Dig. § 2074; Dec. Dig. ⟸800.]

Before Pressley, J., Newberry, November, 1884.

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*This was a petition by Rosannah C. Hair against Harriet S. Goldsmith and others. The opinion states the case.

Messrs. Jones & Jones, for petitioner.

Mr. Y. J. Pope, contra.

April 22, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Peter Hair, late of Greenville County, died on September 26, 1882, leaving of force a last will and testament. At the time of his death he was seized and possessed of certain real estate situate in Newberry County. Of this real estate, he devised four-tenths to his wife, the plaintiff, for life, with remainder in fee to his daughter, Hattie S. Manly, three-tenths to the children of his son, John Hair, and three-tenths to the children of his daughter, Mrs. Goldsmith. His son-in law, William Goldsmith, administered with the will annexed.

On October 26, 1882, just a month after the death of testator, the plaintiff executed a receipt, of which the following is a copy: "I hereby acknowledge that I have received from William Goldsmith, administrator with the will annexed of the estate of Peter Hair, deceased, the four-tenths of the real estate of said deceased devised to me under the will of the said deceased, and of which he died seized and possessed. Witness my hand and seal this 26th of October, A. D. 1882. (Signed) R. C. Hair. (Seal.) In presence of (signed) A. J. Kilgore, M. C. Kilgore." On the same day, at the solicitation and request of her friend, A. J. Kilgore (who, it seems, told her that it would be carrying out his uncle's will), she signed a paper, of which the following is a copy, which was presented to her by the said Kilgore: "I hereby acknowledge that I have received from William Goldsmith, administrator with the will annexed of the estate of Peter Hair, deceased, the four-tenths of the real estate of said deceased for and during my natural life; and I hereby accept the same in lieu of all claim of dower in the real estate of said deceased and of which he died seized and possessed. Witness my hand and seal this 26th of October, 1882. (Signed) R. C. Hair. (Seal). In the presence of (signed) A. J. Kilgore, M. C. Kilgore."

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*Some time the next year, i. e., 1883 (the precise time is not stated in the "Case," nor are there any dates to the initiation papers), she filed a petition in the Court of Probate for Newberry County, demanding dower in the said real estate. The defendants, some of whom were minors, answered (the minors by guardian ad litem), denying her right to dower both under the terms of the will and because of the receipts above mentioned which they set up in bar. The probate judge, after taking testimony and hearing argument, held that while the terms of the will did not exclude her from the claim of dower, yet having expressly accepted the devise thereunder in bar of dower in the lands devised to the other devisees, she was precluded from now claiming it. He therefore dismissed the petition, with costs and disbursements against the plaintiff.

From this decree of the probate judge an appeal was taken to the Court of Common Pleas, which came up before his honor, Judge Pressley, who, holding that the second instrument above was based upon a valuable consideration and in the nature of a family settlement, decided that the plea of mistake

could not avail, and he adjudged that the appeal should be dismissed with costs to the defendants, with directions that his judgment be certified to the court below.

The case is now before us upon appeal by both plaintiff and defendants. The defendants contend that the judgment below may be sustained on the ground that the devise to the plaintiff in the will was intended to be in lieu and bar of dower; and that the plaintiff having elected to take the devise, and having received it, she was now barred, and that the Circuit judge should have so held. The plaintiff, contesting this proposition of the defendants, has excepted to the ruling of his honor, Judge Pressley, in that he erred in holding that the second receipt above was a bar to the claim of dower—the plaintiff alleging that said receipt was without consideration; that the release therein was to no one; that it was executed before the dower had been laid off; that the plaintiff did not understand her rights at the time, but one month having elapsed since the death of her husband and before she had an oppor-

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to consult her attorneys, and be*cause her friend, A. J. Kilgore, had advised that she could not claim the devise and the dower both.

It has been often said that the right to dower is a highly favored claim, and under the influence of this principle the courts have been slow to defeat such a claim. It is not meant, however, by this that the allowance of dower is dependent upon the favor or kind disposition of the courts merely. On the contrary, this right is as much governed by established rules and principles as any other. The difficulty arises when these rules and principles come to be practically applied to the facts of a special case. For instance, it has been well established that when a widow of a deceased testator has been bequeathed or devised a legacy or devise in the will, this does not affect her right to dower in the lands of her deceased husband unless such claim is in opposition to the declared intentions of the testator, or is in such manifest repugnancy to the will that the two cannot stand together.

These are plain enough as general rules, but when the question is presented whether the provisions of a certain will are manifestly repugnant to the claim of dower, neithe the text-books nor the decided cases afford any positive and definite test. And after full examination of these authorities, it will be seen that the question at last must depend upon the intention of the testator, to be ascertained by the ordinary rules of construction and interpretation, and especially whether the devise and dower are repugnant, each case turning upon its own facts and circumstances.

Now, what is precisely the character of the case at bar? The testator died seized and possessed of considerable real estate. He left surviving him his widow, two children, and several grandchildren, the children of a deceased daughter. In his will he devised four-tenths of this real estate to his widow for life, with remainder to his and her daughter, H. S. Manly, in fee, three-tenths to the children of his son, John Hair, and the remaining three-tenths to his grandchildren, the children of Mrs. Goldsmith, deceased. There is no express declaration in the will that the devise to his wife was in lieu and bar of dower; the question then is presented, did the testator intend this devise as such bar? This must be determined by

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the fact whether the two are so *manifestly repugnant that they cannot stand together. This being determined, the intention of the testator is reached and must govern.

It must be remembered in considering this question, first, that dower is a right to which a widow becomes entitled on the death of her husband, not by any gift, contract, or indulgence of her husband, but by operation of law, which is fixed at his death, and over which he has no control, and cannot defeat. Second. That while this is true, yet the husband may bequeath and devise his entire estate to whomsoever he pleases, and upon such conditions as he may choose. There is nothing, therefore, illegal in his annexing, either expressly or by implication, a condition to a bequest or devise to his widow, that she shall surrender her claim to dower. In such case the widow is put to her election, and if she accepts the devise or bequest, she loses her dower, not by the act of her husband, but by her own voluntary choice and surrender. So that although the right to dower is favored by all the courts, yet it is no violation of this principle to hold that she cannot claim it, and also another right which was given her on the condition that she should surrender her dower.

Now, is the devise to the plaintiff in the will in question so manifestly repugnant to her claim of dower as to show that it could not have been the intention of the testator that the two should stand together? At the death of the testator he was seized in fee of the real estate mentioned, subject to a life estate of his widow in one-third thereof as her dower, which inchoate before his death became consummated and vested by his death. The will directed that this real estate should be divided into three parts: one, four-tenths; the remainder into two, three-tenths each: and the persons to make this division were nominated therein, and it was evidently contemplated by the testator that this division should be made as early as the condition of the estate would allow. The testator left two surviving children and the children of a deceased daughter. The scheme of the will was evidently to make an equal division among these, the children

of his son, John Hair, representing one share, and the children of Mrs. Goldsmith, deceased, representing their mother in one share; and inasmuch as the share of his

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daughter, H. S. *Manly, was to be encumbered with the life estate of her mother, he gave to her four-tenths, which was one-tenth more than he gave to the other two.

Now, would it not be manifestly against this scheme if the widow was allowed to come in and claim a life estate in each of the three-tenths, in addition to a life estate in the four-tenths, which is directly devised to her? How could a claim of this kind be practically enforced without breaking up the entire scheme? The land was in two tracts, one containing 167 acres, and the other 194 acres, in all 361 acres. Divide this into three portions—one, four-tenths; the other two, three-tenths each, and we have one, 144½, and two, 108½. Set apart to the widow for life the 144½ acre tract under the will, and give her one-third for life in each of the other two as dower, and the scheme of the division directed in the will is destroyed; and especially if the widow's dower in the two three-tenths should be assigned to her out of one of them—and who could say that it should not?

The share of H. S. Manly was subjected to a life estate therein of her mother, and therefore the testator gave her four-tenths, which was one-tenth more than the shares of the others; but after making this difference so as, no doubt, to make the shares as nearly equal as possible, he could have hardly intended that the shares of the others should also be subject to a life estate of his widow to the extent of one-third each as dower, because this would have destroyed the equality among his children, and not only so, but would have postponed the division and enjoyment of the devises until the death of his widow, when the dower would fall in—which would manifestly contravene his intent. The testator evidently intended that the whole of his lands of which he was seized should ultimately belong to his children and grandchildren, in equal parts, and he desired an immediate division, but he knew that his wife was entitled to a life estate in one-third as dower, which, if she claimed in the whole, would defeat an immediate division. He therefore gave her a life estate in four-tenths, which was a little more than her dower in the whole, and then to make her daughter, Mrs. Manly, about equal with the others, he gave her this four-

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tenths at the termi*nation of her mother's life estate. For the widow now to claim the four-tenths for life and dower too in the remainder, we think would be manifestly repugnant to the scheme of the will.

In our case of Bailey v. Boyce (4 Strob. Eq., 84), the general principle which should control in cases of this kind is laid down as herein above; and it is sustained by many cases, both English and our own, cited in the opinion of the court and the Circuit opinion of Chancellor Dargan, as also in his elaborate dissenting opinion. The difference however, in the court was not so much as to the general principle, but in its application to the facts of that case. It was conceded that in all such cases the intention of the testator was the controlling factor, and that this intention was to be reached by the fact whether or not the devise and the claim of dower were manifestly repugnant.

Now, the widow has accepted the provision made for her in the will. True, this acceptance seems to have been brought about in same haste, one short month only having intervened between it and the death of her husband, but neither the probate judge nor the Circuit judge have found as matter of fact that she was in any way imposed upon in executing this receipt and in accepting the devise. The receipt has not been impeached by any direct proceeding. Nor does it appear that any advantage was taken of her through the persuasion or misrepresentation of any of the parties. The only testimony upon that subject is her own, in which she states that she did not understand the true condition of the estate, and that she would not have accepted if time had been given her to consider and to consult with her attorneys. Whose fault was it that deprived her of time and opportunity for consultation? Her own, as far as we can see. Besides, from the view which we have taken, inasmuch as she could not have claimed both the devise and the dower, even if she had taken time, she no doubt would have still accepted the devise, as by that she gets a life estate in four-tenths, which is greater than would have been her dower. So that she has not shown or claimed that she has been injured by a hasty acceptance.

The acceptance, then, being inconsistent with the claim of dower, and this being sufficient to sustain the judgment below, it is unnecessary to discuss the effect of the sec-

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ond receipt, in which *she released all claim to dower, because whether or not that receipt is obnoxious to the objections interposed by the plaintiff can make no difference. As the case is one of election and the plaintiff having elected as evidenced by her taking possession of the property devised to her, and executing the first receipt, she cannot claim both under and against the will.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

Mr. Justice McGOWAN. I concur with the chief justice. It is true that the husband cannot defeat the wife's dower by willing all his estate to others, but he may give her of his property what he pleases as a sub-

stitute for dower, which provision the wife may take instead of dower; and where the intention is manifest that the provision was given as a substitute, she cannot take the provision and at the same time dower. She may take one or the other, but not both. I think that in most cases where a husband makes provision for his wife by will, and makes no allusion to dower, he intends such provision to be her full share of his estate including dower. The widow of course is concluded when he says expressly that the provision is in lieu and bar of dower, but he often omits to say that in express terms and the question arises whether such was his intention. And upon that subject the rule is as stated in Gordon v. Stevens (2 Hill Eq. 48 [27 Am. Dec. 445]), "That as the right of dower is a clear legal right, an intent to exclude that right must be manifested by express words or by clear and manifest implication," &c.

Taking this as the rule, it seems to me that such implication is manifest in this case. There could be no question about it if the whole real estate had been given to the widow for life. Shaffer v. Shaffer, 16 S. C., 625. If one moiety of it had been given, that would have shown such intent by implication. Bailey v. Boyce, 4 Strob. Eq., 84. Then why should not the same result follow when four-tenths of it was given to her? In the case last cited the testator gave to his wife, Eliza Henry, one-half of his estate, real and personal, and the other half to his daughter, Eliza Bailey, and the court held that the wife could not have dower because it would be "inconsistent with the provisions

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of *the will and conflicting with the evident intent of the testator to make an equal partition of his property." Upon what principle did that case proceed? Why, manifestly upon none other than this—that a certain proportion of his whole estate was given by the testator to his wife, and to take out dower first, before ascertaining that proportion, would be inconsistent with the provisions of the will. As I understand it, this principle is entirely independent of what the proportion may be, one-half, one-third, or four-tenths. In either case, taking out the dower first would equally defeat the intention of the testator.

It does not seem to me that this view is answered by saying that the husband could not give more than he had, and that the wife's right of dower did not belong to him, and therefore he must be considered to have intended that the proportions named should be out of what remained after dower was assigned. That would certainly be a strained construction. The question is not one of power, but of intention, and, considering that the right to dower is in abeyance during the life of the husband, can it be doubted for an instant that the testator, when he spoke of his lands, meant the property itself of which he had the title and which, as understood in common parlance, was his, and was his to all intents and purposes, subject only to his wife's inchoate right of dower? He not only gave his lands to be divided in the proportions indicated, but he appointed three persons to make the division, and we cannot assume that he intended these gentlemen to divide, not his lands as stated, but two-thirds interest in them after allowing the wife's dower. I can have no doubt whatever that he meant all his lands, and that being his intention it follows that to take dower out before making the division would defeat that intention and would, as said by the court in Bailey v. Boyce, supra, "be directly inconsistent with the provisions of the will."

The view is, that the testator intended to dispose, by will, of his whole property, without regard to the wife's inchoate right to dower, and giving to the wife a certain proportion of that property, implies an intention to exclude dower in it as unmistakably as if the whole of it had been given to her. I am aware that there was a long contest in the English courts, whether a wife was entitled to dower in lands upon which her hus-

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band *had charged an annuity in her favor. It seems to have been finally settled that such charge did not necessarily exclude the widow's right to dower. But the question being merely as to the intention of the testator, that case is not identical with this, where the testator devises to the wife an arithmetical proportion of the land itself. I think the provisions of this will make a case of election; and that the widow cannot take under the will and against it at the same time. She may take the provision in the will or dower, but not both.

In this view, the paper signed by the widow, after her husband's death, may be regarded as the expression of her election to take under the will.

Mr. Justice McIVER, dissenting. As I cannot concur in the conclusion reached by the majority of the court, I will proceed to state, as briefly as practicable, the reasons for my dissent. But two questions are raised by this appeal. 1st. Whether the provision made in the will of Peter Hair for his widow, the petitioner, is such as, if accepted, will exclude her claim for dower. 2nd. If not, whether the paper signed by the petitioner, which will be hereinafter set forth, operates as a bar or release of her right of dower.

For a proper understanding of these questions, a brief statement of the facts will be necessary. Peter Hair being seized and possessed of two tracts of land—one containing 167 acres, and the other 194 acres—departed this life on September 26, 1882, having first duly made his last will and testament, by which he disposed of his estate as follows:

To his wife, the petitioner, he gives four-tenths of all his real estate for life, and after her death he gives the same in fee to his daughter, Mrs. Hattie S. Manly; to the children of his son, J. S. Hair, he gives three-tenths of his real estate; and the remaining three-tenths to the children of his daughter, Mrs. N. C. Goldsmith, the wife of Wm. Goldsmith, with a provision that the portions which may go to his married granddaughters shall be settled to their sole and separate use. He then makes several specific bequests, viz., to his grandson, Peter Hair, his gold watch and chain; and to his grandson, Peter H. Goldsmith, his shot-gun and

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two fine pistols. *To the children of his daughter, Mrs. Goldsmith, he bequeaths whatever may be due to him by their father, Wm. Goldsmith; and to his daughter, Mrs. Hattie S. Manly, he gives all the residue of his estate. The will also provides for three persons designated therein to make a division of his real estate, in the proportions previously directed, amongst the several devisees named. And by a codicil to his will, he provides for the payment of $500 to the person who shall administer on his estate in lieu of all commissions and expenses, saying that his son-in-law, Wm. Goldsmith, had signified his willingness to become the administrator upon these terms.

It seems that J. S. Hair and Mrs. Goldsmith were the children of a former marriage of the testator, and that Mrs. Manly was the only child of the marriage with the petitioner. Wm. Goldsmith, having qualified as administrator with the will annexed, procured from the petitioner on October 26, 1882, just one month after the death of the testator, her signature to the following paper, which is relied upon as, and which was held by the Circuit judge to be, a release of her right of dower in all the real estate of the testator, of which he died seized, viz.:

"I hereby acknowledge that I have received from William Goldsmith, administrator with the will annexed of the estate of Peter Hair, deceased, the four-tenths of the real estate of the deceased, devised to me under the will of said deceased, for and during my natural life; and I hereby accept the same in lieu of all claim of dower in the real estate of said deceased, of which he died seized and possessed. Witness my hand and seal this 26th day of October, A. D. 1882." (Signed) "R. C. Hair. (Seal.)" "In presence of (signed) A. J. Kilgore, M. C. Kilgore."

Under this state of facts, the questions above stated will be considered.

First, as to whether the terms of the will are such as put the widow to her election of dower, or of the portion devised to her by the will. It is conceded that the rule is well settled that in order to put the widow to her election, the testator must, either in express terms or by clear and necessary implication, declare his intention that she shall not have both. It is quite certain that there is no such intention declared in express

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terms by the *testator in this case, and the only inquiry, therefore, is whether such intention is clearly and necessarily implied from the terms which have been used. When it is considered how easy it would have been for the testator to have expressed his intention in terms, that the provision made for the wife was intended to be in lieu of dower, which, of course, it must be assumed that he knew she had the right to claim, and when it is remembered that dower is an estate which vests in the wife immediately upon the death of the husband, over which the husband can exercise no control, either by will or otherwise, it must be conceded that when a husband makes a devise of his real estate, or any portion thereof, the presumption always is that such devise is made subject to the widow's right of dower therein, and hence the burden is upon those who seek to deprive her of such right, to show that the terms of the will are such as necessarily imply that the intention was that she should not take both her dower and the provision made for her in the will. As is said by Dargan, Ch., in his Circuit decree, in Cunningham v. Shannon (4 Rich. Eq., 140), which was adopted, on this point, by the Court of Appeals: "Dower is a right which, inchoate during the coverture, becomes absolutely vested in the wife as an estate on the death of her husband, and is as much beyond his control or power of disposition as her own inheritance. It not being his to give, every devise which he makes of the land upon which the right of dower attaches is presumed to be given subject to the legal estate, unless the contrary appears on the face of the will, in express words, or by the strongest kind of implication."

It does not appear to me that the respondents have succeeded in showing that the terms of the will under consideration necessarily imply that the testator intended that the provision made for his widow should be in lieu of her claim of dower. So far as I have been able to discover, the authorities do not establish any rule by which it can be absolutely declared what particular provisions of a will necessarily imply an intention to exclude the claim of dower, but that each case must be determined for itself, upon a consideration of the terms used in the will presented for construction. It certainly cannot be said that such an intention is to be implied from the fact that if the claim of

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dower is allowed, the *provisions made for other objects of the testator's bounty will be reduced in amount, for that would be the result in every case, and the necessary consequence would be that dower would be excluded in every case. The case of Bailey v.

Boyce (4 Strob. Eq., 84), which, though decided by only two chancellors against one, less than a majority of the full court, ought properly to be considered as authority, may be regarded as establishing the doctrine that where a testator by his will divides his estate equally between his widow and his only daughter, such a provision must be regarded as necessarily implying an intention on his part to exclude the widow's claim of dower, upon the ground that such a claim, if allowed, would defeat the scheme of his will.

This case is relied upon as conclusive of the question now under consideration, for it is argued that the scheme of Hair's will was to divide his estate equally amongst the several objects of his bounty, and therefore that the doctrine established in Bailey v. Boyce should control here. But was equality the scheme of the will under consideration? It appears to me clear that it was not. On the contrary, out of all the various persons mentioned in the will as objects of the testator's bounty, only two of them (considering the children of J. S. Hair as one and the children of Mrs. Goldsmith as another) are given equal portions. To say nothing of the small specific bequests to the two grandsons who bore the testator's name, we find that the amount due to the testator by Wm. Goldsmith is given to his children, and the whole residue of the estate is given to Mrs. Manly. What was the amount of the indebtedness of Goldsmith to the testator, or what would be the probable value of the residue, does not appear, and we have no means of determining.

Even as to the real estate, I see no warrant for saying that the testator designed an equal distribution of his estate. The figures certainly do not show it, except as has been stated, as to the provision made for the two sets of grandchildren; and the suggestion that the share of Mrs. Manly was increased by one-tenth, because the enjoyment by her of her share was to be postponed until her mother's death, must be based entirely upon conjecture, as there is nothing in the terms of the will to warrant such a suggestion. The testator having bur-

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dened the whole of the por*tion intended for his daughter with the life estate of the widow, it does not seem unreasonable that the portions intended for his grandchildren should be likewise burdened with the dower or life estate of the widow to the extent of only one-third; and this may possibly have been the reason why the portion which the daughter was ultimately to have was enlarged one-tenth; but this, too, is mere conjecture.

I have not deemed it necessary to cite the several authorities in support of the views herein advanced, as they may be found in the case of Cunningham v. Shannon, supra, though they are more fully collected and more elaborately considered in the dissenting opinion of Dargan, Ch., in Bailey v. Boyce, supra. It seems to me, therefore, that it does not appear from the terms of Peter Hair's will that the provision therein made for his widow was intended to be in lieu of her claim of dower. He has not said so, and there is nothing in the will from which such an intention is clearly and necessarily inferrible. The provision is not so large a proportion of his estate as would excite the belief that it must have been intended to be in lieu of dower. Indeed, as we are not informed as to the value of his personal estate, it is impossible for us to say what proportion is given to the widow, and the burden is on those who resist the claim of dower. It only exceeds by a very small fraction, one-fifteenth, the value of the dower in the real estate. The allowance of dower would not destroy the scheme of the will or defeat any of its provisions. The only effect would be to lessen the value of the portions given to the devisees, and that certainly is not sufficient to defeat the claim of dower. Braxton v. Freeman, 6 Rich., 35 [57 Am. Dec. 775].

The testator having no right to dispose of that portion of the real estate covered by the claim of dower, could only give three-tenths of his own estate subject to his disposition to his grandchildren, and not three-tenths of that which he had no right to dispose of. When he says, "I give three-tenths of my real estate to the children of Mrs. Goldsmith," he must, in the absence of anything showing a contrary intention, be regarded as meaning only three-tenths of that of which he had the right to dispose, and not as intending to include also three-tenths of that of which he did not have the right to dis-

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pose. Hence the allowance of the *claim of dower is not necessarily inconsistent with the devise of three-tenths of his real estate to the children of Mrs. Goldsmith.

The next inquiry is as to the effect of the paper signed by the petitioner, a copy of which has hereinbefore been set out. The judge of probate having found that there was no sufficient evidence to show that her signature was improperly obtained, and the Circuit judge having concurred in this finding, there is no ground upon which it can be successfully assailed as not binding on the petitioner. It will be necessary, therefore, to consider its legal effect. It will be observed that as the paper was executed after the death of the petitioner's husband, and after her estate of dower had become vested, it cannot be regarded as a renunciation of an inchoate right of dower; but if it can have the effect attributed to it, it must be as the conveyance of an estate either by way of deed or by estoppel. It certainly cannot be regarded as a legal conveyance, for there is no grantee named, and there are no convey-

ing words used. It does not even amount to such an informal conveyance or agreement to convey as would be given effect in equity. There is no consideration expressed in it, and none given, so far as I can see, from the evidence. The allegation that it was given to enable Wm. Goldsmith, as administrator, to settle up the estate, as well as in consideration of love and affection to the grandchildren of her deceased husband, has not only no support in the testimony, but is directly contradicted in the testimony of Mrs. Hair.

Nor do I see any foundation for the idea that it was in the nature of a "family settlement." The other parties surrendered nothing, and it does not even appear that any controversy had arisen calling for such a settlement. The position that the paper was executed in order to enable the petitioner to obtain immediate possession of the portion devised to her for life cannot be sustained, for there is not only no evidence that such was the consideration moving her to sign the paper, but as matter of law she was entitled to such possession. The paper amounted to nothing more than a naked declaration by the petitioner that she accepted something which she was clearly entitled to, in lieu of something else to which, in my judgment, she was equally entitled. The other parties gave up nothing, and the most that

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*can be made of it is that she gave up something to which she was clearly entitled in consideration of receiving something else to which she had as good a right before as she would have after the surrender. I do not think it needs any argument or authority to show that a court of equity would never enforce such a one-sided agreement.

Nor do I think that the paper can be regarded as estopping her from asserting her claim of dower, for it does not appear that the parties claiming the benefit of such estoppel were induced by her execution of the paper to do, or omit to do, any act, or in any wise changed their position by the doing or omission of which they have sustained or might sustain any prejudice.

These views, thus hastily thrown out amidst the pressure of other official duties, compel me to withhold my concurrence in the view taken by the majority of the court.

Judgment affirmed.

NOTES OF CASES

Decided during the period comprised in this Volume, and not reported in full.

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*No. 1629. LANG v. WORKMAN. April Term, 1884.

[1. *Receivers* ⟸101.]

Moneys and assets turned over by the receiver of an estate to some of the creditors, to be accounted for on final settlement, are chargeable with only the legal rate of interest, notwithstanding a subsequent order in the cause permitting creditors to borrow the funds at 12 per cent. interest.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 189; Dec. Dig. ⟸101.]

[2. *Receivers* ⟸98.]

Where moneys of an estate were paid out by the receiver, without an order of court, to an attorney representing several creditors, such of the creditors so represented as are afterwards shown to have been alone entitled to receive dividends on their claims, are chargeable pro rata with the whole amount so received by their attorney, although he in fact distributed it pro rata among all his clients in the cause.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 182; Dec. Dig. ⟸98.]

Circuit decree of Fraser, J., affirmed on the first ground and reversed on the second. Opinion by Mr. Chief Justice SIMPSON (who, however, was overruled on the second ground), filed November 28, 1884.

No. 1631. THE STATE ex relatione BOOZER et al. v. THE MAYOR AND ALDERMEN OF THE CITY OF COLUMBIA. November Term, 1884.

[*Mandamus* ⟸74.]

On November 11, 1884, a petition was presented to the City Council of Columbia asking that an election be ordered under the provisions of the local option law. Gen. Stat., § 1746. No quorum being present, the matter was postponed until the next regular meeting of Council on November 25, when it was referred to a committee to ascertain and report whether the petition was signed by the required number of citizens. Before action taken by this committee, this application was made to the Supreme Court November 26 for a writ of mandamus requiring the City Council to order such election. The Council in their return state that their committee inform them that the

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petition is *not signed by the requisite number. This allegation was traversed by the relators. The court referred this issue of fact to a referee, who took testimony and reported that 505 votes were cast in the next preceding municipal election; that there were unauthorized signatures to the petition; but that there were authorized signatures of 165 legal voters, and of nine other voters who had not heretofore registered.

This court, after argument, thereupon adjudged that the petition was signed by a number "equal to one third of the number of votes cast in the next preceding municipal election;" but that the City Council had not refused to discharge their ministerial duty, nor been guilty of unnecessary or unreasonable delay, and therefore the relators were not entitled to the writ of mandamus prayed for.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 150–157; Dec. Dig. ⟸74.]

Opinion PER CURIAM, December 9, 1884. Monteith & Ladson, for relators. F. W. McMaster, contra.

No. 1635. CURETON v. WESTFIELD. November Term, 1884. The facts of this case are the same as in the case next infra, except that no attempt was made to serve the answer until sixty days after the remittitur was filed with the clerk of the Court of Common Pleas for Greenville County. Judgment of Hudson, J., affirmed. Opinion by Mr. Justice McIVER, January 7, 1885. E. F. Stokes, for appellant. Wells & Orr, contra.

No. 1636. CURETON v. STOKES. November Term, 1884. On March 31, 1883, Judge Wallace overruled defendant's demurrer and gave him until April 3 to answer. Defendant did not then answer, but on April 4 gave notice of appeal from Judge Wallace's order. On April 5 defendant gave notice of a motion for further time to answer. On April 10 plaintiff moved for judgment, which was refused upon the ground that there was an appeal pending. Defendant thereupon withdrew his motion. The appeal was heard and dismissed (20 S. C., 582), and the remittitur filed in the court below March 17, 1884. On the same day defendant served a copy of his answer on plaintiff's attorneys, who refused to receive it. On the call of the cause at the next term defendant asked that his answer be admitted. Judge Hud-

son refused this application, and judgment was rendered by default for plaintiff. Defendant appealed. *Held*—

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[1. *Appeal and Error* ⇐87.]

*That giving further time to answer is a matter within the discretion of the Circuit judge, and his ruling thereon is not appealable. This case distinguished from Ayer v. Chassereau, 18 S. C., 597.

[Ed. Note.—Cited in Lowry v. Jackson, 27 S. C. 324, 3 S. E. 473.

For other cases, see Appeal and Error, Cent. Dig. §§ 559–569, 577–596; Dec. Dig. ⇐87.]

[2. *Jury* ⇐16.]

The rendition of a judgment by default is no violation of the right of trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 84–94; Dec. Dig. ⇐16.]

[3. *Limitation of Actions* ⇐182.]

The plea of the statute of limitations can be made by answer only.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 676–680, 682, 695, 705; Dec. Dig. ⇐182.]

[4. *Appeal and Error* ⇐223.]

Error in the calculation of interest not brought to the attention of the Circuit judge, nor ruled upon by him, cannot be considered by the Supreme court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1338–1342, 1344, 1346–1350; Dec. Dig. ⇐223.]

Judgment affirmed. Opinion by Mr. Justice McIVER, January 7, 1885. E. F. Stokes, for appellant. Wells & Orr, contra.

No. 1637. DAUNTLESS MANUFACTURING CO. v. DAVIS. November Term, 1884.

[1. *Execution* ⇐407; *Receivers* ⇐40.]

A Circuit judge may appoint a receiver in supplementary proceedings, notwithstanding another Circuit judge, upon the application of other creditors, had previously refused a similar application. It does not appear that the testimony was the same in the two proceedings, but even if so, the Circuit judge was not bound to adopt the same conclusion reached by another judge in a case between different parties.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1161; Dec. Dig. ⇐407; Receivers, Cent. Dig. § 66; Dec. Dig. ⇐40.]

[2. *Execution* ⇐407.]

Application for a receiver in supplementary proceedings may be made and granted, notwithstanding the pending of an action in the nature of a creditor's bill in the courts of the United States, to reach the property of the debtor, the moving party here not being a party to such action.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1161; Dec. Dig. ⇐407.]

[3. *Assignments for Benefit of Creditors* ⇐189.]

An assignment by a debtor of all his property for the benefit of his creditors does not prevent supplementary proceedings a year later, and the appointment of a receiver thereunder, the validity or effect of the deed of assignment not being thereby adjudicated.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 585–589; Dec. Dig. ⇐189.]

[4. *Assignments for Benefit of Creditors* ⇐343.]

The remedy provided by statute for avoiding assignments does not seem to be exclusive of the remedy through supplementary proceedings.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 1050–1052; Dec. Dig. ⇐343.]

[5. *Appeal and Error* ⇐150.]

A party assigned a judgment held by him to one D., and afterwards made a general assignment for the benefit of his creditors. Under supplementary proceedings afterwards taken out against this party, D. testified

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that the assignment to him was *without consideration, and that he made no claim to the judgment. The judge appointed a receiver and directed D. to transfer the judgment to this receiver. *Held*, that D. was not bound by this order, but that the defendant in the proceedings was not affected and therefore could not appeal.

[Ed. Note.—Cited in Globe Phos. Co. v. Pinson, 52 S. C. 192, 29 S. E. 549.

For other cases, see Appeal and Error, Cent. Dig. § 938; Dec. Dig. ⇐150.]

Order of Kershaw, J., affirmed. Opinion by Mr. Justice McIVER, January 7, 1885. W. L. Wait, Wells & Orr, for appellant. J. H. Heyward, contra.

No. 1638. DOMINICK v. FARR. April Term, 1884.

[*Property* ⇐4.]

Conrad Farr permitted his son John to erect three houses on a tract of land, which he intended to give to John. John sold these houses to plaintiff in 1868, but remained in possession. Afterwards Conrad Farr died, and his administrator brought action against the distributees and creditors of the deceased; and under this proceeding this tract of land was sold to one Hope. At this sale Dominick gave notice of his claim to these houses. Hope sold to John Farr and his two brothers, George and Benson Farr. In 1873 Dominick brought this action against John Farr to recover these houses. John answered, relying upon his purchase from Hope, and the statute of limitations, and alleging that his two brothers were necessary parties.

Plaintiff then had George and Benson made parties defendant, who answered relying upon their purchase from Hope. Dominick received from the estate of Conrad Farr a dividend on a claim which he held against Conrad. Wallace, J., held that the houses were personal property and therefore did not pass under the deed conveying the property of Conrad Farr; but that the action was barred by the statute of limitations. Also, that George and Benson had no interest in the property. He dismissed the complaint with costs in favor of the defendants. On appeal, this judgment was affirmed.

[Ed. Note. Cited in De Laine v. Alderman, 31 S. C. 275, 9 S. E. 950.

For other cases, see Property, Cent. Dig. §§ 4 6; Dec. Dig. ⇐4.]

Opinion by Mr. Justice McGOWAN, January 7, 1885. L. J. Jones, for appellant. Moorman & Simkins, contra.

No. 1639. WRIGHT v. MARS. April Term, 1884. In action commenced January 12, 1882, on promissory note which fell due August 6–9, 1861, against the executor of the maker (who died in December, 1861), there was evidence of an admission made to plaintiff by the executor in 1881, which was re-

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lied upon as a new *promise. Witherspoon, J., in the language of the Brief, "charged the jury that if they found that such new promise had been made, it was sufficient to remove the bar of the statute if made within four years prior to the commencement of this action; and if they did not so find, the bar of the statute was complete." He also charged the jury "upon the nature and effect of the plea of the presumption of payment arising from the lapse of time." He refused plaintiff's request to charge: "That the plea of presumption of payment is not applicable to this case, and, if it were, the same promise necessary to remove the bar of the statute would remove the bar of the presumption of payment." Verdict for defendant, and plaintiff appealed alleging error in this refusal to charge.

[*Appeal and Error* ⇐1067; *Payment* ⇐66; *Trial* ⇐261.]

Held, that the presumption of payment is applicable as well to cases in which a bar is prescribed by the statute of limitations as to other cases, and therefore there was no error in refusing the first clause of the request; that the second clause of the request states a correct principle of law, but the judge was not bound to separate it from the incorrect principle with which it was connected in this request. Moreover, under the charge of the judge, the jury must have found that there was no new promise, and therefore the refusal of the judge was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. ⇐1067; Payment, Cent. Dig. §§ 176–188; Dec. Dig. ⇐66; Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. ⇐261.]

Judgment affirmed. Opinion by Mr. Chief Justice SIMPSON, January 10, 1885. G. S. Mower, for appellant. Moorman & Simkins, contra.

No. 1643. THE STATE ex rel. THE SAVANNAH VALLEY RAILROAD COMPANY v. THE CITY COUNCIL OF ANDERSON. November Term, 1884.

[*Municipal Corporations* ⇐863, 935.]

This was a petition to the Supreme Court for a writ of mandamus to require the City Council of Anderson to issue the bonds in aid of additional subscription to the Savannah Valley R. R. Co., voted at an election on November 28, 1884, which was validated and confirmed by an act of the general assembly on December 23, 1884. 18 Stat., 755.

The City Council answered averring their willingness to discharge their duty whenever ascertained, but that at the time of said election the city charter (17 Stat., 980) limited the indebtedness of said city to $25,000, which indebtedness existed at the time of the election; and that by an act amending

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their charter, approved *December 24, 1884 (18 Stat., 812), all bonds issued by said city were to bear interest payable semi-annually, whereas the bonds here prayed for bore interest payable annually. The relators replied alleging that the limit imposed by the charter had been repealed by implication by act of December 24, 1883 (18 Stat., 633); and further, that in this matter the validating act must control.

The court passed a short order directing the bonds to be issued, with interest payable annually.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1824–1827, 1951; Dec. Dig. ⇐863, 935.]

Opinion PER CURIAM, January 13, 1885. B. F. Whitner, for relators. Brown, Tribble & Brown, contra.

No. 1645. HYRNE v. ERWIN. November Term, 1884.

[*Appeal and Error* ⇐807.]

The appeal in this case having been dismissed by the clerk, it was restored to the docket by order of this court, on appellant's motion, after notice to the respondent, who failed to appear. This was a motion to dismiss this appeal, so restored to the docket, upon affidavits explaining respondent's fail-

ure to appear, and setting forth the facts upon which the appeal should be dismissed. But the court refused the motion, no facts being stated, except such as accrued prior to the order restoring the case to the docket, at which time the respondent had his opportunity to present these facts.

[Ed. Note.—Cited in Clark Bros. v. Wimberly, 24 S. C. 138, 139, 140; Tribble v. Poore, 28 S. C. 571, 572, 6 S. E. 577; Dial v. Dial, 33 S. C. 607, 12 S. E. 474, 475.

For other cases, see Appeal and Error, Cent. Dig. § 3185; Dec. Dig. ⟸807.]

Opinion PER CURIAM, January 27, 1885. J. J. Brown, for the motion. Robert Aldrich, contra.

No. 1646. QUATTLEBAUM v. BLACK. November Term, 1884.

[*Appeal and Error* ⟸713.]

This was a motion by J. W. Tompkins, respondent, to have inserted in the Brief in this case, the order for judgment in the case of Tompkins v. Barr, rendered by the Circuit judge after the hearing of this case, the purpose being to furnish additional ground for sustaining the Circuit decree by showing that the rights of the appellants had been determined and settled in said case of Tompkins v. Barr. The motion was refused, the court saying that they could not incorporate in the case as made for appeal, evidence of a fact which occurred after the trial below, and which was not, nor could have been, introduced there.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2956; Dec. Dig. ⟸713.]

Opinion PER CURIAM, January 30, 1885. A. S. Tompkins, Gary & Evans, for motion. Shepherd Bros., contra.

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No. 1647. MAYBIN v. COLUMBIA & GREENVILLE RAILROAD *COMPANY. April Term, 1884.

[*Carriers* ⟸94.]

This was an action to recover the value of two bales of cotton. Plaintiff proved that he lost two bales of cotton from a platform under his charge, about 450 yards from the depot of the defendant, and that about the same time two bales of cotton were shipped from the depot at this place which were reported afterwards from Charleston as unclaimed, with some evidence of similarity of mark on one of these bales with the mark on one of the lost bales of plaintiff. These bales were afterwards claimed by other parties, and delivered to the claimants by the defendant. Fraser, J., granted a nonsuit, and on appeal his judgment was affirmed, this court saying "it was essential for the plaintiff to show that the cotton in question was delivered to the railroad company; and of this, we think, there was a total want of any evidence whatever."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367–395, 456; Dec. Dig. ⟸94.]

Opinion by Mr. Justice McIVER, February 14, 1885. Moorman & Simkins, for appellant. J. C. Haskell, contra.

No. 1655. DOUTHIT v. WESTFIELD. November Term, 1884. These were two cases heard together, as involving the same questions. The following points were decided:

[1. *Appeal and Error* ⟸106.]

A refusal to grant a motion for continuance is not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 729; Dec. Dig. ⟸106.]

[2. *Equity* ⟸395.]

"While perhaps it is the better practice, as a general rule, for the master to await an order from the court before suing on bonds held by him in his official capacity, yet such action would not, in all cases, be so wholly without authority as to make it legal error for the Circuit judge to refuse to dismiss the complaint on that ground." In this case there was such an order.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 854–856; Dec. Dig. ⟸395.]

[3. *Equity* ⟸399.]

In a chancery case, the judge may order a reference as to the facts, but neither party has a legal right to demand it. If the judge so desires, he may have the testimony taken before him.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 864, 865, 867, 868; Dec. Dig. ⟸399.]

A counter-claim disallowed, the amount thereof having been ordered to be paid out under supplementary proceedings, and under such order paid by this plaintiff.

Decree of Hudson, J., affirmed. Opinion by Mr. Chief Justice SIMPSON, February 27, 1885. E. F. Stokes, for appellant. M. F. Ansel, T. Q. Donaldson, contra.

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*A petition for rehearing was filed in this case, but it was refused.

No. 1661. COLLINS v. ROUMILLAT. November Term, 1884.

[*Appeal and Error* ⟸275, 766.]

This was an order dismissing an appeal on motion, because (1) the exceptions to the rulings during the trial, and to the order refusing a new trial, had not been furnished to the presiding judge; and (2) the Brief presented to this court was not the case as set-

tled, and was not in compliance with the requirements of rule V.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1566, 1567, 1647, 3101, 3126; Dec. Dig. ⇐275, 766.]

Opinion by Mr. Justice McGOWAN, March 3, 1885. A. G. Magrath & Son, for the motion. W. M. Thomas, contra.

No. 1668. BEST v. SANDERS. November Term, 1884.

[*Abatement and Revival* ⇐74.]

A suit for partition was commenced in 1854, and Chan. Dunkin, in February, 1855, declared the right of the parties, and ordered a writ of partition to issue. The writ was issued, but no return was ever made because of disagreement among the commissioners. In February, 1856, the cause was marked "ended" on the docket by Chan. Johnston, and all the papers were put into a package, labelled and entered by its title on the "General Index." The affidavits now submitted show that there had been no partition, and no proceedings subsequent to the issuing of the writ.

This was a motion made before Aldrich, J., at Barnwell, in May, 1883, by the original plaintiff (who was then an infant, who married in 1858, and attained her majority in 1860) for leave to file and serve a supplemental complaint, the original parties and the heirs of those since deceased being named as parties in the supplemental complaint, and notified of the motion. The Circuit judge refused the motion.

On appeal this court held that the evidence showed that the entry on the docket, if not a mistake, was premature, and that the case was never ended; that under the old equity practice, the right to revive would exist without any well defined limit in point of time, and that it might have been accomplished by a bill in the nature of a bill of revivor and supplement; that this right has been substantially preserved by the code of procedure (§ 142); that this is a question relating merely to pleading, and does not affect the merits,

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but there is no authority for applying *the statute of limitations to the right to institute such a proceeding, although the relief therein demanded may be barred.

[Ed. Note.—Cited in Bryce v. Massey, 35 S. C. 140, 14 S. E. 768; Dunham v. Carson, 42 S. C. 388, 20 S. E. 197; De Loach v. Sarratt, 55 S. C. 274, 33 S. E. 2, 35 S. E. 441.

For other cases, see Abatement and Revival, Cent. Dig. § 129; Dec. Dig. ⇐74.]

Judgment reversed. Opinion by Mr. Justice McGOWAN, March 13, 1885. I. L. Tobin, for appellant. No counsel contra.

No. 1671. CLEMONS v. C., C. & A. R. R. COMPANY. November Term, 1884.

[*Appeal and Error* ⇐1177.]

This was an action to recover the value of cross-ties and wood furnished by plaintiff to defendant. The trial justice gave judgment for the plaintiff, and the Circuit judge (Hudson) affirmed the judgment below. On appeal this court approved the findings below as to the cross-ties, but held that there was no evidence whatever as to the wood; and granted a new trial nisi.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597–4604, 4606–4610; Dec. Dig. ⇐1177.]

Opinion by Mr. Justice McGOWAN, March 16, 1885. J. T. Barron, for appellant. H. A. Meltze, contra.

No. 1693. MILLER v. MORRISON. November Term, 1884. One Rives put $10,000 in Confederate money in the hands of defendant in 1864 to speculate with in the buying and selling of negroes, cotton, &c., the defendant to receive one-half of the net profits. At the close of the war defendant had on hand three negroes and some cotton. In 1870 Rives assigned his claim to plaintiff's intestate, who commenced this action in March, 1882. The complaint was dismissed by Aldrich, J., who held, among other things, that the action was barred by the statute of limitations. On appeal, *held*—

[1. *Limitation of Actions* ⇐197.]

That the finding of fact by the referee, concurred in by the Circuit judge, that Rives had demanded a settlement in 1866, approved, as it is sustained by evidence in the case.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 722–726; Dec. Dig. ⇐197.]

[2. *Limitation of Actions* ⇐102.]

That the conduct of the parties show that the trust relation previously existing between them was terminated in 1865 or 1866; a reasonable time thereafter was allowed defendant for a settlement, and he was then liable to an action by Rives. Therefore this action was barred when it was commenced in 1882.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 494–505; Dec. Dig. ⇐102.]

[3. *Appeal and Error* ⇐169.]

A question not raised nor considered below cannot be considered here.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018–1034; Dec. Dig. ⇐169.]

Judgment affirmed. Opinion by Mr. Justice McIVER, April 21, 1885. W. B. Wilson, for appellant. C. E. Spencer, contra.

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*No. 1705. Ex parte FERGUSON, Sheriff, In re SULLIVAN, DREW & CO. v. HAMBLIN. November Term, 1884. Hamblin gave a chattel mortgage to several of his creditors. Afterwards, but before condition broken, several other creditors levied attachments upon the property covered by this mortgage, some of which attachments were afterwards vacated. After this levy, but before the condition of the mortgage was broken, the mortgagees demanded these goods from the sheriff, who refused to surrender them. The claims upon which the attachments were issued were reduced to judgment, and the executions thereon were levied on these same goods. This action was then commenced by one of these judgment creditors against all other claimants to have the mortgage declared fraudulent, and for a sale of the goods and distribution of the proceeds according to the rights of the parties. A consent order was passed, directing the sheriff to sell the goods and put the proceeds into a savings bank, subject to the further order of the court. In this action the mortgage was sustained, and as a result thereof, the judgment and attaching creditors would receive nothing.

The sheriff then intervened by petition, praying that he be allowed to reimburse himself for his expenses, disbursements, and costs. Kershaw, J., decreed that the sheriff pay the fund in bank, together with all accumulated interest, to the mortgagees, less the actual disbursements and expenses of said sheriff necessarily incurred in the sale so made under and since the order of sale, together with commissions on the amount of such sales; also that the complainant pay the costs of clerk and master in this cause, and that every other party pay his own costs; and that the sheriff vouch his claims in this cause to be paid by the parties liable. On appeal, *held*—

[1. *Sheriffs and Constables* ⟸74.]

That the sheriff is entitled to reimburse himself out of the proceeds of sale for all expenses and disbursements since the institution of this action.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 93–96; Dec. Dig. ⟸74.]

[2. *Sheriffs and Constables* ⟸74.]

But not for expenses and disbursements in and about the taking and safe keeping of these goods under the attachments and executions prior to the commencement of this action. Mr. Justice McIVER dissenting.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 93–96; Dec. Dig. ⟸74.]

[3. *Sheriffs and Constables* ⟸74.]

That the sheriff may vouch his bill of disbursements and costs in this cause, but not

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his bill for expenditures incurred in *the attachment suits. Mr. Justice McIVER dissenting as to disbursements (distinguishable from costs) incurred in the preservation of the property (before this action was brought), out of which this fund was realized.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 93–96; Dec. Dig. ⟸74.]

[4. *Chattel Mortgages* ⟸201.]

That the mortgagees are entitled to the interest accrued on the fund while on deposit in the bank.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 360; Dec. Dig. ⟸201.]

[5. *Appeal and Error* ⟸984.]

That this being a chancery case, the general direction of the Circuit judge as to costs will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3815, 3881–3888; Dec. Dig. ⟸984.]

Judgment modified. Opinion by Mr. Chief Justice SIMPSON, May 9, 1885. Simonton & Barker, for the sheriff. Smythe & Lee, for plaintiff and other judgment creditors. J. N. Nathans, for mortgagees.

APPENDIX

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*At the suggestion of Mr. Justice McGowan, the decree of Hon. J. J. Maher, Circuit judge, in the case of THE STATE v. THE SOUTH CAROLINA PHOSPHATE COMPANY, LIMITED, alias THE OAK POINT MINES, is here inserted. This decree was as follows:

This is an information filed by the attorney general in which it is alleged that the defendants have intruded upon the rights and property of the state in North Wimbee Creek, a navigable stream, useful for purposes of trade and commerce, in which the tide from the sea ebbs and flows, by digging, mining, and removing from the bed of said stream, below usual high water mark, phosphate rock and phosphatic deposits of a stated quantity and value; and that they are engaged in such business and intend to pursue it; and judgment is demanded for the value of the rock and deposits so appropriated, and for a perpetual injunction to restrain like operations in future. Defendants in their answer to the information admit the acts charged, and that they are engaged in and intend to continue the business of digging, mining, and removing said rock and deposits, but deny that they have appropriated the quantity alleged; that said creek is a navigable stream; that the rock and deposits therein are the property of the state.

Upon this issue the cause was referred, by a consent order, to Asher D. Cohen, Esq., as special referee, "to report generally with any special matter." The report of the special referee was presented at the June term, 1874, wherein certain findings of fact were set forth, and, at the suggestion of the counsel, a question was proposed for determination by a jury, under instructions as to the law, viz.: Is North Wimbee Creek a navigable stream? In this report reference is made in general terms to a certain grant as part of and to be submitted with the report under which defendants set up a claim of title to low water mark in the bed of said creek. It is proper to state here that said

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grant bears *date June 17, 1869, and purports to convey to one Henry M. Stuart 343 21-100 acres of land, bounded north and northeast by North Wimbee Creek, and south and southeast by South Wimbee Creek, "and on each and every of said water courses extending to low water mark."

The report being read and filed, a consent order was taken June 8, 1874, confirming said findings of fact and referring it back to the special referee "to take the testimony and report the facts as to the remaining questions of fact in the cause and the testimony in connection therewith." On the coming in of the report of the special referee, at February term, 1875, the cause was brought on to be heard upon the pleadings, the findings of fact set forth in the two reports, and certain exceptions on the part of the plaintiff to the second report, and was argued by the counsel of the respective parties. Further preliminary statement is deemed unnecessary.

Referring to the papers in the cause, which will speak intelligibly for themselves, I proceed at once to rule upon the exceptions in their order, and will then state my conclusions as to the law upon the merits.

1. The pleadings raise three issues: (1) As to the quantity of rock appropriated; (2) as to the navigability of the creek; and (3) as to the title of the state in the bed of the creek. The referee reported facts as to the first and third of these issues, and as the order referring the case back limited inquiry to the "remaining questions of fact," it is plain that the second reference was restricted to facts embraced in the general question as to the navigability of the stream. If this question had been submitted to a jury, as was first intended, their verdict would have ripened the case for final determination; and it is manifest from the terms of the order of June 8, 1874, confirming the referee's findings of facts, that they were closed from further investigation. But it appears that the findings now excepted to are based upon testimony which was admitted without objection, and that the referee was not called on to determine the scope of the order until the reference had been closed and requests of counsel were presented. I think, under these circumstances, that the referee rightly conceived his duty in considering such testimony, and in reporting his con-

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clusions thereon; and these *being before the court, without complaint of any prejudice worked by the introduction of the testimony, should not be discarded in deference to an objection which now assumes a purely technical form. The exception is overruled.

2. If the question as to the length of the bar up and down the creek depended entirely on the estimates of the witnesses who spoke from mere observation, I would not feel warranted in disturbing the referee's findings. But the wide differences that prevailed in these estimates give special prominence and weight to any testimony on this point which is founded on actual measurement. I think the map made by Edward F. Kittoe should

control in determining the length of the bar. He is a civil engineer and surveyor by profession, and also superintendent of defendants' works, and he made this map for the use of the dredge and to keep account where it worked. True, he did not vouch for its perfect accuracy, yet he testified conformably to it in stating that the bar averages two hundred and fifty yards in length. Allowing for some inexactness in the measurement, the map still outweighs, in my judgment, estimates based on observations more or less casual, and I am satisfied that the length of the bar does not exceed three hundred yards. The hydrographical map of Barbot and Smith supports this conclusion, and the weight of the general testimony is to the same effect. The exception is sustained and the court substitutes this finding for that of the referee: That the length of the bar up and down the creek is about three hundred yards.

3. The United States coast survey was very properly adopted by the referee as the most scientific and exact representation of "the depth of water and tides in said stream." The soundings, as expressed in the chart, show the depth of mean low water. A section of the bar is represented as dry at low water, and the depth of mean low water upon the remainder of the bar is given as six inches. The fall of low water below the plane of reference, at spring tides, is seven inches, and the height of low water above the plane of reference at neap tide is six inches. These are facts in the case which have not been discredited. I am unable to reconcile them with the findings of the referee, that ordinarily the plateau practically runs dry at low tide. Such is undoubtedly the case at low spring tide, and that it is

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frequently *so at ordinary low tide, when off-land winds prevail, is made clear by the testimony. But I cannot understand how a place upon which the mean depth of low water is six inches can ordinarily be dry. The findings of the referee must be corrected in this particular, and the court substitutes the following: That at extreme low tides, and frequently at low tides when the same are affected by off-land winds, the plateau practically runs dry, &c.

4. The conclusion of the referee does not seem to me to be compatible with that suggested as the proper conclusion in this exception. Both results are, I think, regularly deducible from the data given in the report. The referee states the rise of the tide upon the plateau to be about six feet, gives the rate of rise and fall, and concludes that for about twelve hours in each twenty-four there is a depth of from two and a half to three feet of water. Plainly this statement does not convey the idea that during the time specified there is no greater depth of water on the plateau than two and a half or three feet. I do not perceive any error in this conclusion, and accordingly overrule the exception.

5. There is no proper or sufficient proof of the existence of old rice fields now submerged with salt water on the promontory towards Horse Landing. The testimony on this point is mere hearsay, and this of the most vague and indefinite character. Old residents on the creek who were examined make no mention of this circumstance, which could not possibly have escaped their observation if it really existed. The general testimony makes decidedly against the probability of rice cultivation on Kean's Neck at any period of the past, and it is certain that for the last forty years rice has not been planted on the creek, except at its extreme headwaters, eight miles at least from the bar, and on the east of the stream where the waters of the Combahee are accessible for purposes of irrigation. The finding of the referee is reversed, so far as it certifies the existence of old rice fields on the promontory.

6. For reasons stated in the ruling upon the first exception, the finding impugned by the sixth exception must stand. But the clear weight of the testimony entitles the plaintiff to a finding of further matter, as suggested in the exception, and the court makes such finding, as follows: That the lands on either side of North Wimbee Creek,

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where the phosphate beds in con*troversy are deposited, are not now nor have they ever been rice lands.

7. The seventh exception is overruled.

The questions to be considered are: 1. Whether North Wimbee Creek is a navigable stream? and if such, then 2. Whether defendants have established title against the state to the bed of the creek below usual high water mark, and if so, to what extent? To low water mark only or to the centre of the stream?

I. Our own cases afford little light on the subject of navigability, beyond the observation of Judge Nott, Cates v. Wadlington (1 McCord, 580 [10 Am. Dec. 699]), that "that cannot be considered a navigable river the natural obstructions of which prevent the passage of boats of any description whatever." In the case of the Daniel Ball (10 Wallace, 557 [19 L. Ed. 999]), the Supreme Court of the United States held that rivers are navigable in fact "when they are used or are susceptible of being used in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

This definition was followed and further elucidated in the case of the Montello (11 Wall., 411 [20 L. Ed. 191]), where it was held that "the capability of use by the public, for the purposes of transportation and commerce, affords the true criterion of the navigability of a river, rather than extent and

manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway." The court considered the vital and essential point to be "whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so, the river is navigable in fact, although its navigability may be encompassed with difficulties by reason of natural barriers, such as rapids and sand bars." Numerous authorities are cited in support of these propositions. The following remarks of Chief Justice Shaw, in Rowe v. Granite Bridge Corp. (21 Pick., 344), are quoted with approbation: "It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable; but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."

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*The well considered case of Morgan v. King (35 New York, 454), is among the cases cited. The true rule on this subject was there declared to be "that the public have a right of way in every stream which is capable, in its natural state, and its ordinary volume of water, of transporting, in a condition fit for market, the products of the forests or rivers, or of the tillage of the soil upon its banks." It may be observed here, that Mr. Washburn, in his work on easements, page 397, states that this rule is pretty generally received in the United States. The court further held that it is not essential to the public easement "that the capacity of the stream, as above defined, should be continuous, or, in other words, that its ordinary state, at all seasons of the year, should be such as to make it navigable; if it is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons; and if its periods of high water, or navigable capacity, continue a sufficient length of time to make it useful as a highway, it is subject to the public easement."

I shall mention but one other case cited in the Montello, as expressing, in a concise definition, what seems to me to be the fair result of the leading authorities in this country on the question of navigability. In Hickok v. Hine (23 Ohio, 523; 13 Amer. Rep., 255), it was held that "a river is navigable which is capable of floating to market the products of the country through which it passes, or upon which commerce may be conducted; and from the fact of its being so navigable, it becomes in law a public river or highway."

The actual use commonly made of North Wimbee Creek, during the past forty years, by the proprietors of the six flourishing plantations bordering upon its banks, in the transportation of their crops to market, and of their return supplies, demonstrates the navigable capacity of the stream for purposes useful to trade and agriculture; and my conclusion is that North Wimbee Creek is a public navigable stream.

II. As to the title to the soil or bed of the creek, and first as to the space between usual high and low water mark, defendants claim this portion of the bed of the creek under the grant to Stuart. The validity of the grant is disputed, it being maintained on the part of the state that the bed of a navigable

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stream, *in which the tide ebbs and flows, is not "vacant land," within the meaning of the act of 1791 (5 Stat., 168), under which this grant purports to have been issued; and hence that it passed no interest in the soil of the creek below ordinary high water mark. The authority of the legislature to vest the title to such land in an individual is not controverted. The point made is, that lands of this character have been reserved from location and grant, under the provisions of the statute regulating vacant lands, and that a special act of the legislature is necessary to confer title in respect to such lands. Certainly no express reservation to this effect is to be found in any of the statutes relating to the public land.

Land, in its legal signification, comprehends soil covered by water. 2 Black. Com., 18, 19. The words "lands liable to rates" may extend to navigation, cuts, and canals, as well as to quays and wharves. Regina v. Leeds and Liverpool Canal Companies (7 Adol. and El., 685), per Patterson, J. "They are not the less land for being covered with water." Potter's Dwarris, 290. "Vacant lands, in the sense of our statutes, are lands that have not been 'taken up' by individuals, nor appropriated to particular public purposes." Thus, by an act of 1695, § 15 (2 Stat., 101), lands escheated and reverted to the lords proprietors, under a former act, by reason of having "lain waste," and no rent having been paid, "shall be deemed, to all intents and purposes, as lands untaken up." By an act of 1731, § 7 (3 Stat., 292), lands not registered as therein required, "shall be deemed, reputed, and taken as vacant lands," and it is declared lawful for any person "to take up the same." An act of 1778 (4 Stat., 404) recites, in preamble, that certain land was "not granted, but still vacant." An act of 1787, § 7 (5 Stat., 39), avoids grants of land for Sullivan's Island, Middle Bay Island, "or any other lands whatever, which have been, or are now, appropriated for any particular public purposes."

In Thomas v. Daniel (2 McC., 354), it was held that land ceded to the state by the Cherokee Indians, with reservation of right to inhabit same during good behavior, was not vacant land, and a grant of such land was declared void. The court say: "Land ap-

propriated by the legislature is not vacant, be that appropriation what it may, to in-

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dividuals, to public purposes, or *to the Cherokees." In McHugh v. Dinkins (2 Brev., 324), it was held that lands escheated to the state were not vacant lands, the ground of the judgment being that a public sale of such property was required by the statute regulating escheats. And in State v. Arledge (2 Bail., 401 [23 Am. Dec. 145]), it was held that lands purchased by the state from a corporation to which they had been originally granted, were not subject to grant as vacant land. The decision was rested on the authority of the adjudged cases as to escheated land, without, it would seem, adverting to the special reason upon which they were based.

It appears, therefore, that there is nothing in the legal signification of the term, "vacant land," to restrict its application, so as to exclude land covered by water, which has not been appropriated to individual or public use, by authority of law.

That land flowed by the tide is the subject of grant in this state is conclusively shown by statutes in which "all lands granted in this state" were classified and rated for purposes of taxation. The first of these was the act of 1784 (4 Stat., 627) to raise supplies. This classification was continued in the supply acts of each succeeding year until 1815, when it was made permanent by "An act to fix the value of lands in this state for taxation," &c. (6 Stat., 7). In these acts "tide swamp not generally affected by salt or freshets" and "salt marsh" proved to be "incapable of immediate cultivation" are set down, the first taking rank as the most valuable land in the state. There is no trace of any special legislation providing for the location and grant of lands of this character, and the necessary inference is that they were disposed of under the general regulations prescribed by the statutes relating to vacant lands.

An act of 1714 (7 Stat., 61 and 62, §§ 3 and 5) recognizes claims of individuals, under grant or conveyance, to sundry lots on the bay in Charleston, "from high to low water mark," and imposes penalties and forfeiture for neglect by such claimants to build their proportion of the sea wall. An act of 1719 (7 Stat., 69, § 20), reciting that owners of front lots on the bay were discouraged from building their part of the sea wall by reason of others claiming lots before them to low water mark, provides a mode of adjusting disputes, and declares that upon failure of the claimant of the lower lot to present his

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claim within a stated *time, said lot should be vested in the owner of the front lot, "he paying to the owner of the lot to the eastward from high to low water mark his full charges that he was at for his grant for the same," &c.; and section 22 provides that "upon the title to the front and lower lots becoming vested in the same person, they should not again be separated, and if the front lot should be disposed of by sale or gift, the other should go along with it as an appurtenance."

An act of 1787 (5 Stat., 39, § 4) allowed persons to carry off oysters and oyster shells below high water mark from land for which surveys had been taken out but not passed and confirmed by grants under the signature of the governor since the opening of the land office by the act of 1784. And (§ 6) allowed owners of wharves and low water lots in Charleston exclusive privilege, for six months after the passage of the act, of obtaining grants for land covered by water in front of their wharves or lots as far as the western channel of Cooper River and the northern channel of Ashley River. By act of 1836 (7 Stat., 151), all vacant land not legally vested in individuals in the harbor of Charleston, covered by water, was vested in the city council of Charleston for public purposes, &c.

These citations from our statutes are, to my mind, conclusive of the question under consideration. They show unmistakably that lands below high water mark in tidal navigable rivers have been uniformly recognized by the legislature as embraced within the description of vacant lands, and subject as such to location and grant under the general regulations of the land office. This practical interpretation of its own language by the legislature, being in accordance with the comprehensive meaning which it bears in law, there would seem to be an end to the question whether a grant of land to low water mark in the bed of a tidal navigable stream, issued in conformity to the provisions of the act of 1791, passed the title of the state to the grantor.

My conclusion is that defendants have valid title, under the grant of 1869 to Henry M. Stuart (from whom they derived), to the soil between ordinary high water and low water mark in said creek, embraced within the lines of said grant. As to the title to the bed of the creek below ordinary low water mark, I hold that it is in the state. No express

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grant conveying this land has *been produced. No long-continued acts of ownership in the bed of the creek have been shown in support of a prescriptive right. Angell on Tide Waters, 96; Tyler on Boundaries, 36.

The possession for forty years of the adjacent land by those under whom defendants claim undoubtedly raises the presumption of a grant co-extensive with the limits of such possession. But to extend the boundary to the centre of the creek would be to overturn an established principle of the common law which has never yet been questioned by any court in England or this country. The tendency of American decisions has been to re-

strict riparian proprietorship even upon navigable rivers above the tides, and not to enlarge it in respect to navigable streams in which the tide ebbs and flows. Whenever the common law test of navigability has been repudiated, the common law consequences of navigability have been held to attach. Nothing more can be claimed under the grant presumed from the possession of the upland than would result from an express grant calling for the creek as a boundary, conceding that usage would carry the line to low water mark, the principle on which it could be extended further upon the facts of this case is not to be found in the common law, nor in any decision that has come within my notice.

The plaintiff is entitled to judgment in conformity to this decision. The order for judgment will be settled at chambers, upon motion of either party, opposite counsel being duly notified.

AMENDMENTS OF THE RULES OF COURT

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*The last publication of the rules of court in book form was on July 1, 1882. Since that time some amendments have been adopted which are here reprinted for the convenience of the profession.

SUPREME COURT RULES.

Rule XIII. It is ordered that rule XIII. of this court be stricken out and the following inserted in lieu thereof: "In the hearing of causes in this court, counsel will be limited to two hours on each side, in which will be counted the time occupied in reading the Brief or Case; and the time thus allowed may be apportioned amongst the counsel on the same side at their discretion: Provided, however, that such time may be extended upon special application, in writing, to be filed before the case is called for hearing, stating reasons satisfactory to the court for such extension." Adopted May 30, 1884.

It is ordered that rule XIII. be amended by adding thereto the following words: "Hereafter counsel, in the course of their argument, will not be permitted to read from books, except by special leave of the court, which will only be granted in such exceptional cases as in the opinion of the court may call for a departure from this rule. When counsel wish to quote from books, they will be required to use written or printed extracts therefrom." Adopted June 2, 1885.

So that rule XIII. now reads as follows:

Rule XIII. In the hearing of causes in this court, counsel will be limited to two hours on each side, in which will be counted the time occupied in reading the Brief or Case; and the time thus allowed may be apportioned amongst the counsel on the same side at their discretion: Provided, however, that such time may be extended upon special application in writing, to be filed before the case is called for hearing, stating reasons satisfactory to the court for such extension.

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*Hereafter counsel, in the course of their argument, will not be permitted to read from books, except by special leave of the court, which will only be granted in such exceptional cases as in the opinion of the court may call for a departure from this rule. When counsel wish to quote from books, they will be required to use written or printed extracts therefrom.

22 S. C. 604

CIRCUIT COURT RULES.

Rule XI. is amended by striking out the second paragraph thereof and inserting the following: "Before the argument commences, the counsel on each side shall submit to the judge in writing such propositions of law as they propose to rely on, which shall constitute the requests to charge: Provided, however, that nothing herein contained shall prevent either counsel at the close of the argument from submitting such additional requests as may be suggested by the course of the argument." Adopted December 14, 1882.

So that rule XI. now reads as follows:

Rule XI. Counsel shall not attempt to argue or explain a case, or any matter arising therein, after he has been heard and the opinion of the court has been pronounced.

Before the argument commences, the counsel on each side shall submit to the judge in writing such propositions of law as they propose to rely on, which shall constitute the requests to charge: Provided, however, that nothing herein contained shall prevent either counsel at the close of the argument from submitting such additional requests as may be suggested by the course of the argument.

Rule XIV. is amended by striking out the word "private," in the first line, and by inserting at the end of the rule the following: "Or unless made in open court and noted by the presiding judge." So that rule XIV. now reads:

Rule XIV. No agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be

binding, unless the same shall have been re-
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duced to the form of *an order by consent and entered; or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel; or unless made in open court and noted by the presiding judge. Adopted May 13, 1885.

Rule LXXI., as heretofore numbered, was changed to No. LXXII. on December 14, 1882, and the following additional rule adopted by the convention of the judges:

Rule LXXI. No action for malicious prosecution, based upon an indictment tried by the Court of Sessions, shall be commenced unless a copy of the indictment has been first obtained by order of the judge before whom the case was tried. Adopted December 14, 1882.

TRIBUTE OF RESPECT

TO

JUDGE THOMAS WORTH GLOVER

22 S. C. *606

*While the Supreme Court was in session on Tuesday, November 25, 1884, it being the first day of the November term, the Honorable Ch. Richardson Miles, the attorney general, rose and said:

May it please your honors: Another link which bound the present to the past has been broken—the Honorable Thomas W. Glover, the last but one of the law judges of South Carolina under the constitution of 1790, has died since the last term of this court.

Judge Glover's connection with the legal profession extended over the unusually long period of sixty-six years. Admitted to the bar in 1818, he was at the time of his death the oldest surviving member of the bar of South Carolina. After thirty-four years of active and useful professional life, he was elevated to the bench in 1852, and served most usefully, faithfully, and acceptably until he was, under the constitution of 1868, deprived of the office which he was entitled to hold for life. Although he had then long passed the age at which men feel privileged to withdraw from the active pursuits of life, he immediately resumed the active practice of his profession, with intellect undimmed and vigor undaunted, until the year 1878, when he was appointed master for Orangeburg County—an office which he held, and the duties of which he most thoroughly performed, until his death.

The mental and moral qualities of Judge Glover made him useful in all the responsible positions which he filled, and won for him the confidence and respect of all, while his amiable and affectionate nature, and gentle and courteous manners, secured to him the warmest esteem and affection. In the private and domestic relations of life, he was singularly happy. And after an active and useful life, prolonged far beyond the allotted span, supported by the conscience of "duties well performed and days well spent," in his loved home surrounded by all which
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should *accompany old age—as honor, love, obedience, troops of friends—he has been gathered to his rest. For him we feel no regret, but only sorrow for those in whose hearts the loss of their loved one has left a void.

I have been requested by the bar of Orangeburg to present to this court the tribute of respect offered by that bar to the memory of Judge Glover, and to ask that the same be entered on the journal of the court. And as a further mark of respect, I move that this court do now adjourn.

The tribute of the Orangeburg bar, presented to the court by the attorney general, was as follows:

On the night of the 2d day of October, A. D. 1884, Thomas Worth Glover, by the decree of the Almighty and All-wise Judge, was called from the field of his earthly toils. By the mercy of that Eternal Judge, he had been continued on earth for the fulfillment of his useful life beyond the period allotted to mortal man (which is three-score years and ten) and into those four-score years which we are told are full of "labor and sorrow." Removed after these later years, having faithfully performed the work set before him, and having undergone the "labor and sorrow" of those years, he, dying, has severed one more of the few last remaining links of that chain which connected the history of the old judiciary of the State of South Carolina with the living present.

At the feet of this our Gamaliel, we his younger brethren have had the privilege of

sitting and drinking in the lessons of wisdom from his lips. It is but meet and proper that, according to a time-honored custom, we should express our regrets and deep sense of the great loss which his death has entailed upon us and our country. Therefore, be it

Resolved, That in the death of Hon. Thomas W. Glover we, in common with the State of South Carolina, mourn the loss of an upright, learned, and honorable judge—one who, upon a bench as pure as ever commonwealth knew, illustrated and enforced those principles of virtue, integrity, and justice which should ever adorn the judiciary, and which characterized that bench whose decisions are quoted and recognized in the courts of the civilized world. That as

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throughout the broad boundaries of *our state his public merit and judicial services were acknowledged and pre-eminent, so in that portion which was his home for so many years his private life, virtue, and integrity have erected an imperishable monument before his own people, to stimulate to higher aims and nobler aspirations—feeling that "the good that men do lives after them" and its influence never dies, and knowing that the grandest example left for their emulation is that of the Christian gentleman who has passed from among their lives.

Resolved, That his honor be requested to order these resolutions spread upon the journal of the court, and that a blank page thereof be dedicated to his memory.

Resolved, That the members of the bar do wear the usual badge of mourning for thirty days.

Resolved, That in respect to the memory of Hon. Thomas W. Glover this court do now adjourn.

Resolved, That copies of these resolutions be furnished the family of the deceased.

Resolved, That these resolutions be presented to the Supreme Court and that court requested to have the same entered upon its journals.

In seconding the motions of the attorney general, Mr. W. H. Parker spoke as follows:

May it please your honors: I ask permission to make a few brief remarks in support of the tribute of respect just offered by the attorney general to the memory of Judge Glover. At the time he, with his distinguished associates, passed off the bench of the state, in the great upheaval of 1868, nearly twenty years ago, I had practised so little before him as a judge, that in this presence, and before gentlemen who knew so much more of him, and are so much more competent to do the subject justice, I will not presume to eulogize his character, measure his capacity, or speak of his peculiar qualifications and attainments for the high office which the state with confidence entrusted to him. I often saw him on the bench, and cannot forget the impression he made. It seemed to me that in the discharge of his responsible, arduous duties, he mingled, in the happiest manner, the suaviter in modo with the fortiter in re; always courteous, gentle, and kind, but in the discharge of duty, as firm and inflexible as steel. For

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six*teen years he discharged the duties of his office with promptness, fidelity, and marked ability.

It is, however, as a citizen and friend that I would crave indulgence to say one word, not in the hope of entwining another shining garland, worthy of his character and fame, but simply to drop a tear over the memory of one who was, undoubtedly, the ornament of the society in which he moved, the very idol of his immediate family, and the loved, consistent, and life-long friend of those to whom I am bound by all the ties that make life desirable. In private and domestic life, Judge Glover was universally respected and beloved.

It has sometimes occurred to me that though he did not seem physically strong, long life was vouchsafed to Judge Glover, beyond the allotted period of "three-score years and ten," probably for the reason that he did not wear out his frame, or break down his constitution, by fretting at little annoyances, or pining over inevitable misfortunes. He was, in the best sense, a philosopher, and met all the vicissitudes and cares of life with a gentle temper and a cheerful, resolute fortitude.

I have known no one to whom could be applied, with more truthful propriety, the beautiful language of Mr. Legaré in speaking of another upon an occasion similar to this: "With the blandest manners, the most affectionate temper, the most considerate toleration of dissent, the most patient acquiescence in the decisions of authority, even where he had most strenuously exerted himself to prevent them, his life seemed to me a beautiful pattern of all that is lovely, winning, and effective in the charity of a Christian gentleman. I say effective, for his was no 'fugitive and cloistered' virtue, which gave no offense because it shunned all contest, and maintained its purity only by avoiding the contaminations of the world. He lived, on the contrary, in the very midst of the passions, the struggles, and the warfare of active and even public life; he omitted no opportunity of doing good, which either chance or design afforded him; and his patriotism and philanthropy vied with each other in turning to account every moment of his time which was not engrossed in the cares of his fireside, or the business of his profession."

The genial companion, the hearty and cordial friend, gentle, dignified, and polished in

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manner, possessing, in an eminent de*gree, those qualities which distinguish the cultivated and elegant gentleman, joined to literary culture and high legal attainments, he was a

citizen of whom any state might be proud; and after a long and pure life, he has left to his family the imperishable inheritance of an illustrious name, and to his surviving countrymen an example worthy of all imitation, and which must exert its influence for good to future generations.

At the conclusion of Mr. Parker's remarks, Mr. Edward McCrady, Jr., rose and said:

May it please your honors: It has been well observed by a great writer that those who compare the age on which their lot has fallen with a golden age, which exists only in their imagination, may talk of degeneracy and decay, but that no man who is correctly informed as to the past will be disposed to take a morose or desponding view of the present. I have always coincided with this view, have felt little sympathy with those who exalt the past at the expense of the present, and have supposed that human nature was the same yesterday as it is to-day, and, given the same circumstances, I have imagined that those who have gone before us would probably not have greater virtue and fortitude than those of us who live to grapple with the difficulties and temptations which now surround us.

But on such occasions as this, when truth not only warrants but requires our cordial assent to the virtues which have so feelingly been paid to one of the last of a generation that is now nearly gone, is it not a fitting moment for us to pause and ask ourselves whether we of to-day, soiled and worn as we are with the present struggle, are preserving the honor and character of the bar, which formerly stood so high? Is it not well for us to dwell upon the high characteristics of the distinguished jurist, whose memory we honor to-day, that we may in some degree measure our own standard thereby, whether we hold it up as high as of old?

Judge Glover was an eminent type of the character which in the time of his judicial career demanded the respect and support of our people. He was learned, but it was his truthfulness and fearlessness in the discharge of duty upon which they more relied. He was laborious and painstaking, but the people

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valued *still more his fairness and sense of justice. He was firm in the maintenance of the dignity of his court, but he was courteous to all, and gentle and considerate with the young and diffident. Are we of the bar of to-day moulding men fit to be his successors, and the successors of the other great and good men who adorned our bench? Are we teaching them to despise the mean and paltry tricks of the pettifogger as Judge Glover would have done? To battle for the true and just as did our great lawyers of old? If, as has been said by another great writer, the bar may be considered on most subjects a fair exponent of the educated opinion of the people, is not the whole community interested in the study of such a life as that of Judge Glover, that its virtues may be impressed upon the bar, and exhibited by its members to the honor of those whom they represent?

Yes; and the close of that life will teach a noble lesson. Judge Glover had enjoyed high offical position. He had been elevated, as it were, above his fellow-citizens in the dignity of his official office; but when the overthrow of our institutions came, with how much still greater honor and dignity did he return to the bar and bear with his people her share of the struggle to resist wrong and oppression. He did not sit down and uselessly moan the days when he had been a judge over them; but, without complaint, he quietly and earnestly set himself to do his duty in the new state of affairs in which his state was involved. And when his people returned to power, how modestly did he accept a position lower than that which he had formerly so well adorned, bringing to the lesser office all the store of learning and experience he had gathered in the higher.

I have esteemed it a privilege indeed, on behalf of the bar of Charleston, which so honored and admired Judge Glover, to ask your permission to join in the resolutions which have been so appropriately and feelingly offered in his memory.

The Chief Justice responded in eloquent and fitting terms, commending the character of the illustrious jurist to the bar of the state, and granted the request and motion of the attorney general.

The court was then adjourned.

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